

# What If a Job Applicant Discloses a Disability?

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**E**mployers generally are prohibited from asking questions about disabilities before making conditional job offers to applicants, but what should an employer do if a job applicant voluntarily discloses a disability at the interview stage?

Telling applicants upfront what to expect from the interview process can help surface accommodation requests early on so they can be addressed in advance. Regardless of when an applicant's voluntary disclosure of disability occurs, employers should focus on the applicant's ability to perform the essential functions of the job and should document any accommodation discussions.

## Give-and-Take

Employers may tell applicants what the hiring process involves—such as the interview, a timed written test or a job demonstration—and ask applicants if they will need an accommodation for this process, said Caroline Larsen, an attorney with Ogletree Deakins in Phoenix.

"Providing this information upfront may help prevent problems that arise when an applicant unexpectedly expresses the need for an accommodation to complete part of the hiring process and the employer is unprepared to offer it," she said.

Conventional wisdom in accommodating applicants with disabilities has evolved, according to Lori Armstrong Halber, an attorney with Fox Rothschild in Philadelphia and Warrington, Pa. "When I was a newly practicing attorney," she said, "the advice was 'don't ask about anything that might reveal anything about someone's protected class because if we don't know about it, we won't be discriminating.' "

But in today's climate of inclusion, employers want to know about people and honor their differences, Halber explained. "Employers need to be thoughtful about their application and interview process," she said. "Ask upfront whether the applicant has any suggestions for how the process can best showcase their talents and skills."

Be sure to follow the Web Content Accessibility Guidelines for online job platforms and the Americans with Disabilities Act (ADA), she added.

## Prohibition on Disability-Related Questions

Under the ADA, employers generally can't ask disability-related questions, such as whether the applicant has a disability or what the nature or severity of the disability is, or require applicants to undergo medical examinations until after the applicant has received a conditional job offer, noted Laurie Baddon, an attorney with McDermott Will & Emery in Los Angeles.

Once a conditional job offer has been made, the employer may ask disability-related questions or require a medical examination so long as all individuals who receive offers for the same job are treated similarly. That means they must be asked the same questions or required to undergo the same medical examination, she said. (Once an individual is employed, disability-related questions and examinations again are prohibited except in limited circumstances.)

Employers may, however, ask applicants whether they can perform the essential duties of a position with or without accommodation, Baddon noted.

Federal law also permits employers to ask applicants about reasonable accommodations before a conditional offer is made if the employer reasonably believes that the applicant may need an accommodation due to an obvious or voluntarily disclosed disability, or when an applicant has disclosed a need for an accommodation.

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### Focus on Job Functions and Abilities

Even in instances where questions about accommodations are permitted, though, the real focus should be on the requirements of the job and whether the individual will be able to perform them, said Peter Petesch, an attorney with Littler in Washington, D.C.

Many states have anti-discrimination laws analogous to the ADA that may set different standards, Baddon noted.

Employers should not make assumptions about the abilities of applicants with disabilities, Halber cautioned. "Ask the applicant how they will perform those [essential job] functions," she said. "Ask whether they have previously performed those functions and to provide examples—just as you would ask any applicant about their experience."

When responding to an applicant who has requested an accommodation for a disability that isn't obvious, an employer should be forthright with the applicant if it can't honor the request, said Jonathan Mook, an attorney with DiMuroGinsberg in Alexandria, Va.

"If the requested accommodation cannot be provided, HR should not just say 'no,' " he said. Instead, the employer should explain why implementing the accommodation is not possible, either because it would prevent the proper assessment of the applicant's skills or because it would be so expensive that it would create an undue hardship for the employer, Mook said.

It is worth noting, however, that it can be difficult for an employer to prove in court that an accommodation would be so expensive as to result in an undue hardship. If another, more affordable, accommodation is available, the employer should provide the alternative accommodation, Mook noted.

Kristen Gallagher, an attorney with McDonald Carrano in Las Vegas, noted that under the ADA, the onus for requesting reasonable accommodation generally is on the job applicant. However, she said, an accommodation should be provided without request if the employer knows the applicant has a disability.

For example, an applicant with limited use of her hands would obviously have difficulty completing a written application form. "In this instance, it would behoove the HR professional to ask the applicant if ... she needs any assistance in completing the written form and what that assistance would be," Mook said.

Employers must show a good-faith effort to identify an accommodation, so don't abandon the process for doing so too early, said Michael Futterman, an attorney with MARC Law in Florham Park, N.J.

Finally, "properly document the interaction with the applicant and the interactive process," he said.

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