

Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)

INTRODUCTION

The Americans with Disabilities Act (ADA), which was amended by the ADA Amendments Act of 2008 ("Amendments Act" or "ADAAA"), is a federal law that prohibits discrimination against qualified individuals with disabilities. Individuals with disabilities include those who have impairments that substantially limit a major life activity, have a record (or history) of a substantially limiting impairment, or are regarded as having a disability.¹

Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers. Section 501 of the Rehabilitation Act provides similar protections related to federal employment. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and may provide protections in addition to those available under the ADA.²

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This document, which is one of a series of question-and-answer documents addressing particular disabilities in the workplace,³ explains how the ADA applies to job applicants and employees with intellectual disabilities. In particular, this document explains:

- when an employer may ask an applicant, employee, or third party (such as the family member of an applicant or employee) questions about an intellectual disability;
- what types of reasonable accommodations applicants and employees with intellectual disabilities may need;
- how an employer should handle safety concerns about applicants and employees with intellectual disabilities; and
- how an employer can ensure that no employee is harassed because of an intellectual disability or any other disability.

GENERAL INFORMATION ABOUT INTELLECTUAL DISABILITIES

An intellectual disability (formerly termed mental retardation) is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior that affect many everyday social and practical skills.⁴ An

individual is generally diagnosed as having an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical skills; and (3) the disability originated before the age of 18.⁵

"Adaptive skill areas" refer to basic skills needed for everyday life. They include communication, self care, home living, social skills, leisure, health and safety, self direction, functional academics (reading, writing, basic math), and work. Individuals with severe intellectual disabilities are more likely to have additional limitations than persons with milder intellectual disabilities.⁶

An estimated 2.5 million Americans have an intellectual disability.⁷ The majority of adults with an intellectual disability are either unemployed or underemployed, despite their ability, desire, and willingness to engage in meaningful work in the community.

As a result of changes made by the ADAAA, individuals who have an intellectual disability should easily be found to have a disability within the meaning of the first part of the ADA's definition of disability because they are substantially limited in brain function and other major life activities (for example, learning, reading, and thinking).⁸ An individual who was misdiagnosed as having an intellectual disability in the past also has a disability within the meaning of the ADA.⁹ Finally, an individual is covered under the third ("regarded as") prong of the definition of disability if an employer takes a prohibited action (for example, refuses to hire or terminates the individual) because of an intellectual disability or because the employer believes the individual has an intellectual disability.¹⁰

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

Title I of the ADA limits an employer's ability to ask questions related to an intellectual disability and other disabilities and to conduct medical examinations at three stages: pre-offer, post-offer, and during employment.

Job Applicants

Before an Offer of Employment Is Made

1. May an employer ask a job applicant whether she has an intellectual disability before making a job offer?

No. An employer may not ask questions about an applicant's medical condition or require an applicant to have a medical examination before it makes a conditional job offer. This means that an employer cannot legally ask an applicant questions such as:

- whether she has taken any classes designated for "special education" or "special needs" students; or
- whether any of her school records indicate that she has mental retardation

or an intellectual disability.

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Of course, an employer may ask questions pertaining to the qualifications for, or performance of, the job, such as:

- whether the applicant can read;
- whether the applicant can put files in alphabetical order; or
- whether the applicant can place items in numerical order.

Additionally, where an employer reasonably believes that the applicant's known (that is, obvious or disclosed) intellectual disability may interfere with or prevent the performance of a job-related function, the employer may ask the applicant to describe or demonstrate how, with or without reasonable accommodation, she will be able to perform that function.¹¹

2. May an employer ask any follow-up questions if it is obvious that an applicant has an intellectual disability or an applicant voluntarily reveals that she has an intellectual disability?

If it is obvious that an applicant has an intellectual disability or voluntarily tells an employer that she has an intellectual disability, and the employer reasonably believes that she will require an accommodation to perform the job, the employer may ask whether the applicant will need an accommodation and what type. The employer must keep any information an applicant discloses about her medical condition confidential. (See "Keeping Medical Information Confidential.")

Example 1: An applicant for a position as an office clerk voluntarily discloses to the employer that she has an intellectual disability and sometimes needs to be reminded of her duties. The employer may ask the applicant whether she needs a reasonable accommodation, such as a detailed checklist or the use of a computer with a touch screen that reads instructions out loud or has images to guide her through the steps in a task. However, the employer may not ask whether she will need to take frequent leave because of her intellectual disability or whether her condition is genetic.¹²

At the pre-offer stage, an employer also is prohibited from asking a third party (such as a job coach, family member, or social worker attending an interview with an applicant who has an intellectual disability) any questions that it would not be permitted to ask the applicant directly.

After an Offer of Employment Is Made

After making a job offer, an employer may ask questions about the applicant's health (including questions about the applicant's disability) and may require a medical examination, as long as all applicants for the same type of job are treated equally (that is, all applicants are asked the same questions and required to take the same examination). After an employer has obtained basic medical information from all individuals who have received job offers, it may ask specific

individuals for more medical information if it is medically related to the previously obtained medical information.¹³ For example, if an employer asks all applicants post-offer about their general physical and mental health, it can ask individuals who disclose a particular illness, disease, or impairment for more medical information or require them to have a medical examination related to the condition disclosed.

3. What may an employer do when it learns that an applicant has an intellectual disability after she has been offered a job but before she starts working?

When an applicant discloses after receiving a conditional job offer that she has an intellectual disability, an employer may ask the applicant questions about the extent of her disability. The employer also may ask the applicant to submit documentation from an appropriate professional answering questions specifically designed to assess her ability to perform the job's functions safely. Permissible follow-up questions at this stage differ from those at the pre-offer stage when an employer only may ask an applicant who voluntarily discloses a disability whether she needs an accommodation to perform the job and what type.

An employer may not withdraw an offer from an applicant with an intellectual disability if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation, without posing a direct threat (that is, a significant risk of substantial harm) to the health or safety of himself or others that cannot be eliminated or reduced through reasonable accommodation. ("Reasonable accommodation" is discussed at Questions 7 through 14. "Direct threat" is discussed at Question 15.)

Example 2: A deli clerk who worked at a grocery chain for five years accepts an offer to be a deli clerk at a specialty market. In response to a question on a post-offer medical history questionnaire, she discloses that she was diagnosed with an intellectual disability in first grade. When the store manager tells the applicant that her disability makes him concerned about her ability to use a meat slicer and other sharp utensils, the applicant explains that she was supervised closely when she first started working as a deli clerk and that she has worked five years without injuring herself. Because there is no evidence that the applicant will pose a significant risk of substantial harm because of her intellectual disability, the employer may not withdraw the job offer.

Employees

The ADA strictly limits when an employer may ask questions about an employee's medical condition or require the employee to undergo a medical examination. Once an employee is on the job, his actual performance is the best measure of ability to do the job.

4. When may an employer ask an employee whether her intellectual

disability, or some other medical condition, may be causing her performance problems?

Generally, an employer may ask disability-related questions or require an employee to have a medical examination when it knows about a particular employee's medical condition, has observed performance problems, and reasonably believes that the problems are related to a medical condition. At other times, an employer may ask for medical information when it has received reliable information from someone else (for example, a family member or co-worker) indicating that the employee may have a medical condition that is causing performance problems. Often, however, poor job performance is unrelated to a medical condition and generally should be handled in accordance with an employer's existing policies concerning performance.¹⁴

Example 3: A mailroom clerk with an intellectual disability and attention deficit disorder who has performed his job successfully for five years starts to make mistakes in sorting and delivering letters and packages. He also appears anxious and emotional. The supervisor observed these changes soon after the employee moved into his brother's house. The supervisor can ask the employee why his performance has declined and may explore ways to ensure that mail is not misdirected, but may not ask him questions about his intellectual disability unless there is objective evidence that his poor performance is related to his disability.

5. Are there any other instances when an employer may ask an employee with an intellectual disability about his condition?

Yes. An employer also may ask an employee about an intellectual disability when it has a reasonable belief that the employee will be unable to safely perform the essential functions of his job because of his disability. In addition, an employer may ask an employee about his intellectual disability to the extent the information is necessary:

- to support the employee's request for a reasonable accommodation needed because of his intellectual disability;
- to verify the employee's use of sick leave related to his intellectual disability if the employer requires all employees to submit a doctor's note to justify their use of sick leave; 15 or
- to enable the employee to participate in a voluntary wellness program.¹⁶

Keeping Medical Information Confidential

With limited exceptions, an employer must keep all medical information it learns about an applicant or employee confidential and must keep this information separate from general personnel files. Under the following circumstances, however, an employer may disclose that an employee has an intellectual disability:

- to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee's work restrictions;

- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in the event of an emergency;
- to individuals investigating compliance with the ADA and similar state and local laws; and
- where required for workers' compensation or insurance purposes, for example, to process a claim.

6. May an employer tell employees who ask why their co-worker is allowed to do something that generally is not permitted (such as additional time to finish training) that the employee is receiving a reasonable accommodation?

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure that the employee has a disability. Rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining employee privacy. Employers may be able to avoid many of these kinds of questions by giving all employees training on the requirements of equal employment opportunity laws, including the ADA.

Additionally, an employer will benefit from providing information about reasonable accommodations to all of its employees. This can be done in a number of ways, such as through written reasonable accommodation procedures, employee handbooks, staff meetings, and periodic training. This kind of proactive approach may lead to fewer questions from employees who misperceive co-worker accommodations as "special treatment."

ACCOMMODATING PERSONS WITH INTELLECTUAL DISABILITIES

The ADA requires employers to provide adjustments or modifications -- called reasonable accommodations -- to enable applicants and employees with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (that is, a significant difficulty or expense). Accommodations vary depending on the needs of the individual with a disability. Not all employees with intellectual disabilities will need an accommodation or require the same accommodations, and most of the accommodations a person with an intellectual disability might need will involve little or no cost.

7. What types of reasonable accommodations may persons with intellectual disabilities need for the application process?

Some persons with intellectual disabilities will need reasonable accommodations to apply and/or interview for a job. Such accommodations might include:

- providing someone to read or interpret application materials for a person who has limited ability to read or to understand complex information;
- demonstrating, rather than describing, to the applicant what the job requires;

- modifying tests, training materials, and/or policy manuals; and
- replacing a written test with an "expanded" interview.¹⁷

Example 4: A person with an intellectual disability applies for a position as a baker and is scheduled for an interview with the employer. The applicant also has a speech and hearing impairment. The employer can accommodate the applicant by conducting an expanded interview to allow the applicant to demonstrate his ability to do the job.

8. What specific types of reasonable accommodations may employees with intellectual disabilities need to do their jobs or to enjoy the benefits and privileges of employment?

The following are accommodations that employees with intellectual disabilities may need:

- reallocation of marginal tasks to another employee

Example 5: An individual with an intellectual disability is hired as part of a crew of three employees that works at the concession stand at a baseball stadium. He helps stock the counter with candy and snacks; at closing time, he cleans the counters and equipment and restocks the counters with supplies. However, he cannot perform the function of accurately counting money at closing time, which is usually done by the crew leader. Another concession stand employee, who is able to count money when the crew leader cannot, also sometimes performs the function of placing empty boxes and trash in designated bins at closing time. These are functions that the employee with an intellectual disability can perform. Allowing the employee with an intellectual disability to perform these functions instead of counting money, which is a marginal function for his position, is a reasonable accommodation.

- training or detailed instructions to do the job, including having the trainer or supervisor:
 - give instructions at a slower pace;
 - allow additional time to finish training;
 - break job tasks into sequential steps required to perform the task;
 - use charts, pictures, or colors;

Example 6: As part of his job, a restaurant worker with an intellectual disability refills condiment containers. The manager uses color-coding so the employee can identify the specific condiment that goes in each container.

Example 7: A retail store employee with an intellectual disability and attention deficit disorder loads customers' cars with purchased items. The store has a dress code that he often fails to follow. His supervisor gives

him a sheet with photographs illustrating both proper attire and items of clothing prohibited by the store's employee dress code.

- provide a tape recorder to record directions as a reminder of steps in a task;
- use detailed schedules for completing tasks; and
- provide additional training when necessary.

Example 8: A hotel cleaning crew worker with an intellectual disability and autism has not performed his cleaning duties to company quality standards. His supervisor offers him additional training and allows him to bring a third party to the training sessions to assist him in learning proper cleaning techniques.

- a job coach, who can:
 - assist the employee in learning how to do the job;
 - provide intensive monitoring, training, assessment, and support;
 - help develop a healthy working relationship between management and the employee by encouraging appropriate social interaction and maintaining open communications; and
 - assist the parties in determining what reasonable accommodation is needed.
- modified work schedule or shift change

Example 9: A grocery stock worker with an intellectual disability is scheduled to attend group counseling sessions on Tuesdays during working hours. Her employer has granted her request for a modified work schedule, allowing her to leave two hours early each Tuesday to attend the counseling sessions and to make up for the time by beginning work two hours early on Tuesdays.

- help in understanding job evaluations or disciplinary proceedings
 - An employer may allow the employee to bring someone to a job evaluation or disciplinary meeting to help him ask questions and to explain the job evaluation results or the purpose of the meeting.
- acquisition or modification of equipment or devices

Example 10: A receptionist with an intellectual disability and fetal alcohol syndrome has difficulty remembering the telephone numbers of office workers when transferring calls. As a reasonable accommodation, the employer purchased a large-button telephone with a speed dial and clearly labeled buttons with the names of office staff.

- work station placement

Example 11: An employer relocates a data entry employee with an intellectual disability and attention deficit disorder from a large open area where employees work side-by-side to a quieter part of the office to accommodate limitations on the employee's ability to concentrate.

- reassignment to a vacant position when the employee is no longer able to perform current job

Example 12: For five years, a factory worker with an intellectual disability operated a cutting tool by hand until the plant replaced the tool with a more complex automated machine. Although the worker has received training, his functional limitations prevent him from learning how to operate the new equipment and there are no reasonable accommodations that will enable him to do his job. The worker asks his supervisor if there is some other job he can do at the plant. The employer should work with the employee to determine whether he can be reassigned to a vacant position for which he is qualified. The vacant position must be equivalent in terms of pay and status to the original job, or as close as possible if no equivalent position exists. The position need not be a promotion, although the employee should be able to compete for any promotion for which he is eligible.

Although these are some examples of the types of accommodations commonly requested by employees with intellectual disabilities, other employees may need different changes or adjustments. Employers should ask the particular employee, or person acting on the employee's behalf, what he needs that will help him do his job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the website for the Job Accommodation Network (JAN)(<http://askjan.org/media/intcog.html>) provides information about many types of accommodations for employees with intellectual disabilities.

9. How does a person with an intellectual disability request a reasonable accommodation?

There are no "magic words" that a person has to use when requesting a reasonable accommodation. An employee simply has to tell the employer that she needs an adjustment or change at work because of her intellectual disability. A request for a reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with an intellectual disability.

Example 13: A person with an obvious intellectual disability wants to apply for a job in a large retail store. The store manager gives him the application forms. The applicant tells the manager that he needs someone to assist him with the application. This is a request for a reasonable accommodation.

Example 14: A video store clerk with an intellectual disability and Prater-Willi Syndrome, who usually is scheduled to work when the store opens at 10:00 a.m., tells his supervisor that he needs to change his work schedule because the medication he takes every night makes it difficult for him to wake up before noon. This is a request for a reasonable accommodation.

Example 15: The mother of a clerk with Down Syndrome calls the clerk's supervisor to tell him that she wants to schedule a meeting to discuss problems that her son is having with his job and some possible solutions. This is a request for a reasonable accommodation.

10. Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with an intellectual disability has not requested one?

Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.¹⁸

Example 16: A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that the employee is unable to ask for a reasonable accommodation because of his intellectual disability. The employer asks the employee about the misplaced items and asks if it would be helpful to label the containers and refrigerator shelves. When the employee replies that it would, the employer, as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name or picture.

11. May an employer ask for documentation when a person with an intellectual disability requests a reasonable accommodation?

Yes. An employer may request reasonable documentation where a disability or the need reasonable accommodation is not known or obvious. An employer, however, is entitled only to documentation sufficient to establish that the employee has an intellectual disability and to explain why an accommodation is needed. A request for an employee's entire medical record, for example, would be inappropriate as it likely would include information about conditions other than the employee's intellectual disability.¹⁹

When a person's intellectual disability is obvious, the employer should focus on requesting documentation that describes the limitations stemming from the disability rather than on establishing that the person, in fact, has a disability. If a person has more than one disability, an employer may only ask for information related to the disability that requires accommodation. The employer may request that a physician or an appropriate professional provide information or documentation of a person's impairment. Information about a person's functional limitations also can be obtained from non-professionals, such as the applicant, his family members, and friends.

Example 17: A marketing office clerk with an intellectual disability has difficulty concentrating and meets with his supervisor every morning to discuss his tasks for the day. In order to remember his assigned tasks, the clerk needs his instructions in writing, but due to his disability, he has difficulty writing clearly. The clerk tells his supervisor about his disability and requests a personal digital assistant (PDA), where his supervisor can record and he can retrieve step-by-step audio and video instructions regarding his tasks. The employee's supervisor may ask him for reasonable documentation about his disability and why the disability requires the use of a PDA.

12. Does an employer have to grant every request for an accommodation?

No. An employer does not have to provide an accommodation if doing so will be an undue hardship. Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense. An employer also does not have to eliminate an essential function of a job as a reasonable accommodation, tolerate performance that does not meet its standards, or excuse violations of conduct rules that are job-related and consistent with business necessity and that the employer applies consistently to all employees (such as rules prohibiting violence, threatening behavior, theft, or destruction of property).

If more than one accommodation would be effective, the employee's preference should be given primary consideration, although the employer is not required to provide the employee's first choice of reasonable accommodation. If a requested accommodation is too difficult or expensive, an employer may choose to provide an easier or less costly accommodation as long as it is effective in meeting the employee's needs.

Example 18: A photocopy clerk with an intellectual disability has great difficulty reading the many work-related memoranda that her supervisor sends to the office staff. The employee has no difficulty understanding oral communication. The clerk asks her supervisor to record all the memoranda that are distributed. The supervisor asks whether having someone read and explain the memoranda would work instead, and the employee agrees that it would. Since both accommodations are effective, the supervisor may decide to have someone read

and explain the memoranda to the employee.

13. May an employer be required to provide more than one reasonable accommodation for the same person with a disability?

Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some employees with intellectual disabilities may require only one reasonable accommodation, others may need more than one. For example, an employee with an intellectual disability may require charts or pictures to learn how to do a job and later may require additional training. An employer must consider each request for a reasonable accommodation and determine whether it would be effective and whether providing it would pose an undue hardship.

14. Do persons with intellectual disabilities need more supervision than other employees?

Not necessarily. The type and amount of supervision required for an employee with an intellectual disability will depend on the type of job and the person's individual strengths. Although it may take longer for some individuals with intellectual disabilities to master the tasks associated with a job, with the proper training, many can perform as effectively as employees without intellectual disabilities in the same job. In other situations, supervisors may have to modify how they give instructions or communicate what needs to be done as a form of reasonable accommodation. For example, some employees with intellectual disabilities may benefit from additional day-to-day guidance or feedback, or from having a large task broken down into smaller parts that are easier to understand.

CONCERNS ABOUT SAFETY

When it comes to safety, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and the extent to which the intellectual disability affects his ability to work in a particular job.

15. When may an employer refuse to hire or terminate a person with an intellectual disability because of safety concerns?

An employer may refuse to hire or terminate a person with an intellectual disability for safety reasons when the individual poses a direct threat. A "direct threat" is a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation.²⁰ This determination must be based on objective, factual evidence.

In making a direct threat assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also must consider:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.²¹

The harm must be serious and likely to occur, not remote and speculative. Finally,

the employer must determine whether any reasonable accommodation (for example, temporarily limiting an employee's duties, temporarily reassigning an employee, or placing an employee on leave) would reduce or eliminate the risk.²²

Example 19: An employer cannot deny an applicant with an intellectual disability a job preparing food in a restaurant kitchen based on the assumption that people with intellectual disabilities are incapable of using sharp knives or working around hot ovens without injuring themselves. To assess whether the applicant would actually pose a direct threat, the employer must consider information from an appropriate professional and the applicant himself concerning the limitations imposed by the disability. The employer should also consider any training or prior work experience the applicant may have had, and whether he has had safety problems performing tasks similar to those required for the current position.

Example 20: An employer may deny a factory job requiring work around dangerous machinery to someone whose intellectual disability makes it impossible for her to understand and follow safety procedures.

HARASSMENT

The ADA prohibits harassment, or offensive conduct, based on disability just as other federal laws prohibit harassment based on race, sex, color, national origin, religion, age, and genetic information. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

16. What should employers do to prevent and correct harassment?

Employers should make clear that they will not tolerate harassment based on disability or on any other basis. This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager. Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action. For more information on the standards governing harassment under all of the EEO laws, see www.eeoc.gov/policy/docs/harassment.html.

RETALIATION

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation related to a charge of employment discrimination. It is also unlawful for an employer to retaliate against someone for requesting a reasonable accommodation. Persons who believe that they have experienced retaliation may file a charge of retaliation as described below.

HOW TO FILE A CHARGE OF EMPLOYMENT DISCRIMINATION

Against Private Employers and State/Local Governments

Any person who believes that his or her employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a charge of discrimination with the EEOC. A third party may also file a charge on behalf of another person who believes he or she experienced discrimination. For example, a family member, social worker, or other representative can file a charge on behalf of someone who is incapacitated because of diabetes. The charge must be filed by mail or in person with the local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination agency has the authority to grant or seek relief as to the challenged unlawful employment practice.

The EEOC will send the parties a copy of the charge and may ask for responses and supporting information. Before formal investigation, the EEOC may select the charge for EEOC's mediation program. Both parties have to agree to mediation, which may prevent a time consuming investigation of the charge. Participation in mediation is free, voluntary, and confidential.

If mediation is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination has occurred. If reasonable cause is found, the EEOC will then try to resolve the charge with the employer. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a court action. A charging party can also request a notice of a "right to sue" from the EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving the notice. For a detailed description of the process, you can visit our website at www.eeoc.gov/employees/howtofile.cfm.

Against the Federal Government

If you are a federal employee or job applicant and you believe that a federal agency has discriminated against you, you have a right to file a complaint. Each agency is required to post information about how to contact the agency's EEO Office. You can contact an EEO Counselor by calling the office responsible for the agency's EEO complaints program. Generally, you must contact the EEO Counselor within 45 days from the day the discrimination occurred. In most cases the EEO Counselor will give you the choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If you do not settle the dispute during counseling or through ADR, you can file a formal discrimination complaint against the agency with the agency's EEO Office. You must file within 15 days from the day you receive notice from your EEO Counselor about how to file. Once you have filed a formal complaint, the agency will review the complaint and decide whether or not the case should be dismissed for a procedural reason (for example, your claim was filed too late). If the agency doesn't dismiss the complaint, it will conduct an investigation. The agency has 180 days from the day you filed your complaint to finish the investigation. When the investigation is finished, the agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred. For a detailed description of the process, you can visit our website at www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

Footnotes

¹ See U.S.C. §12102(2); 29 C.F.R. §1630.2(g).

² For example, disability laws in California, Pennsylvania, New Jersey, and New York apply to employers with fewer than 15 employees.

³ See "The Question and Answer Series" under "Available Resources" on EEOC's website at www.eeoc.gov/laws/types/disability.cfm.

⁴ Sometimes "intellectual disability" is also referred to as developmental disability, which is a broader term that includes ASD (autism spectrum disorders), epilepsy, cerebral palsy, developmental delay, fetal alcohol syndrome (or FASD) and other disorders that occur during the developmental period (birth to age 18). See Definition of Intellectual Disability, American Association of Intellectual and Developmental Disabilities (AAIDD), www.aaidd.org/content_100.cfm?navID=21; see also Intellectual Disability, The Arc, www.thearc.org/page.aspx?pid=2543.

⁵ According to the AAIDD, the following five assumptions are essential to the application

of this definition:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors.

3. Within an individual, limitations often coexist with strengths.

4. An important purpose of describing limitations is to develop a profile of needed supports.

5. (5)

6. With appropriate personalized supports over a sustained period, the life functioning of the person with an intellectual disability generally will improve.

www.aaidd.org/content_104.cfm.

⁶ Id.

⁷ See Peter David Blanck, The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation, American Association on Mental Retardation (1998) at 17, citing Ability: The Bridge to the Future, President's

Committee on Employment of Persons with Disabilities, Educational Kit (July 1997).

⁸ 29 C.F.R. §1630.3(j)(3)(iii).

⁹ Id. at §1630.2(k).

¹⁰ Id. at §1630.2(g)(l)(iii).

¹¹ Id; see also EEOC Enforcement Guidance on Preemployment Disability-Related Questions & Medical Examinations (Oct. 10, 1995) (hereinafter EEOC Preemployment Guidance). This enforcement guidance is available at

www.eeoc.gov/policy/docs/preemp.html.

¹² Some intellectual disabilities stem from genetic causes, such as Down or Fragile x syndromes.

www.thearc.org/page.aspx?pid=2543.

Asking applicants or employees about genetic conditions also violates Title II of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. 2000ff et seq., which prohibits employers from requesting, requiring, or purchasing genetic information (including family medical history) about applicants or employees. 29 C.F.R. §1635.8(a).

¹³ See EEOC Preemployment Guidance supra note 13.

¹⁴ An employer also may ask an employee about his epilepsy or send the employee for a medical examination when it reasonably believes the employee may pose a direct threat because of his diabetes. See "Concerns About Safety."

¹⁵ An employer also may ask an employee for periodic updates on his condition if the employee has taken leave and has not provided an exact or fairly specific date of return or has requested leave in addition to that already granted. Of course, an employer may call employees on extended leave to check on their progress or to express concern for their health without

violating the ADA.

¹⁶ The ADA allows employers to conduct voluntary medical examinations and activities, including obtaining voluntary medical histories, which are part of an employee wellness program (such as a smoking cessation or diabetes detection screening and management program), as long as any medical records (including, for example, the results any diagnostic tests) acquired as part of the program are kept confidential. See Q&A 22 in EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

¹⁷ An expanded interview allows applicants who have difficulty describing their abilities to demonstrate their skills at the employment office or work site.

¹⁸ See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002) at Q&A 40. This enforcement guidance is available at www.eeoc.gov/policy/docs/accommodation.html.

¹⁹ Requests for documentation to support a request for accommodation may violate Title II of GINA where they are likely to result in the acquisition of genetic information, including family medical history. 29 C.F.R. §1635.8(a). For this reason employers may want to include a warning in the request for documentation that the employee or the employee's doctor should not provide genetic information. Id. at §1635.8(b)(1)(i)(B).

²⁰ 29 C.F.R. §1630.2(r).

²¹ Id.

²² Id.