

## SPECIAL INSTRUCTIONS TO EMPLOYERS

The federal Americans with Disabilities Act (ADA) and the multitude of state and local laws governing disability discrimination in the workplace often create challenges for employers who want to fill positions, comply with applicable laws, and ensure the safety and well-being of employees. The goal of these laws is to focus on a person's ability to perform the required tasks of a job, with or without accommodation. To assist you in understanding what is permissible to ask or say as part of the hiring process, The Ohio Manufacturers' Association has compiled *this guidance*. This guidance is a set of best practices, and does not constitute legal advice. Consult with your company's legal counsel to understand specific limitations that may apply in your states of operation or in your industry.

The Americans with Disabilities Act and its amendments cover employers with 15 or more employees, but many state laws have a lower threshold. In Ohio, companies with 4 or more employees are subject to the state disability discrimination law (O.R.C. §4112.02, et seq). The ADA and similar discrimination laws limit an employer's ability to make disability-related inquiries or to require medical examinations to only three stages: pre-offer, post-offer, and during employment. Disability-related inquiries and medical examinations of employees must be "job-related and consistent with business necessity." Prior to employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. Once a conditional offer of employment is extended, an employer may, if there is a job-related business necessity, have individuals evaluated by a medical professional to determine whether they are able to perform the functions of the position, with or without accommodation. Employers may also obtain medical information about employees when they are required to do so by another federal law or regulation (e.g., DOT medical certification requirements for interstate truck drivers).

The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination, including medical information from voluntary health or wellness programs, as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA. In addition to the ADA, the Genetic Information Non-Disclosure Act also imposes limitations on an employer's

ability to inquire into an applicant's or employee's health history. Consult your company's legal counsel to understand limitations that may apply to your company.

### Special Instructions for Application for Employment

The sample application, *downloadable here*, contains a generic Equal Opportunity Employer statement covering race, gender, national origin, religion, and other protected factors covered by Ohio law. Certain state laws and local ordinances include sexual orientation as a protected class, and this statement should be modified to reflect the standard applicable in your state(s) or location(s) of operation. Please consult with your company's legal counsel to determine whether this form should be modified to comply with local requirements where you conduct business.

### Special Instructions for Fair Credit Reporting Act

The Application for Employment states that the applicant authorizes the employer to conduct certain investigations.

The federal Fair Credit Reporting Act (FCRA) requires employers to follow specific procedures before they can obtain "consumer reports." A "consumer report" is very specifically defined by FCRA, and you should consult with your company's legal counsel to determine whether the FCRA rules apply to your company's use of background checks.

Generally, a company can conduct its own criminal or credit background checks without being subject to the consumer reporting requirements if it does not use a paid third party service. If a third party service is used, a consent form separate from the employment application must be executed by the employee or applicant, with legal notices that comply with the FCRA's requirements. Check with your company's legal counsel to confirm that state(s) in which you operate in do not have additional requirements relating to background checking.

The Fair Accurate Credit Transaction Act (FACTA) governs how that information is disposed (the "Disposal Rule"). The Disposal Rule applies to paper records and to electronically transmitted or stored consumer information. The Disposal Rule requires entities disposing of such information to take reasonable, specific measures to protect against unauthorized access to or use of the information which is being disposed.