

GUIDANCE TO AVOIDING DISABILITY DISCRIMINATION CLAIMS DURING INTERVIEWS

Certain jobs may necessitate physical capability. However, state and federal disability discrimination laws limit the types of inquiries that prospective employers can make to determine which applicants are able to do the job, with or without accommodation.

As a service to our members, The Ohio Manufacturers' Association provides the following suggested questions that can be incorporated into interview questions. These suggestions are not intended to constitute legal advice, nor do they fit every situation or industry. Consult with your company's legal counsel to understand specific limitations that may apply to your operations.

YOU CAN ASK:

- How are you? (general questions about well-being such as noting a person looks tired or ill, or if s/he is feeling alright; asking an applicant who is sneezing or coughing whether s/he has a cold or allergies, etc.)
- Here is a copy of the position description. Are you able to perform the functions of this job, with or without reasonable accommodation?
- Please describe/demonstrate how you would perform these functions.
- Can you meet the attendance requirements of this job?
- How many days of unexcused absence did you have last year?
- How many Mondays or Fridays did you miss last year (other than approved leaves)?
- Do you use a controlled substance such as illegal drugs or marijuana?
- How do you handle stress? (Alternatively, how well can you handle stress?) Do you work better or worse under pressure?

YOU CANNOT ASK:

- Do you have a disability that would interfere with your ability to perform the job? Do you have a disability that would prevent you from performing the essential functions of the job with or without reasonable accommodation? Are there parts of this job you cannot perform on account of any medical condition?
- Do you have [condition, disease]?
- How many days were you sick last year? How often will you require leave for treatment of [condition, disease]?
- How much alcohol do you drink each week? Have you ever been treated for alcohol problems? Are you an alcoholic? How often have you used illegal drugs in the past? Have you ever been treated for drug abuse/drug addiction?
- Have you ever been treated for mental health problems?
- What prescription drugs/medications are you currently taking?
- What is your corrected vision? What is your uncorrected vision?
- Have you sought treatment for your inability to handle stress? Do you ever get lose time from work or become ill due to stress? Does stress affect your ability to be productive? Have you ever been unable to cope with work-related stress?
- (If an applicant voluntarily discloses a disability) How debilitating is your disability? Does it limit your ability to work? Do you expect your condition to get worse?
- Do you have job-related injuries? What is your workers' compensation history? Have you ever filed for workers' compensation?
- Broad questions about a person's ability to perform major life activities are generally prohibited (e.g., "Can you stand?" or "Can you walk?").

ABOUT THE FEDERAL AMERICANS WITH DISABILITIES ACT (ADA):

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.