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**Best Practices Guideline for Employers
Interviewing Job Candidates with Disabilities**

COMMITTEE ON LABOR & EMPLOYMENT LAW
AND THE COMMITTEE ON LEGAL ISSUES AFFECTING
PEOPLE WITH DISABILITIES

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Best Practices Guideline for Employers Interviewing Job Candidates with Disabilities

Overview

The Americans with Disabilities Act (ADA), and New York State and City Human Rights Laws provide protections for persons with disabilities in the employment context. The ADA applies to employers with fifteen or more employees. The New York State and City Human Rights Law cover employers with four or more employees. Each of these laws sets forth obligations that employers must follow when hiring persons with disabilities.

Given that the interview is the initial and perhaps most important component of the hiring process, it is important for employers to be aware of what their obligations are, and how to best handle interviewing a job candidate with a disability.

This *Best Practices Guideline for Employers Interviewing Job Candidates with Disabilities* (“Best Practices”) is provided by the New York City Bar Association’s Committee on Legal Issues Affecting Persons with Disabilities, and Committee on Labor & Employment Law. These Best Practices are presented to provide employers with an understanding of their legal obligations when interviewing job candidates with disabilities. The Best Practices are designed to provide practical advice on:

- Setting up an interview for a job candidate with a disability;
- Conducting an interview with a job candidate with a disability;
- Making pre- and post-conditional offers of employment to a job candidate with a disability.

In addition, these Best Practices provide sample scenarios to illustrate how employers should handle different factual situations that may arise during the hiring process for a person with a disability.

These Best Practices are intended to provide guidelines for employers and are not to be considered formal legal advice. As the application of the ADA and NYS and NYC Human Rights Laws is extremely fact-specific, all employers are urged to consult with an attorney on matters related to hiring, employing, and accommodating persons with disabilities and should not rely solely upon these materials.

Contents

1. Identifying the Essential Tasks of the Job. Importance of identifying the essential tasks of the position prior to the interview.
2. Arranging the Interview. Employer’s obligation to make reasonable accommodations to interview a candidate who discloses a disability.

3. Conducting the Pre-Offer Interview. Focus on the candidate's qualifications, not the disability. Permissible / prohibited questions.
4. Post-Conditional Offer. Medical exams and disability inquiries. When permissible? When prohibited?
5. Confidentiality. Requirements to keep medical information of job applicant confidential. Exceptions.
6. Applicable Statutes. What laws address employer obligations for interviewing and hiring job candidates with disabilities.

1. Identifying the Essential Tasks of the Job

Prior to interviewing a potential candidate for a vacant job position, an employer should have a clear understanding of the requirements and responsibilities of the open position. Specifically, an employer should recognize which functions of the job are essential and which functions are marginal.

- Why does it matter whether a particular aspect of a position constitutes an “essential function” of the job?

Under the ADA, a disabled individual is not a qualified individual with a disability – thereby subject to the protections of the ADA – if he or she cannot perform the essential functions of the job with or without reasonable accommodation. Moreover, employers have no obligation to reallocate essential functions of jobs as a reasonable accommodation.

- What are the essential functions of a job?

While the determination of whether a particular function is an “essential function” of the job under the ADA requires a job-specific, individualized, inquiry, “essential functions” are defined in the ADA regulations as, “The fundamental job duties of the employment position the individual with a disability holds or desires. The term does not include the ‘marginal functions’ of the position.”

Example: The essential function of a bus driver position is to drive a bus because the position exists to perform that function. However, the bus driver position may also have several non-essential functions that are part of the job description. For example, on occasion, the bus driver may be asked to help clean buses (e.g., if the cleaning crew is short-staffed) or complete administrative paper work. Such functions are likely marginal. Therefore, if a disabled individual was capable of driving a bus (with or without a reasonable accommodation) but, because of a limitation relating to his or her disability, could not clean buses, the employer would have to consider reassigning that marginal function, provided doing so would not constitute an undue hardship.

- When is a particular function an “essential function”?

A function may be essential because:

- (a) the reason the position exists is to perform the function (*e.g.*, driving is the essential function of being a bus driver);
 - (b) only a limited number of employees are available who may perform that function (*e.g.*, lifting may be an essential function of a librarian position when there are only two librarians at work at a time and one function of the librarian position is to restock books on shelves); and/or
 - (c) the function is so highly specialized that the individual was hired for his or her expertise or ability to perform the particular function (*e.g.*, the ability to program computers in a specific language would be an essential function of a computer programmer position when the person was hired specifically for his/her ability to program in that specific computer language).
- How can an employer demonstrate that something is an essential function?

When an employer must demonstrate that a particular function is essential to a job, the evidence it may rely upon includes, but is not limited to:

- (a) the employer’s judgment as to which functions are essential;
 - (b) written job descriptions prepared before advertising or interviewing applicants for the job;
 - (c) the amount of time spent on the job performing the function;
 - (d) the consequences of not requiring someone in the job to perform the function;
 - (e) the terms of a collective bargaining agreement;
 - (f) the work experience of past incumbents in the job; and/or
 - (g) the current work experience of incumbents in similar jobs.
- What are examples of essential functions?

Courts have held that in certain circumstances the following functions may be essential functions of a broad range of jobs:

- (a) the ability to handle stress and get along reasonably well with others;
- (b) regular and reliable attendance at work/punctuality;
- (c) the ability to lift items of a specific weight;

- (d) the ability to work independently; and
- (e) the ability to stay awake.

2. Arranging the Interview

Employers are required by law to provide reasonable accommodations to qualified applicants with disabilities, so that they may participate in the interview process in a manner that is equal to the opportunity afforded a candidate without a disability. Accommodations are considered reasonable so long as they do not create an undue hardship for the employer.

Example: Jim uses a wheelchair for his mobility. Jim has submitted a resume to an employer to apply for a job position. Jim is contacted by the employer, Mr. Smith, and is asked to come in for an interview. Jim informs Mr. Smith that he uses a wheelchair and will need to meet in an office that is accessible. Mr. Smith realizes that there are four steps at the entrance to the office building.

When Mr. Smith realizes that the office he wants to use for the interview is inaccessible to Jim, he suggests that they meet at another office the company owns that is on the ground floor and is accessible. In most cases, it is reasonable to hold off-site interviews in locations that are accessible to a job candidate with a disability. It was prudent of Jim to inform Mr. Smith that he needed a reasonable accommodation. An employer needs advance notice to provide reasonable accommodations, and may ask an applicant whether he or she will need a reasonable accommodation in the hiring process. Employers may request reasonable documentation from a job candidate supporting a request for a reasonable accommodation in a case where a disability or accommodation is not obvious.

What if Jim requested a ramp or lift installed at the original office location? The cost of constructing a ramp or installing a lift may create an undue financial hardship on the employer, thus making the accommodation unreasonable and not legally required. On the other hand, such an investment may be relatively minor and therefore not present an undue hardship.

What if Mr. Smith offered to conduct the interview over the phone? This would not be considered a “best practice” as other candidates would have the benefit of a face-to-face meeting with Mr. Smith, while Jim would be relegated to phone conversation to prove that he is the right candidate for the job.

Reasonable accommodations that are necessary during the interview process may also include:

- Providing sign language interpreters for job candidates with hearing impairments;
- Enhancing the font of written materials, or providing the same in Braille or audiotape for job candidates with seeing impairments;
- Increased time to take aptitude tests.

Employers should not refuse to consider an applicant with a disability because he/she requires a reasonable accommodation to be interviewed for the job.

3. Conducting the Pre-Offer Interview

Once an employer identifies the essential and non-essential functions of a position, the ADA requires that an employer focus on whether an applicant can perform the requirements of the position he or she seeks. Employers may ask applicants to describe or demonstrate how they would perform job tasks, as long as the employer asks all applicants for that job to do the same. If an employer wishes to require a job demonstration, and a disabled applicant requests a reasonable accommodation to do so, the employer must grant the reasonable accommodation provided that doing so would not cause an undue hardship. If the employer does not want to provide the reasonable accommodation at that time, another option is simply to allow the disabled applicant to describe how he/she would perform the job functions with or without a reasonable accommodation.

The ADA prevents employers from using the pre-offer interview process to discover whether the applicant has a health condition or a disability.

Legitimate Questions: Legitimate areas of inquiry include the applicant's education, work history, and ability to perform the essential and non-essential duties of the position in question.

Illegitimate Questions: Before an employer offers an applicant a job, the employer *cannot* ask about the applicant's health and disabilities, even if visible: these questions are illegal under the ADA.

One Exception: The one exception is if a known [an obvious or volunteered] disability might interfere with a job-related function.

Example 1: Steven Jones is applying for an editorial position at Tiger Publishing, a small publishing company. The essential functions are proofreading and editing the books, dealing with the printer, selling the books to various bookstores, including monthly travel, and distributing the books. The holiday season is crucial, and editors can work more than 65 hours a week getting books out for the season. Mr. Jones has worked for a major publishing company from 1998 through 2007, and is still employed.

Tiger may ask Mr. Jones about his education, job history, and skills. Tiger may describe the requirements of the editor's position and ask whether Mr. Jones can satisfy the requirements. Tiger can also ask about the reasons Mr. Jones is seeking a new position. Tiger can also ask about how much time off Mr. Jones took in his previous position, but should not ask why, because that question can be construed as a request for health or medical information.

Tiger should not ask about whether Mr. Jones has a physical or mental disability, even if the disability is obvious. If Mr. Jones is in a wheelchair, Tiger should not ask why he uses a wheelchair. Nor should Tiger ask Mr. Jones about any medication that he might be taking, or about his worker's compensation history.

All of these questions are barred by the ADA, unless an obvious or known disability might interfere with a job requirement.

Example 2: Mr. Jones has an obvious vision impairment. Tiger should describe the duties of the editor's position, and ask him how he will perform them, with or without a reasonable accommodation. Tiger may ask Mr. Jones to demonstrate how he can perform the job duties.

Tiger, however, must focus on the requirements of the position, and should not ask Mr. Jones how his vision became impaired, whether his vision loss relates to a specific medical condition, or will become worse over time.

Example 3: If during the course of the interview Mr. Jones reveals that he has a disability, Tiger should focus on the job requirements and how Mr. Jones can meet them, with or without a reasonable accommodation. For example, if Mr. Jones reveals that he is diabetic and needs to eat on a regular schedule, Tiger should not assume that Mr. Jones is unable to perform the editor's position simply because he is diabetic. Tiger should discuss the requirements of the editor's position - proofreading, editing, travel, *etc.* - and how Mr. Jones can meet them, with or without a reasonable accommodation. If Mr. Jones replies that he needs to eat at 8 a.m., noon, 4 p.m., and 8 p.m., Tiger must consider whether this is a reasonable accommodation.

Example 4: If Mr. Jones reveals that he has a mental disability, Tiger cannot assume that Mr. Jones is unable to perform the editor's position because he has a mental disability. Tiger must focus on the requirements of the editor's position - proofreading, editing, travel, *etc.* - and how Mr. Jones can meet them, with or without a reasonable accommodation. For example, if Mr. Jones reveals he is being treated for depression and sees a psychologist, Tiger can ask Mr. Jones about how he can meet the requirements of the position, with or without a reasonable accommodation. Tiger cannot ask about the details of Mr. Jones' treatment.

Example 5: If Mr. Jones' known disability is not related to the requirements of the position, Tiger should not ask about it. For example, if Mr. Jones has an artificial leg, which has no implications for performing the functions of the position, Tiger should not ask about Mr. Jones' artificial leg.

4. Making the Post-Conditional Offer

The ADA regulates the sequence of an employer's hiring process by prohibiting medical examinations and inquiries until after the employer makes a conditional job offer to the applicant.

The conditional offer cannot be a pretense for obtaining medical information from applicants. An employer must act in good faith and may not offer a job to all applicants for the purpose of identifying individuals with health issues. An offer conditioned on the applicant taking a physical or mental test, a medical exam, or otherwise responding to questions about his or her health or disability should be made only after an employer completes all non-medical aspects of their application process or shows that it could not have reasonably done so.

An employer's eagerness to beat the competition and place a potential applicant is not a legitimate reason for altering the ADA's requirement of deferring medical inquiries until the non-medical component of the hiring process is completed. However, if complying with the ADA's sequence would result in prolonging an applicant's trip until a background check has cleared or require an applicant to travel more than once simply to complete a medical exam, an employer may demonstrate that compliance with the ADA's sequence is unreasonable.

After a conditional offer of employment is made, an employer may make medical inquiries and conduct exams to determine whether an applicant can perform a job effectively and/or safely so long as all employees within the same job category are subject to an examination or inquiry. All medical inquiries and/or exams should be restricted to the scope needed to determine whether an individual is qualified to perform the essential functions of the job with or without an accommodation.

The ADA requires this sequence because it allows applicants whose job offer is later withdrawn to identify the fact that they received an offer that was withdrawn after the employer received information about their health and/or disability.

Example

Bob interviewed for a position with a company. At the end of the second round of interviews, James told Bob that he was impressed with his credentials and experience, and said "My decision is already made. Can you start work next week?" Elated by the news, Bob replied, "I'll be there with bells on." James told Bob to stop by the Human Resources Department to complete the required paperwork and procedures.

David, the Human Resources Director for the company, asked Bob for his references and to submit to a medical exam with the company's doctor. Bob told David that he was authorized to contact Daniel and Sarah for references and agreed to submit to a medical exam the next day.

That evening, Sarah and Bob met at their local diner to celebrate his new position. Bob mentioned that there were just a few formalities that he needed to take care of before he started work next week.

As scheduled, Bob kept his appointment with the company's doctor. After the exam, the doctor determined that Bob would not be a good hire for this position because Bob failed to meet the minimum vision requirements for the job. After learning the exam results, David never bothered to check Bob's references.

James told Bob he would not be hired for the position because "everything did not check out as we had hoped," and gave no further explanation. Disappointed by the news, Bob met with Sarah and Daniel to commiserate over the bad turn of events. Dumbfounded, Bob exclaimed, "I don't understand what went wrong. Surely you both gave me a glowing reference, right?" Daniel and Sarah both shook their heads and said no one had ever called them for a reference.

Employers are well advised to conduct all non-medical inquiries, i.e., reference and background checks before extending an offer of employment, and then and only then, should the employer conduct medical exams or make disability inquiries. After a real job offer has been made, employers may ask questions that are likely to reveal the existence of a disability as long as the employer asks the same questions of other applicants offered the same type of job.

In the foregoing example, the employer may have violated the ADA because the employer conducted a medical exam prior to extending a real conditional job offer to the applicant.

5. Confidentiality

The ADA requires employers to maintain the confidentiality of medical information supplied by applicants, regardless of whether the applicant volunteered the information or responded to an employer's inquiries. Medical information must be maintained on separate forms and in separate files and should never be placed in an employee's personnel file.

Employers, however, may share the information to the extent needed to make hiring decisions and comply with the ADA. Employers may generally share medical information with the following individuals:

- supervisors and managers may be told about necessary restrictions on the work or duties of an employee and about reasonable accommodations, but should not be told about the employee's disability or medical condition requiring the restrictions and/or accommodations;
- first aid and safety personnel may be told if the disability might require emergency treatment;
- government officials investigating compliance with the ADA;
- state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers;
- insurance providers.

Example

April, a new hire at a major retail establishment, was assigned to an upscale department, where the designers used fabrics containing only natural fibers. April knew that she was allergic to synthetic fabrics, and informed Human Resources at the time of her hire. After several months of working in the department, Diane, April's direct supervisor, transferred April to a department containing synthetic garments to meet staffing needs. April soon developed hives on her face, neck and hands.

April asked Human Resources for a transfer to her original department and explained her allergies were the main reason for her request. Human Resources granted April's request and told Diane to transfer another employee.

In the foregoing example, the employer would not have violated the ADA because the Human Resources Department accommodated April without divulging information about her underlying health.

6. Applicable Laws

Federal Law

The Americans with Disabilities Act (“ADA”) is the federal law prohibiting discrimination against individuals with disabilities (42 U.S.C. §12111-12117). The portions of the ADA prohibiting discrimination by employers against the disabled are enforced by the United States Equal Employment Opportunity Commission (“EEOC”). The EEOC has issued regulations on the ADA, published at 29 C.F.R. §1630 *et seq.*, as well as an interpretative guidance. The ADA, regulations, and guidance are available at www.eeoc.gov. Guidance regarding the job application process in particular may be found at www.eeoc.gov/facts/jobapplicant.html.

State Law

The New York State Human Rights Law is the New York State law prohibiting discrimination against individuals with impairments (N.Y. Exec. Law §296). The Human Rights Law is broader than the ADA, and covers more individuals. The Human Rights Law is enforced by the New York State Division of Human Rights. A copy of the law is available at www.dhr.state.ny.us.

New York City Law

The New York City Human Rights Law is the New York City law prohibiting discrimination against individuals with impairments (N.Y.C. Admin. Code, Title 8, §8-107). Like the State Human Rights Law, the N.Y.C. Human Rights Law is broader than the ADA, and covers more individuals. The Human Rights Law is enforced by the New York City Commission on Human Rights. A copy of the City Law is available at www.nyc.gov/html/cchr.