



Questions & Answers about Diabetes 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 who have or had diabetes. In particular, this document explains:

- when an employer may ask an applicant or employee questions about her diabetes and how it should treat voluntary disclosures;
- what types of reasonable accommodations employees with diabetes may need;
- how an employer should handle safety concerns about applicants and employees with diabetes; and
- how an employer can ensure that no employee is harassed because of diabetes or any other disability.

GENERAL INFORMATION ABOUT DIABETES

Diabetes is a group of diseases characterized by high blood glucose or sugar levels that result from defects in the body's ability to produce and/or use insulin.⁴ Insulin is a hormone that helps the glucose enter the body's cells to give them energy. With Type 1 diabetes, the body does not make insulin. With Type 2 diabetes, the more common type, the body does not make or use insulin well. Some women develop a type of diabetes called gestational diabetes during pregnancy when their bodies are not able to make and use all the insulin it needs, but may not have diabetes after giving birth. Without enough insulin, the glucose stays in the blood.⁵

Although diabetes cannot be cured, it can be managed. Some people are able to control their diabetes by eating a balanced diet, maintaining a healthy body weight, and exercising regularly. Many individuals, however, must take oral medication and/or administer insulin injections to manage their diabetes.⁶

With nearly two million new cases diagnosed each year, diabetes is becoming more prevalent in the United States and is the most common endocrine disease.⁷ Today, an estimated 18.8 million adults in the United States have diabetes.⁸

As a result of changes made by the ADAAA, individuals who have diabetes 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 the major life activity of endocrine function.⁹ Additionally, because the determination of whether an impairment is a disability is made without regard to the ameliorative effects of mitigating measures, diabetes is a disability even if insulin, medication, or diet controls a person's blood glucose levels. An individual with a past history of diabetes (for example, gestational diabetes) also has a disability within the meaning of the ADA.¹⁰ 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 diabetes or because the employer believes the individual has diabetes.¹¹

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

Title I of the ADA limits an employer's ability to ask questions related to diabetes 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 or had diabetes or about her treatment related to diabetes before making a job offer?

No. An employer may not ask questions about an applicant's medical condition¹² 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 diabetes or has been diagnosed with diabetes (for example, gestational diabetes) in the past;
- whether she uses insulin or other prescription drugs or has ever done so in the past; or,
- whether she ever has taken leave for medical treatment, or how much sick leave she has taken in the past year.

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

- whether the applicant has a commercial driver's license; or
- whether she can work rotating shifts.

2. Does the ADA require an applicant to disclose that she has or had diabetes or some other disability before accepting a job offer?

No. The ADA does not require applicants to voluntarily disclose that they have or had diabetes or another disability unless they will need a reasonable accommodation for the application process (for example, a break to eat a snack or monitor their glucose levels). Some individuals with diabetes, however, choose to disclose their condition because they want their co-workers or supervisors to know what to do if they faint or experience other symptoms of hypoglycemia (low blood sugar), such as weakness, shakiness, or confusion.¹³

Sometimes, the decision to disclose depends on whether an individual will need a reasonable accommodation to perform the job (for example, breaks to take medication or a place to rest until blood sugar levels become normal). A person with diabetes, however, may request an accommodation after becoming an employee even if she did not do so when applying for the job or after receiving the job offer.

3. May an employer ask any follow-up questions if an applicant voluntarily reveals that she has or had diabetes?

No. An employer generally may not ask an applicant who has voluntarily disclosed that she has diabetes any questions about her diabetes, its treatment, or its prognosis. However, if an applicant voluntarily discloses that she has diabetes **and the employer reasonably believes that she will require an accommodation to perform the job because of her diabetes or treatment**, 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 individual applying for a cashier's position at a grocery store voluntarily discloses that she has diabetes and periodically needs to administer insulin and monitor her blood sugar levels. The employer explains that cashiers typically get two 15-minute breaks and 30 minutes for lunch during an eight-hour shift and asks whether she needs an accommodation (for example, more frequent breaks or a longer lunch period). Before an offer of employment is made, the employer may not ask any questions about the condition itself, such as how long the applicant has had diabetes, how much medication she takes, or whether anyone else in her family has diabetes.¹⁴

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 are 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. 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.

4. What may an employer do when it learns that an applicant has or had diabetes 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 diabetes, an employer may ask the applicant additional questions such as how long she has had diabetes; whether she uses insulin or oral medication; whether and how often she experiences hypoglycemic episodes; and/or whether she will need assistance if her blood sugar level drops while at work. The employer also may send the applicant for a follow-up medical examination or ask her to submit documentation from her doctor 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 diabetes 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 10 through 15. "Direct threat" is discussed at Questions 6 and 16 through 18.)

Example 2: A qualified candidate for a police officer's position is required to have a medical exam after he has been extended a job offer. During the exam, he reveals that he has had diabetes for five years. He also tells the doctor that since he started using an insulin pump two years ago, his blood sugar levels have been stable. The candidate also mentions that in his six years as a police officer for another department, he never had an incident related to his diabetes. Because the candidate can perform the job's essential functions without posing a direct threat, it would be unlawful for the employer to withdraw the job offer.

Employees

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

5. When may an employer ask an employee whether diabetes, 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 observed symptoms, such as extreme fatigue or irritability, or 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.¹⁵

Example 3: Several times a day for the past month, a receptionist has missed numerous phone calls and has not been at her desk to greet clients. The supervisor overhears the receptionist tell a co-worker that she feels tired much of the time, is always thirsty, and constantly has to go to the bathroom. The supervisor may ask the receptionist whether she has diabetes or send her for a medical examination because he has a reason to believe that diabetes may be affecting the receptionist's ability to perform one of her essential duties - sitting at the front desk for long periods of time.

Example 4: A normally reliable secretary with diabetes has been coming to work late and missing deadlines. The supervisor observed these changes soon after the secretary started going to law school in the evenings. The supervisor can ask the secretary why his performance has declined but may not ask him about his diabetes unless there is objective evidence that his poor performance is related to his medical condition.

6. May an employer require an employee on leave because of diabetes to provide documentation or have a medical examination before allowing her to return to work?

Yes. If the employer has a reasonable belief that the employee may be unable to perform her job or may pose a direct threat to herself or others, the employer may ask for medical information. However, the employer may obtain only the information needed to make an assessment of the employee's present ability to perform her job and to do so safely.

Example 5: A newspaper reporter, who has been on leave for two months because of complications stemming from her diabetes, notifies her employer that she will be able to return to work in two weeks but will need a flexible schedule. Because the reporter's job frequently requires her to meet short deadlines, the employer may ask her to provide a doctor's note or other documentation indicating whether there are any limits on how many hours a day she can work.

7. Are there any other instances when an employer may ask an employee with diabetes about his condition?

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

- to support the employee's request for a reasonable accommodation needed because of his diabetes;
- to verify the employee's use of sick leave related to his diabetes if the employer requires all employees to submit a doctor's note to justify their use of sick leave; ¹⁶ or
- to enable the employee to participate in a voluntary wellness program.¹⁷

Keeping Medical Information Confidential

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. Under the following circumstances, however, an employer may disclose that an employee has diabetes:

- to supervisors and managers in order to provide a reasonable accommodation or to meet an employee's work restrictions;
- to first aid and safety personnel if an employee may need emergency treatment or require some other assistance because, for example, her blood sugar level is too low;
- to individuals investigating compliance with the ADA and similar state and local laws; and

- where needed for workers' compensation or insurance purposes (for example, to process a claim).

8. May an employer tell employees who ask why their co-worker is allowed to do something that generally is not permitted (such as eat at his desk or take more breaks) that she 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 the privacy of all employees and emphasize that its policy is to refrain from discussing the work situation of any employee with co-workers. Employers may be able to avoid many of these kinds of questions by training all employees 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."

9. If an employee experiences an insulin reaction at work, may an employer explain to other employees or managers that the employee has diabetes?

No. Although the employee's co-workers and others in the workplace who witness the reaction naturally may be concerned, an employer may not reveal that the employee has diabetes. Rather, the employer should assure everyone present that the situation is under control. An employee, however, may voluntarily choose to tell her co-workers that she has diabetes and provide them with helpful information, such as how to recognize when her blood sugar may be low, what to do if she faints or seems shaky or confused (for example, offer a piece of candy or gum), or where to find her glucose monitoring kit. However, even when an employee voluntarily discloses that she has diabetes, the employer must keep this information confidential consistent with the ADA. An employer also may not explain to other employees why an employee with diabetes has been absent from work if the absence is related to her diabetes or another disability.

ACCOMMODATING EMPLOYEES WITH DIABETES

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 diabetes will need an accommodation or require the same accommodations, and most of the accommodations a person with diabetes might need will involve little or no cost. An employer must provide a reasonable accommodation that is needed because of the diabetes itself, the effects of medication, or both. For example, an employer may have to accommodate an employee who is unable to work while learning to manage her diabetes or adjusting to medication. An employer, however, has no obligation to monitor an employee to make sure that she is regularly checking her blood sugar levels, eating, or taking medication as prescribed.

10. What other types of reasonable accommodations may employees with diabetes need?

Some employees may need one or more of the following accommodations:

- a private area to test their blood sugar levels or to administer insulin injections
- a place to rest until their blood sugar levels become normal
- breaks to eat or drink, take medication, or test blood sugar levels

Example 6: A manufacturing plant requires employees to work an eight-hour shift with just a one-hour break for lunch. An employee with diabetes needs to eat several times a day to keep his blood sugar levels from dropping too low. Absent undue hardship, the employer could accommodate the employee by allowing him to take two 15-minute breaks each day and letting him make up the time by coming to work 15 minutes earlier and staying 15 minutes later.

- leave for treatment, recuperation, or training on managing diabetes¹⁸
- modified work schedule or shift change

Example 7: A nurse with diabetes rotated from working the 6:00 a.m. to 2:00 p.m. shift to the midnight to 8:00 a.m. shift. Her doctor wrote a note indicating that interferences in the nurse's sleep, eating routine, and schedule of insulin shots were making it difficult for her to manage her diabetes. Her employer eliminated her midnight rotation.

- allowing a person with diabetic neuropathy¹⁹ that makes it difficult to stand for long periods of time to use a stool
- reallocation or redistribution of marginal tasks to another employee

Example 8: A janitor, who had a leg amputated because of complications from diabetes, can perform all of his essential job functions without accommodation but has difficulty climbing into the attic to occasionally change the building's air filter. The employer likely can reallocate this marginal function to one of the other janitors.

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

Example 9: Following complications from neuropathy that resulted in a toe amputation, a hotel housekeeper requests to be reassigned to a laundress position because the job would require less walking. Although the employer does not have to "bump" another employee to create a vacancy, it should determine whether the housekeeper is qualified for the new position and whether it would be an undue hardship to reassign her. 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 she is eligible.

Although these are some examples of the types of accommodations commonly requested by employees with diabetes, other employees may need different changes or adjustments. Employers should ask the particular employee requesting an accommodation 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/Diabetes.html>) provides information about many types of accommodations for employees with diabetes.

11. How does an employee with diabetes request a reasonable accommodation?

There are no "magic words" that a person has to use when requesting a reasonable accommodation. A person simply has to tell the employer that she needs an adjustment or change at work because of her diabetes. 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 diabetes.

Example 10: A custodian tells his supervisor that he was recently diagnosed with diabetes and needs a week off to attend a class on how to manage the condition. If leave for this length of time and/or for this reason would not be allowed under an existing leave policy, the employee's request for leave is a request for reasonable accommodation (for example, an exception to or modification of the leave policy).

12. May an employer request documentation when an employee who has diabetes requests a reasonable accommodation?

Yes. An employer may request reasonable documentation where a disability or the need for reasonable accommodation is not known or obvious. An employer, however, is entitled only to documentation sufficient to establish that the employee has diabetes 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 diabetes.²⁰

Example 11: When an employee asks for one week of unpaid leave to attend a class on how to manage his recently diagnosed diabetes, his employer asks for a letter from the employee's doctor. The employee submits a letter from his endocrinologist stating that the employee has been diagnosed with Type 2 diabetes and that the one-week class will teach him how to monitor his blood glucose levels, administer insulin injections, and plan his meals. The doctor's letter is sufficient to demonstrate that the employee has a disability and needs the requested reasonable accommodation. If the employee makes a subsequent accommodation request related to his diabetes (for example, asks for a shift change) and the need for accommodation is not obvious, the employer may ask for documentation explaining why the new accommodation is needed but may not ask for documentation concerning his diabetes diagnosis.

13. Does an employer have to grant every request for a reasonable 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 will 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 will 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.

14. May an employer be required to provide more than one accommodation for the same employee with diabetes?

Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some employees with diabetes may require only one reasonable accommodation, others may need more than one. For example, an employee with diabetes may require leave to attend a class on how to administer insulin injections and later may request a part-time or modified schedule to better control his glucose levels. 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.

15. May an employer automatically deny a request for leave from someone with diabetes because the employee cannot specify an exact date of return?

No. Granting leave to an employee who is unable to provide a fixed date of return may be a reasonable accommodation. Although diabetes can be successfully treated, some individuals experience serious complications that may be unpredictable and do not permit exact timetables. An employee requesting leave because of diabetes or resulting

complications (for example, a foot or toe amputation), therefore, may be able to provide only an approximate date of return (e.g., "in six to eight weeks," "in about three months"). In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss the need for continued leave beyond what originally was granted. The employer also has the right to require that the employee provide periodic updates on his condition and possible date of return. After receiving these updates, the employer may reevaluate whether continued leave constitutes an undue hardship.

CONCERNS ABOUT SAFETY

When it comes to safety concerns, an employer should be careful not to act on the basis of myths, fears, or stereotypes about diabetes. Instead, the employer should evaluate each individual on her skills, knowledge, experience and how having diabetes affects her.

16. When may an employer refuse to hire, terminate, or temporarily restrict the duties of a person who has diabetes because of safety concerns?

An employer only may exclude an individual with diabetes from a job 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.²¹ This determination must be based on objective, factual evidence, including the best recent medical evidence and advances in the treatment of diabetes.

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.²²

The harm must be serious and likely to occur, not remote or 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.²³

Example 12: At his post-offer medical examination, an applicant for a machine operator position admitted that because he often does not take his insulin as prescribed or monitor what he eats, he sometimes feels confused when his glucose levels drop too low. Based on the applicant's admitted history of noncompliance, the high temperatures in the plant, and the fact that the applicant would have to climb tall ladders and operate dangerous machinery, the doctor concluded that the applicant could seriously injure himself if his unregulated diabetes made him lose consciousness or become disoriented. Relying on the doctor's assessment that the applicant would pose a significant risk of substantial harm, the employer lawfully rescinded the conditional job offer.

Example 13: When an actor forgets his lines and stumbles during several recent play rehearsals, he explains that the fluctuating rehearsal times are interfering with when he eats and takes his insulin. Because there is no reason to believe that the actor poses a direct threat, the director cannot terminate the actor or replace him with an understudy; rather, the director should consider whether rehearsals can be held at a set time and/or whether the actor can take a break when needed to eat, monitor his glucose, or administer his insulin.

17. May an employer require an employee who has had an insulin reaction at work to submit periodic notes from his doctor indicating that his diabetes is under control?

Yes, but only if the employer has a reasonable belief that the employee will pose a direct threat if he does not regularly see his doctor. In determining whether to require periodic documentation, the employer should consider the safety risks associated with the position the employee holds, the consequences of the employee's inability or impaired ability to perform his job, how long the employee has had diabetes, and how many insulin reactions the employee has had on the job.

Example 14: Four times in the past two months, a telephone repair technician had a hypoglycemic reaction right before climbing a pole and was unable to do his job. The repair technician explained that he was using a new type of insulin and that his blood sugar levels occasionally dropped too low. Given the safety risks associated with the repair technician's job, his change in medication, and recurrent hypoglycemic reactions, the employer could ask for periodic documentation to make sure that the repair technician does not pose a direct threat to himself or others.

Example 15: The owner of a daycare center knows that one of her teachers has diabetes and that she once had an insulin reaction at work when she skipped lunch. When the owner sees the teacher eat a piece of cake at a child's birthday party, she becomes concerned that the teacher may have an insulin reaction. Although many people believe that individuals with diabetes should never eat sugar or sweets, this is a myth. The owner, therefore, cannot require the teacher to submit periodic notes from her doctor indicating that her diabetes is under control because she does not have a reasonable belief, based on objective evidence, that the teacher will pose a direct threat to the safety of herself or others.

18. What should an employer do when another federal law prohibits it from hiring anyone who uses insulin?

If a federal law prohibits an employer from hiring a person who uses insulin, the employer is not be liable under the ADA. The employer should be certain, however, that compliance with the law actually is required, not voluntary. The employer also should be sure that the law does not contain any exceptions or waivers. For example, the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) issues exemptions to certain individuals with diabetes who wish to drive commercial motor vehicles (CMVs).²⁴

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).

19. 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 42 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 See Diabetes Basics, www.diabetes.org/diabetes-basics (last visited January 10, 2013); see also www.diabetes.org/diabetes-basics/gestational/

⁵ Id.; see also information on diabetes from the National Institutes of Health, www.nlm.nih.gov/medlineplus/diabetes.html.

⁶ Diabetes Basics, *supra* note 4.

⁷ According to the Centers for Disease Control and Prevention (CDC), about 1.9 million people aged 20 or older were newly diagnosed with diabetes in the United States in 2010. See National Diabetes Fact Sheet (2011), <http://www.cdc.gov/diabetes/pubs/factsheet11.htm> (last visited January 10, 2013); see also Endocrine Diseases, www.nlm.nih.gov/medlineplus/endocrinediseases.html#cat1.

⁸ See 2011 National Diabetes Fact Sheet (released January 26, 2011), www.diabetes.org/diabetes-basics/diabetes-statistics (last visited January 13, 2013).

⁹ See 29 C.F.R. §1630.2(j)(3)(iii).

¹⁰ Id. at §1630.2(k).

¹¹ Id. at §1630.2(l).

¹² Federal contractors are required under 41 C.F.R. § 60-741.42, a regulation issued by the Office of Federal Contract Compliance Programs (OFCCP), to invite applicants to voluntarily self-identify as persons with disabilities for affirmative action purposes. The ADA prohibition on asking applicants about medical conditions at the pre-offer stage does not prevent federal contractors from complying with the OFCCP's regulation. See Letter from Peggy R. Mastroianni, EEOC Legal Counsel, to Patricia A. Shiu, Director of OFCCP, www.dol.gov/ofccp/regs/compliance/section503.htm#bottom.

¹³ Insulin and some oral medications can sometimes cause a person's blood sugar levels to drop too low. A person experiencing hypoglycemia (low blood sugar) may feel weak, shaky, confused, or faint. Most people with diabetes, however, recognize these symptoms and will immediately drink or eat something sweet. Many individuals with diabetes also carry a blood glucose monitoring kit with them at all times and test their blood sugar levels as soon as they feel minor symptoms such as shaking or sweating. Often, a person's blood sugar returns to normal within 15 minutes of eating or drinking something sweet. See generally information from the American Association of Diabetes, www.diabetes.org.

¹⁴ Asking an applicant or employee about family medical history 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).

¹⁵ An employer also may ask an employee about his diabetes 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."

¹⁶ 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. See also Q&A 15. 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.

¹⁷ 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>

¹⁸ An employee with diabetes who needs continuing or intermittent leave, or a part-time or modified schedule, as a reasonable accommodation also may be entitled to leave under the Family and Medical Leave Act (FMLA). For a discussion of how employers should treat situations in which an employee may be covered both by the FMLA and the ADA, see

Questions 21 and 23 in the EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (rev. Oct. 17, 2002) at www.eeoc.gov/policy/docs/accommodation.html.

¹⁹ Diabetic neuropathy is a common complication of diabetes in which nerves are damaged as a result of high blood sugar levels (hyperglycemia). See National Center for Biotechnology Information, U.S. National Library of Medicine, www.ncbi.nlm.nih.gov.

²⁰ 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).

²¹ See 29 C.F.R. §1630.2(r).

²² *Id.*

²³ *Id.*

²⁴ Under FMCSA's Diabetes Exemption Program, an individual who intends to operate a CMV in interstate commerce may apply for an exemption from the diabetes standard if he or she meets all medical standards and guidelines, other than diabetes, in accordance with 49 CFR §391.41 (b) (1-13).