



Questions & Answers about Epilepsy 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 epilepsy. In particular, this document explains:

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

GENERAL INFORMATION ABOUT EPILEPSY

Epilepsy is a chronic neurological condition characterized by recurrent seizures. It is also called a seizure disorder.⁴ A seizure happens when abnormal electrical activity in the brain causes an involuntary change in body movement or function, sensation, awareness, or behavior. People diagnosed with epilepsy have had at least two seizures and may have had more than one type of seizure. A seizure can last from a few seconds to a few minutes. Some individuals recover immediately from a seizure, while others may be dazed and sleepy for a period of time following a seizure. The severity of epilepsy and the type of seizure vary from person to person.⁵

Today, almost three million people in the United States have some form of epilepsy, and about 200,000 new cases of seizure disorders and epilepsy are diagnosed each year.⁶ One in ten adults will have a seizure sometime during his lifetime.⁷ Although there is no cure for epilepsy, antiepileptic drugs successfully prevent seizures in the majority of people who take them regularly and as prescribed. It has been estimated that seizures can be completely controlled in 50 percent of individuals with epilepsy for substantial periods of time, while another 20 percent experience a significant reduction in the number of seizures.⁸

As a result of changes made by the ADAAA, individuals who have epilepsy 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 neurological functions and other major life activities (for example, speaking or interacting with others) when seizures occur.⁹ Additionally, because the determination of whether an impairment is a disability is made without regard to the ameliorative effects of mitigating measures, epilepsy is a disability even if medication or surgery limits the frequency or severity of seizures or eliminates them altogether.¹⁰ An individual with a past history of epilepsy (including a misdiagnosis) also has a disability within the meaning of the ADA.¹¹ 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 epilepsy or because the employer believes the individual has epilepsy.¹²

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

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

No. An employer may not ask questions about an applicant's medical condition¹³ 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 epilepsy or seizures;
- whether she uses any prescription drugs; or
- whether she ever has filed for workers' compensation or been injured on a job.

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

- whether an applicant has a driver's license; or
- whether he can operate heavy machinery or equipment.

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

No. The ADA does not require applicants to voluntarily disclose that they have epilepsy or another disability unless they will need a reasonable accommodation for the application process (for example, permission to bring a service animal to an interview). Some individuals with epilepsy, however, choose to disclose their condition because they want their co-workers or supervisors to know what to do if they have a seizure. Often the decision to disclose depends on the type of seizure a person has, the need for assistance during or after a seizure, the frequency of seizures, and the type of work for which the person is applying.

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). A person with epilepsy, 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 epilepsy?

No. An employer generally may not ask an applicant who has voluntarily disclosed that she has epilepsy any questions about her epilepsy, its treatment, or its prognosis. However, if an applicant voluntarily discloses that she **has epilepsy and the employer reasonably believes that she will require an accommodation to perform the job because of her epilepsy 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 applies to be a clerk for a law firm, a job that sometimes requires going out to purchase office supplies and picking up and delivering documents. When the interviewer explains that clerks typically walk, take a taxi, or occasionally use the company car to run errands, the applicant discloses that she does not have a driver's license due to epilepsy and, therefore, would have to use some other form of transportation to run errands if she could not walk or take a taxi.¹⁴ Because there is no reason to believe that the applicant will need an accommodation to do the job, the interviewer may not ask the applicant follow-up questions about her epilepsy, such as when she was diagnosed, whether her license was suspended because she had a seizure, or whether anyone else in her family has epilepsy.¹⁵

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 epilepsy after he has been offered a job but before he starts working?

When an applicant discloses after he has received a conditional job offer that he has epilepsy, an employer may ask the applicant additional questions about his epilepsy, such as whether he has held the same or a similar job since his diagnosis; whether he takes any medication; whether he still has seizures and, if so, what type; how long it takes him to recover after a seizure; and/or, whether he will need assistance if he has a seizure at work. The employer also may send the applicant for a follow-up medical examination or ask him to submit documentation from his doctor answering questions specifically designed to assess the applicant's 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 epilepsy 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 herself or others that cannot be eliminated or reduced through reasonable accommodation. ("Reasonable accommodation" is discussed in Questions 10 through 15. "Direct threat" is discussed in Questions 6 and 16 through 19.)

Example 2: An experienced chef receives an offer from a hotel resort. During the post-offer medical examination, he discloses that he has had epilepsy for ten years. When the doctor expresses concern about the applicant's ability to work around stoves and use sharp utensils, the applicant explains that his seizures are controlled by medication and offers to bring information from his neurologist to answer the doctor's concerns. He also points out that he has worked as a chef for seven years without incident. Because there is no evidence that the applicant will pose a significant risk of substantial harm while performing the duties of a chef, the employer may not 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, his actual performance is the best measure of ability to do the job.

5. When may an employer ask an employee whether epilepsy, 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 the 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.¹⁶

Example 3: Several times during the past three months, a supervisor has observed a newly hired secretary staring blankly, making chewing movements, and engaging in random activity. On these occasions, the secretary has appeared to be unaware of people around her and has not responded when the supervisor has asked if she was okay. The secretary has no memory of these incidents.¹⁷ The supervisor may ask the secretary whether a medical condition, such as epilepsy, is affecting her ability to perform the essential functions of her job.

Example 4: Lately, a normally reliable receptionist with epilepsy has been missing work on Mondays and leaving work early on Fridays. The supervisor noticed these changes soon after the receptionist's fiancé moved to another state. The supervisor can ask the receptionist about her attendance problems but may not ask her about her epilepsy.

6. May an employer require an employee on leave because of epilepsy 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 four months following experimental surgery for frequent seizures, notifies her employer that although she appears to be seizure free, she will need to have follow-up appointments with her doctor for the next six months. Because the reporter's job frequently requires her to travel on short notice, the employer may ask her to provide a doctor's note indicating whether she can travel during the next six months and, if so, whether there are any limits on how long she can be away.

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

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

- to support the employee's request for a reasonable accommodation needed because of her epilepsy;
- to verify the employee's use of sick leave related to her epilepsy if the employer requires all employees to submit a doctor's note to justify their use of sick leave; ¹⁸ or
- to enable the employee to participate in a voluntary wellness program.¹⁹

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 epilepsy:

- 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 would need emergency treatment or require some other assistance if she had a seizure at work;²⁰
- 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 have 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 has a seizure at work, may an employer explain to other employees or managers that the employee has epilepsy?

No. Although the employee's co-workers and others in the workplace who witness the seizure naturally may be concerned, an employer may not reveal that the employee has epilepsy. Rather, the employer should assure everyone present that the situation is under control. The employer also should follow the employee's plan of action if one has been created.²¹

Example 6: During a staff meeting, an attorney's arm and leg suddenly start jerking. Although she appears awake, she does not say anything. When another employee asks whether he should call an ambulance, a manager calmly explains that no first aid is necessary and assures everyone that the attorney will be okay in a few minutes. He adjourns the meeting and stays with the attorney until she recovers from her seizure.

An employee may voluntarily choose to tell her co-workers and others that she has epilepsy and provide them with helpful information, such as how to recognize when she is having a seizure, how long her seizures generally last, what, if anything, should be done if she has a seizure, and how long it generally takes her to recover. However, even when an employee voluntarily discloses that she has epilepsy, the employer must keep this information confidential consistent with the ADA. An employer also may not explain to other employees why an employee with epilepsy has been absent from work if the absence is related to her epilepsy or another disability.

ACCOMMODATING EMPLOYEES WITH EPILEPSY

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 epilepsy will need an accommodation or require the same accommodations, and most of the accommodations a person with epilepsy might need will involve little or no cost. An employer must provide a reasonable accommodation that is needed because of the epilepsy itself, the effects of medication, or both. For example, an employer may have to accommodate an employee who is unable to work while undergoing diagnostic tests to determine the reason for her seizures or because of the side effects of medication. An employer, however, has no obligation to monitor an employee's medical treatment or to make sure she is getting enough rest or taking medication as prescribed.

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

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

- breaks to take medication
- leave to seek or recuperate from treatment or adjust to medication²²
- a private area to rest after having a seizure
- a rubber mat or carpet to cushion a fall
- adjustments to a work schedule

Example 7: A library schedules employees to work eight-hour shifts starting as early as 8:00 a.m. and as late as 1:00 p.m. A librarian with epilepsy, who experiences nocturnal seizures that leave her tired in the early morning, requests that her shifts start in the late morning or early afternoon. The employer determines that because there is sufficient staff available between 8:00 a.m. and 10:00 a.m. to respond to requests from the public for assistance, the accommodation can be granted without undue hardship.

- a consistent start time or a schedule change (for example, from the night shift to the day shift)

Example 8: A home nurse rotated from working the 7:00 a.m. to 3:00 p.m. shift to the midnight to 8:00 a.m. shift. His doctor wrote a note to the employment agency indicating that interferences in the nurse's sleep were making it difficult for him to get enough rest and, as a result, he was beginning to have more frequent

seizures. If eliminating the nurse's midnight rotation would not cause an undue hardship, this would be a reasonable accommodation.

- a checklist to assist in remembering tasks

Example 9: A box packer frequently had absence seizures²³ while packing boxes and forgot what he was doing. The supervisor created a checklist for each step of the job. Now, when the box packer has a seizure, he simply looks at the checklist to see what steps he has completed.

- permission to bring a service animal to work²⁴
- someone to drive to meetings and other work-related events
- permission to work at home
- reassignment to a vacant position if the employee is no longer able to perform her current job

Example 10: A telephone repair technician submits a note from his doctor stating that he recently was diagnosed with epilepsy and must avoid climbing and working at heights above ground level, an essential function of his job. Because there is no reasonable accommodation that would allow the repair technician to do his current job, the employer should determine whether there is another vacant position for which he is qualified that would meet his restrictions. Although the employer does not have to "bump" another employee to create a vacancy, it should determine whether the technician is qualified for another position and whether it would be an undue hardship to reassign him. 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 epilepsy, other employees may need different changes or adjustments. Employers should ask the particular employee requesting an accommodation what she needs that will help her do her 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) (www.askjan.org/media/epilepsy.html) provides information about many types of accommodations for employees with epilepsy.

11. How does an employee with epilepsy 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 epilepsy. A request for reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with epilepsy.

Example 11: A teacher tells her principal that she recently has been diagnosed with epilepsy and needs three weeks off to find out whether medication will control her seizures. 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 (that is, an exception to or modification of the leave policy).

12. May an employer request documentation when an employee who has epilepsy 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 epilepsy 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 epilepsy.²⁵

Example 12: When a medical transcriber started having frequent, unpredictable seizures at work, she asked her supervisor if she could work at home until her seizures were controlled. Before granting or denying the request, the employer asked the employee to submit a doctor's note. The employee provided a note from her neurologist explaining that she has epilepsy, that she is experiencing more frequent seizures because her current medication has become less effective, and that working from home for a month or two would enable the employee to get additional sleep (by avoiding the time it took to travel to and from the office) and avoid stress that might aggravate her condition while adjusting to new medication. If, after returning from her telework accommodation, the employee later requests another accommodation related to her seizures (such as 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 establishing that she has epilepsy.

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 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.

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

Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some employees with epilepsy may require only one reasonable accommodation, others may need more than one. For example, an employee with epilepsy may require leave because of frequent seizures and later may request a part-time or modified schedule to get more rest to control her seizures. 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 epilepsy 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 epilepsy often can be successfully controlled, some individuals may be need to take extended leave because of the frequency or severity of their seizures and may be able to provide only an *approximate* date of return (for example, "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.

16. If an employee does not have a driver's license because of epilepsy, does an employer have to eliminate driving from his job duties?

It depends. If driving is an essential function of a job, an employer does not have to eliminate it. However, an employer should carefully consider whether driving actually is an essential job function, a marginal job function, or simply one way of accomplishing an essential function. If an accommodation is available that would enable an employee with epilepsy to perform a function that most employees would perform by driving, then the employer must provide the accommodation, absent undue hardship. Similarly, if driving is a marginal (or non-essential) function, the fact that an individual with epilepsy does not have a driver's license cannot be used to deny the individual an employment opportunity.

Example 13: A qualified sales clerk applies for promotion to assistant manager of a store. The employer promotes someone else because it claims that an essential function of the assistant manager's job is driving store receipts to the bank. Because depositing the receipts in a safe and timely manner, not driving, is the actual function of the job, the employer should have determined whether the sales clerk could have done the job with a reasonable accommodation (for example, having another employee drive her or paying for her to take a taxi).

Example 14: College orientation guides are hired to hand out information packets and give tours of the campus. Occasionally, a guide also may be asked to drive prospective students to and from the airport. Not every guide is asked to perform this function, and there are always other guides available to perform the function if a particular individual is unavailable. Because driving is not an essential function of the job, the college cannot refuse to hire a person to be a guide who does not have a driver's license because of epilepsy but, rather, would have to assign someone else to perform that task.

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 about epilepsy. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and how having epilepsy affects him.

17. When may an employer refuse to hire, terminate, or temporarily restrict the duties of a person with epilepsy because of safety concerns?

An employer only may exclude an individual with epilepsy 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.²⁶ This determination must be based on objective, factual evidence, including the best recent medical evidence and advances in the treatment of epilepsy.

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.²⁷

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.²⁸

Example 15: A tool inspector with epilepsy applies to be a welder for the same company. During the past two years, the employee has on several occasions failed to take prescribed medication and has experienced several seizures at work. Because of the likelihood that the employee would experience sudden and unpredictable seizures and the serious consequences that would result if the employee had a seizure while working as a welder, the employer may deny the employee the job.

18. May an employer require an employee who has had a seizure at work to submit periodic notes from his doctor indicating that his epilepsy 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 epilepsy, and how many seizures the employee has had on the job.

Example 16: An x-ray technician who had been seizure free for ten years, has had four seizures at work in the past six months, each time hitting his head and/or biting his tongue and cheek. The technician explained that he and his doctor were trying to determine whether his new medication or something in the environment (e.g., fluorescent lighting) was responsible. Although the technician was not with a patient during any of his seizures, given the safety risks associated with his job, the employer can ask for periodic documentation to make sure that he does not pose a direct threat to himself or others.

Example 17: A budget analyst with epilepsy has a seizure at work and explains to her manager that following a seizure she typically is very tired and needs to rest for several hours. The analyst says that she will be fine the next morning and will be back at work, but asks if she can call someone to drive her home and can take off the rest of the day. Because there is no reason to believe that the analyst poses a direct threat, the employer may not require her to submit periodic notes from her doctor clearing her to work.

19. What should an employer do when another federal law prohibits it from hiring anyone who has epilepsy?

If a federal law prohibits an employer from hiring a person with epilepsy, the employer is not 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, although the regulations of the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) provide that a person is qualified to drive a commercial motor vehicle if he has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle, an individual with epilepsy may apply for an exemption where he can show that safety would not be diminished by granting the exemption.²⁹

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).

20. 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 with the EEOC 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 that 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 epilepsy. 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 See generally About Epilepsy, www.epilepsyfoundation.org/about/ and Centers for Disease Control (CDC), www.cdc.gov/nccdphp/epilepsy/index.htm.

⁵ For example, some seizures result only in small involuntary movements or brief lapses of attention. In other instances, consciousness (the ability to react to external stimuli in a meaningful and appropriate way) may be unaffected, lost completely, or altered but not lost completely. In addition, motor control may be partially affected (e.g., a person's hand may shake or she may be alert but cannot speak) or completely lost. Id.

⁶ Epilepsy and Seizure Statistics, www.epilepsyfoundation.org/about/statistics.cfm

⁷ Id.

⁸ Treatment Options: Medications, www.epilepsyfoundation.org/about/treatment/medications/index.cfm

⁹ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 29 C.F.R. §1630.3(j)(1)(vii).

¹⁰ The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. Id. at §1630.3(j)(1)(vi). An individual who, because of the use of a mitigating measure, has experienced no limitations (e.g., seizures), or only minor limitations, related to the impairment may still be an individual with a disability, where there is evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting. Id. at Part 1630, app. § 1630.3(j)(1)(vi).

¹¹ Id. at §1630.2(k).

¹² Id. at §1630.2(l).

¹³ 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.

¹⁴ Every state licenses people with epilepsy to drive, though eligibility requirements vary. The most common requirement is that individuals be seizure free for a specified period of time and submit a physician's evaluation of their eligibility to drive safely. Some states require individuals with epilepsy to submit periodic medical reports for as long as they remain licensed.

¹⁵ Some types of epilepsy can be inherited. Parents with a history of generalized absence seizures are more likely to have children with the same condition than those with other generalized seizures. www.epilepsyfoundation.org/about/ Asking applicants or employees about medical conditions that their family members have 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).

¹⁶ 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 epilepsy. See "Concerns About Safety."

¹⁷ Symptoms of "absence" or "petit mal" seizures, which can last from two to 15 seconds, include staring, eye fluttering, "automatisms" (such as lip smacking, picking at clothes, or fumbling). Following this type of seizure, a person may have no memory of the seizure occurring. See Types of Seizures, www.epilepsyfoundation.org/about/types/types/index.cfm

¹⁸ An employer also may ask an employee for periodic updates on her 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.

¹⁹ 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>

²⁰ Although many individuals who have seizures do not require any first aid or assistance, an employee who might need assistance may want to work with his employer to create a plan of action that includes such information as: who to contact in an emergency; warning signs of a possible seizure; how and when to provide assistance; when to call an ambulance, etc. The employee and employer also should discuss who in the workplace should know this information. Some individuals also might want to ask their employers for an opportunity to educate their co-workers about epilepsy to dispel any misperceptions or unsubstantiated fears that co-workers may have about the condition.

²¹ See supra note 13.

²² An employee with epilepsy 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 by both 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.

²³ See supra note 5.

²⁴ Service animals are animals that are trained to perform tasks for individuals with disabilities such as guiding people who are blind, alerting people who are deaf, pulling wheelchairs, alerting and protecting a person who is having a seizure, or performing other special tasks.

²⁵ 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).

²⁶ 29 C.F.R. §1630.2(r).

²⁷ Id.

²⁸ If the individual is a current employee, reasonable accommodation must include consideration of reassignment to a vacant position for which the employee is qualified.

²⁹ See FMCSA regulations at 49 C.F.R. §341.41(3)(b)(8) and 49 C.F.R. §381.300.