

The EEOC's Updated Guidance Addresses Hearing Disabilities and the ADA

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On January 24, 2023, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a technical assistance guidance explaining how the Americans with Disabilities Act ("ADA") applies to job applicants and employees with hearing disabilities.^[1] The Guidance, titled "Hearing Disabilities in the Workplace and the Americans with Disabilities Act," contains a series of questions and answers, with situational examples, to guide employers in addressing hearing impairments in the workplace. Although the Guidance is focused on issues related to individuals with hearing impairments, it provides an overview of the requirements of the ADA, including the definition of a disability, pre- and post- job offer disability-related questions, and providing reasonable accommodations in the workplace.

Title I of the ADA, which covers private employers with 15 or more employees, as well as government employers, prohibits discrimination against individuals with disabilities and requires that covered employers provide reasonable accommodations to disabled employees under certain circumstances.^[2] The ADA defines a person with a disability as someone with a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment or is regarded as having such an impairment. Applying this definition, an individual with impaired hearing will fall within the definition of an individual with a disability if they can show that they are substantially limited in hearing or in another major life activity (e.g., the major bodily function of special sense organs). The Guidance reminds employers that the definition of "disability" is interpreted broadly, in favor of expansive coverage, and ignores the positive effects of any mitigating measures, such as hearing aids or cochlear implants.

A. Questions Related to Disabilities and Medical Examinations.

The Guidance discusses the ADA's restrictions on an employer's ability to ask applicants and employees questions related to disabilities and to conduct medical exams at three separate stages: pre-offer, post-offer, and during employment.

1. Pre-Offer.

Employers may not ask questions about an applicant's medical condition or require a medical examination before making a conditional offer. This restriction includes asking an applicant about a hearing aid or whether they have any condition that affects their hearing, but does not prevent an employer from asking questions pertaining to the applicant's ability to perform the essential functions of the job, such as whether the applicant can respond quickly to instructions in a noisy, fast-paced work environment.

The ADA does not require applicants to disclose that they have a disability, including impaired hearing, unless they need a reasonable accommodation for the application process. The EEOC addresses the question of whether an employer may ask questions where the applicant discloses a hearing condition or has an obvious hearing condition. In either situation, the employer may not ask questions about the impairment, its nature or severity, when it began, or how the individual manages the condition. However, in such situations, "***if the employer reasonably believes that the applicant will require an accommodation to complete the application process or to perform the job because of the condition***, the employer may ask whether the applicant will need an accommodation and what type."^[3]

2. Post-Offer/Pre-employment

Once an offer of employment has been made, an employer may ask questions about an applicant's health, to include a disability, and may require a medical examination, as long as the employer does so as to all applicants for the same job position. After receiving general medical information from all applicants, an employer may ask specific individuals for more information related to disclosed health conditions.

For an applicant who has received a conditional job offer and disclosed a current or prior hearing condition, the employer may ask additional questions, such as "how long the individual has had the hearing condition, what, if any, hearing the applicant has, what specific hearing limitations the individual experiences, and what, if any, reasonable accommodation the applicant may need to perform the job."^[4] An employer may also send the applicant for a hearing exam or ask for medical documentation answering certain questions designed to determine whether the employee can perform the essential functions of the job.

3. During Employment

The Guidance includes a cautionary note reminding employers that the ADA strictly limits the circumstances in which an employer can ask an employee about a medical condition or require a medical examination. These circumstances include: when an employer "knows... [of] a medical condition, has observed performance problems, and reasonably believes that the problems are related to the medical condition," or when an employer

“has observed symptoms, such as difficulties hearing, 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.”^[5]

In addition, an employer may ask about a medical condition, such as a hearing condition, in the following circumstances:

- when it has a reasonable belief that the employee will be unable to safely perform the essential functions of the job because of such condition;
- to support an employee’s request for a reasonable accommodation;
- to enable the employee to participate in a voluntary wellness program; or
- to verify the employee’s use of sick leave if the employer requires all employees to submit a doctor’s note to justify their use of sick leave.^[6]

B. Providing Reasonable Accommodations for Employees with Hearing Disabilities.

The ADA requires employers to provide a reasonable accommodation to a qualified applicant or employee with a disability in certain circumstances. As it relates to applicants with disabilities, this obligation requires the employer to provide a reasonable accommodation “that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless the employer can show undue hardship).”^[7] With regard to employees, the obligation is to provide a reasonable accommodation where necessary to enable the employee with a disability to perform the essential functions of the job, unless doing so results in an undue hardship to the employer.

The Guidance contains a list of reasonable accommodations that an employer may provide to an employee with a hearing impairment, including a hearing aid compatible telephone headset, emergency notification systems, assistive software or applications, work area adjustments, time off, altering an employee’s marginal (i.e., non-essential job functions) and reassignment to a vacant position.^[8] However, the EEOC notes that the list contains only some examples of the types of accommodations commonly requested by employees with hearing conditions; other employees may need different changes or adjustments.^[9]

The EEOC reminds employers of the obligation to engage in the “interactive process” – a dialog with the applicant or employee – to obtain information that will assist the employer in addressing the need for an accommodation. As the Guidance explains, employers should ask the employee requesting an accommodation what the employee needs to perform the job. If an individual’s hearing condition is not obvious, the employer may ask for reasonable documentation regarding how the condition limits major life activities and why a reasonable accommodation is needed. The Guidance explains that an employer’s request for documentation in such circumstances must be limited to documentation sufficient to establish that the individual has a disability; the employer may not ask for medical records unrelated to the individual’s hearing.^[10]

Keep in mind that “there are no magic words that a person has to use when requesting an accommodation.”^[11] The EEOC suggests as a “best practice” that employers inform all new hires post-offer that they may request any needed accommodation in advance of their start date or once on the job.^[12] The duty to provide a reasonable accommodation is an ongoing duty that may require more than one accommodation for an employee with a disability. 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.”^[13]

In the event there is more than one effective accommodation, the employee’s preference should be given primary consideration, according to the EEOC, although the employer is not required to provide the employee’s first choice, where other effective accommodations are just as effective and less expensive or difficult to implement.

C. Refusing Requests for an Accommodation Under the ADA.

An employer is not required to provide an accommodation for an employee with a disability if doing so would create an “undue hardship” for the employer. The EEOC explains that an “undue hardship” exists where the accommodation “will result in significant difficulty or expense.”^[14] We advise employers to tread carefully when considering whether an undue hardship exists, as the threshold is high and whether the expense or difficulty is “significant” should be determined on a case-by-case basis.^[15] Also, where one accommodation is too difficult or expensive, an employer should consider alternative accommodations that are not as expensive or difficult.

The Guidance explains that employers are not required to provide an accommodation in the form of eliminating an essential function of the job, tolerating performance that does not meet its standards, or excusing violations of conduct rules that are job-related and consistent with business necessity and that the employer applies consistently to all employees.^[16] The ADA also does not require employers to provide employees with any personal use items, such as hearing aids or other devices that are used both on the job and off the job.

D. Concerns About Safety.

The EEOC advises employers to be careful “not to act on the basis of myths, fears, or stereotypes about hearing conditions.”^[17] Employers need to evaluate each individual with a hearing condition on the basis of the individual’s skills, knowledge, experience, and the effect that the hearing condition has on the individual. An employer may exclude an individual with a hearing disability from a job only where that individual poses a “direct threat,” which is defined as a “significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through a reasonable accommodation.”^[18] In order to determine whether an employee poses a direct threat, the employer must perform an assessment that considers the duration of the risk, the nature and severity of the harm, the likelihood that potential harm will occur, and the imminence of potential harm.^[19] Where the assessment reveals that the employee poses a direct threat, before excluding the employee from the job, the employer must determine whether any reasonable accommodation reduces or eliminates the risk.

E. Conclusion.

The Guidance provides a good overview of the issues that come with assessing and addressing disabilities in the workplace. The EEOC includes 28 examples of factual scenarios that accompany the question-and-answer format. As we move into a post-pandemic time period in which disability-related charges and claims are on the rise, employers are encouraged to review the Guidance as a refresher of their legal obligations under the ADA.

[1] “Hearing Disabilities in the Workplace and the Americans with Disabilities Act,” January 24, 2023, (the “Guidance”) www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilities-act#.

[2] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

[3] Guidance, p. 6

[4] Guidance, p. 7

[5] Guidance, p. 8

[6] Guidance, p. 9

[7] Guidance, p. 20

[8] Guidance, pp. 12 – 15

[9] Guidance, p. 16

[10] Guidance, p. 17

[11] Guidance, p. 16

[12] Guidance, p. 16 - 17

[13] Guidance, p. 19

[14] Guidance, p. 18

[15] The EEOC addresses undue hardship in its Enforcement Guidance “Reasonable Accommodations and Undue Hardship Under the ADA,” <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue>.

[16] Guidance, p. 18.

[17] Guidance, p. 22

[18] Guidance, p. 22, citing 29 C.F.R. § 1630.2(r).

[19] *Id.*