

“The ADA and Staffing” An NSM White Paper

By Christopher Smith

The Americans with Disabilities Act or ADA was enacted by Congress in 1990 to protect individuals with disabilities from discrimination in access to employment, governmental services and programs, public accommodations, transportations, and telecommunications. As stated in the law, the ADA is “an Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.”

The ADA has five titles, each of which defines and prohibits discrimination on the basis of disability within a specific arena:

- Title I applies to employment and provides protection for qualified applicants and employees, including judges and court staff.
- Title II applies to programs and services of state and local governments, including the judicial branch. Title II provides that “subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
- Title III applies to public accommodations and services operated by private entities. Examples include attorneys, mediators, physicians, hotels, transportation services, restaurants, stores, airlines and shopping malls.

- Title IV applies to telecommunications.
- Title V contains miscellaneous provisions.

This White Paper will focus on Title I as it applies to employment and applicants for the Temporary Staffing Agency. It will discuss who is an Employee/Employer by definition under the ADA, ADA Guidelines for potential employees, what can an employer ask in a job interview, what is a reasonable accommodation and how the ADA affects Workers’ Compensation.

Who is an “Employee/Employer” for Americans with Disabilities Act (ADA): The United States Supreme Court adopts a Common-Law definition focusing on the Employer’s Control.

In a recent case law the US Supreme Court accordingly held that the common-law definition of employer should be applied. That definition focuses on the employer’s level of control over the individual or employee, and includes the following 6 factors:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individuals work;
2. Whether, and if so, to what extent, the organization or employer supervises the individual’s work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent, the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

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The above six (6) factors should be used to determine who is an employee and who is an employer regarding the Americans with Disabilities Act (ADA).

ADA Guidelines for Interviewers: What can we ask in a job interview? The measure of a successful pre-employment interview in any context is whether the employer can make a clear determination of the candidate's abilities to perform the job. The ADA does not change this goal. In short, the interview should focus on the ability of the person, and not the disability.

Managers are advised to consider training anyone who routinely does interviews and briefing those who do so occasionally regarding basic etiquette for interviewing people with disabilities.

- *Do not ask candidate how they became disabled or what effect their disabilities will have on their work.* However, it is permissible to ask whether an individual anticipates any difficulties doing the job, and to allow the candidate to discuss any problems that relate to a disability.
- *If the person mentions a disability, the interviewer may then discuss it in the context of reasonable accommodation.* This discussion should be framed by statements of the organization's policy of nondiscrimination and its commitment to making reasonable accommodations. If an applicant responds that no accommodation will be needed for the job, the interviewer cannot pursue the issue. If the applicant responds that an accommodation will be needed, questions about the type of required accommodation such as "What will

you need?" are lawful, however you may not ask questions about reasonable accommodation for activities unrelated to job functions.

- *Use proper language when discussing disability.* As with other groups, proper language communicates respect. Use "people with disabilities" and avoid terms like "handicapped" or "crippled." "Wheelchair user" is preferred over "wheelchair-bound."
- *Do not stare at a manifestation of a person's disability or call undue attention to it.* Normal courtesies should be offered graciously, and accommodations, such as removing a chair for a wheelchair user or escorting a blind person through an office, should be done discreetly, without fanfare.
- *Use common sense.* Do not speak louder to a blind person (they are blind, not deaf), and when a sign language interpreter is involved, speak in a normal voice and look at the applicant, not the interpreter.

(Many organizations for people with disabilities have guidelines available for etiquette associated with persons having specific disabilities.)

Other job related questions an employer may ask related to:

- *An applicant's non-medical qualifications and skills (e.g., education, work history, required certifications and licenses).*
- *Whether an applicant can meet your attendance requirement.*
- *About an applicant's current illegal use of drugs or prior casual illegal drug use.*

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- *Whether an applicant drinks alcohol or has been arrested for driving under the influence.*
- *As applicants to describe or demonstrate how they would perform job tasks if the employer asks this of all applicants in the same job category or reasonably believe that an applicant will not be able to perform a job function because of a known disability.*

Before a job offer has been made, you may not ask applicants:

- *Whether they have a particular disability.*
- *How many days they have been sick.*
- *If they can perform major life activities.*
- *Whether they lawfully use drugs.*
- *How much alcohol they drink or whether they have participated in an alcohol rehabilitation program.*
- *If they used to be addicted to illegal drugs. You can, however, test job applicants for illegal drug use and ask applicants about positive test results.*
- *Disability-related questions at the pre-offer stage even if you intend to look at the answers only at the post-offer stage.*

Questions that you may not ask applicants cannot be posed to a third party, i.e., during reference checks. At the pre-offer stage, medical examination, including alcohol tests are prohibited; however after a conditional job offer is made, an employer may ask disability-related questions and require medical examinations only if the employer requires this of all entering employees in that job category.

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At the post-offer stage, disability related questions and medical examinations do not have to be job-related. These questions may concern an applicant's workers' compensation history; prior sick leave usage; whether an individual needs reasonable accommodation to perform the job; documentation of his or her disability if the need for the accommodation is not obvious; illnesses, diseases, impairments and general physical and mental health.

How will the ADA affect Workers' Compensation:

In the application and selection processes, the interviewer may not ask a candidate about his or her workers' compensation history before making a conditional offer of employment. After a conditional offer has been made, the employer may ask about workers' compensation claims history only if all candidates are asked as part of a medical examination or inquiry. The only circumstance where this information can be used in a hiring decision is when the individual poses a "significant risk of substantial harm" to self or others on the job. In other words, a person cannot be denied a position simply because the employer thinks he or she may raise worker's compensation costs in the future.

Employers would do well to take some steps to keep workers' compensation and work-related injury claims in line while still complying with the ADA, including:

- *Continuing to screen out applicants with a history of fraudulent workers' compensation claims. This is still permissible under the ADA.*
- *Developing a system for determining when an employee poses a direct threat to the health and safety of self*

or others. Be sure that the assessment of risk is based on objective medical evidence and not fears, suspicions, or myths, and that the process allows for reasonable accommodations attempting to reduce the threat to an acceptable level.

- *All relevant departments inside and outside the organization in a coordinated effort to manage workers' compensation and work-related injuries within ADA guidelines.* Safety and health officials, state workers' compensation agencies, and others may help personnel management staff on such efforts.

Most ADA-related problems in job interviews result not from intentional acts but from ignorance of the law or a lack of awareness about people with disabilities. In summary, a Temporary Staffing Agency should be sure that disability related information is not used to exclude applicants with disabilities. Also an applicant's possible hidden disability is not considered before you evaluate his or her non-medical qualifications and make certain a rejected applicant does not wonder whether he or she was rejected because of a disability.