



# How The ADA Impacts Your Hiring

Insights

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Most employers understand their fundamental obligations under the Americans with Disabilities Act (ADA) to protect against disability discrimination and to provide reasonable accommodations to qualified disabled employees, enabling them to perform essential functions of their jobs. But these obligations continue to confuse employers in practice, especially when it comes to hiring.

Employers want to make sure the person they hire can actually perform the job, but often don't know how to obtain the information necessary to make this assessment without violating the law. A lawsuit recently filed by the EEOC against the owner and operator of a nursing home illustrates how the ADA can impact the hiring process, and reinforces the need to familiarize those involved in hiring with the requirements of the ADA.

## Hearing-Impaired Applicant Denied Employment

In a lawsuit filed in a federal district court, the EEOC has charged that Genesis Healthcare, LLC violated the ADA when it declined to hire a deaf applicant for a position in the food service department in one of its nursing facilities. *EEOC v. Genesis Healthcare LLC*.

According to the EEOC, the applicant, who had experience in food service, was offered the part time positions of Dietary Aide and Cook 1/ Assistant Cook at the end of an interview with the facility's Food Services and Hospitality Services Directors. A few weeks later this individual was asked to submit to a second interview with the facility Administrator and Human Resources Manager. He was asked about his communication skills during this interview, and was advised that he was not being selected for the position, according to the lawsuit. The EEOC claims the facility refused to hire the applicant because of his disability in violation of the ADA.

## The ADA And The Hiring Process

The ADA Amendments Act significantly broadened the scope of individuals who are considered “disabled” under the Act. EEOC regulations interpreting the ADAAA list deafness as an impairment that “in virtually all cases” will satisfy the definition of “disability.” Therefore, an employer interviewing a deaf or hearing-impaired candidate for a job position should be sensitive to its obligations under the ADA.

Of course, an applicant’s alleged status as a “disabled” individual, does not preclude an employer from asking questions during an interview to determine whether the applicant is qualified for the position sought. A “qualified” individual is one who satisfies the requisite skill, experience, education and other job-related requirements of the employment position the individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. Thus, to determine if an applicant is qualified, an employer must first identify the essential functions of the position sought. Applicants can then be asked whether and how they can perform such functions.

The EEOC has acknowledged that if an applicant has an obvious disability, an employer also may ask whether the applicant will need a reasonable accommodation to do the job, and if so, what type of accommodation might be needed. But employment should not be denied simply because the employer *believes* that the applicant’s impairment will make it difficult, or even impossible, to perform the job. Nor can it be denied to avoid the expense that might be associated with providing a reasonable accommodation if the individual is hired, unless the accommodation would pose an undue hardship.

Although there is no allegation in the EEOC’s complaint against Genesis that the deaf applicant requested or needed an accommodation during the hiring process, employers should also understand that the reasonable-accommodation obligation can be triggered at that stage if an applicant needs assistance to complete the application process.

The ADA imposes strict restrictions on an employer’s ability to make medical inquiries and conduct medical examinations of applicants and employees. These restrictions vary depending upon when the inquiry is made. No disability-related or medical inquiry is permitted at the pre-offer stage. But post-offer/pre-employment medical inquiries are permitted as long as this is done for all entering employees in that job category.

Even when such inquiries are permitted, a job offer should not be denied an individual with a disability based on the results, unless you can demonstrate that the applicant is unable to perform the essential functions of the position with or without a reasonable accommodation or would pose a direct threat.

In its complaint against Genesis, the EEOC alleged that the Food Services Director told the applicant during his first interview that she thought the applicant had “great experience” and offered him the job. It also alleged that in the second interview – scheduled after the applicant was allegedly offered the job – the Nursing Facility Administrator and Human Resources Manager “grilled” the applicant about his communication skills. Even assuming these allegations can be proved, we can only speculate whether the Food Services Director had authority to offer the applicant a job, why the facility conducted a second interview, and why the initial offer of employment was withdrawn. But if questions were asked of the applicant about communication skills as alleged, the facility should be able to establish that such skills were essential to the functions of the job sought.

Employers may safely hire the most qualified applicant for the position, and the ADA does not require that disabled applicants be given preferential consideration. The key point to remember is that the decision must ultimately be based on sound, business-related reasons rather than a person’s disability.

## **Takeaway**

There are steps you can take to minimize the risk of potential ADA pitfalls during the hiring process. Job descriptions that define essential functions, qualifications and your expectations should be developed before advertising and interviewing for a position. Inquiries should be directed to the applicant’s ability to perform those functions and meet those expectations, and should elicit only that information necessary to make a legitimate and informed decision for the position sought.

Employers also should make informed choices in designating those employees who will represent them in the hiring process. Employees who interview applicants should understand their roles and scope of authority, and all persons involved in interviewing or hiring should be trained on the requirements of the ADA, including acceptable and prohibited inquiries. Before any decision is communicated to an applicant, decisionmakers should articulate and document legitimate, nondiscriminatory reasons for the selection or decision not to hire.

The ADA focus on individualized assessments does not permit a standardized “one-size-fits-all”

approach to ADA related issues that arise in the hiring process. However, proper planning and training can go a long way toward facilitating compliance with the intricacies of the law.

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