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A collaborative program between the
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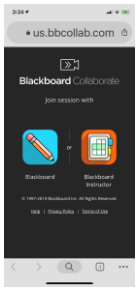

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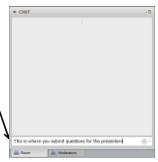

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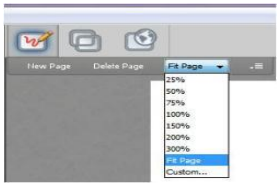

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Our Favorite Inappropriate Questions Under the ADA

Diego Demaya, J.D.
Southwest ADA Center

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The World is Ripe with Inappropriate Inquiries

- "State and federal laws make discrimination based on certain protected categories unlawful: e.g., national origin, citizenship, age, marital status, disabilities, arrest and conviction record, military discharge status, race, gender, or pregnancy.
- Many types of inappropriate and/or unlawful questions; e.g., Do you have an arrest record? Are you married? What religious holidays do you practice? Do you have children? What country are you from?

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Illustration: Unconscious Bias that Leads to Inappropriate Questions

- General Assignment Reporter role with major newspaper. Must have ability to break news and meet tight deadlines. Must have the ability to reach, bend, lift, push, pull and carry a minimum of 25 lbs.. Must be able to type 40 wpm and read computer screens and hand written notes. The role is a sedentary desk job that requires ability to sit for extended periods -- up to 8-hour shifts. Must be able to work in inaccessible office building without elevator.

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Three Stages of Employment and Medical Inquiries

- Pre-offer: the ADA prohibits all disability-related inquiries and medical examinations -- even if job related;
- Post-offer: after a conditional job offer, but before starting work, employer may make disability-related inquiries and require medical examinations -- regardless whether related to the job -- as long as it does so for all entering employees in the same job category and does not use results to discriminate;
- During employment: employer may make disability-related inquiries and require medical examinations -- only if they are job-related and consistent with business necessity.

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KB Staffing Settles EEOC Discrimination Suit for Unlawful Pre-Offer Health Questionnaires (2017)

- KB Staffing asked applicants to complete a paper application package with a detailed medical questionnaire before the company offered applicants a position or placement;
- EEOC also charged that although KB Staffing changed its process in 2013, it still required applicants to complete the medical questionnaire prior to job offers.
- The questionnaires asked for sensitive health information and included numerous disability-related questions.

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Class Action Court Decision Side with EEOC

- The court recognized that applicants who completed the intrusive pre-offer medical questionnaire could be awarded damages for being denied employment.
- Court said: "[i]t is reasonable to infer that emotional or other damages may have been caused by the embarrassment or distress of answering the specific questions alleged in the Complaint regarding private and/or sensitive medical information, which include questions about mental health conditions and/or treatment, or disabilities."

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Medical Documentation of Disability and Reasonable Accommodation

- Employers may request documentation showing how a non-obvious disability or medical condition affects job performance and how accommodations may help overcome functional limitations;
- Medical information must be relevant, not be overly broad, and delineate a logical nexus (or connection) between a disability and requested accommodations;
- Broad (all medical records" requests) should be avoided, because they will likely disclose unnecessary and likely protected confidential-private information.

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Pre-offer medical examinations and medical inquiries

- During the application process employers may ask about an applicant's ability to perform job-related functions with or without reasonable accommodation -- but may not ask whether an applicant has a disability or about the nature or severity of the disability;
- The applicant may respond a simple "yes" WITHOUT disclosing a disability;
- Neither job applicants or employees have an obligation to disclose a disability – unless they ask for an accommodation.

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Illustration: Voluntary Disclosure

- Clark applies for a data entry position. He tells the interviewer that he does not have a driver's license due to epilepsy and will need a flexible schedule because public transportation is not always reliable. He also mentions that he has not had a seizure in more than six months.
- What may the interviewer ask?

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The Interviewer May Ask

- When an applicant voluntarily discloses a disability, an employer may ask two questions: a) whether he needs a reasonable accommodation, and if so, b) what type of accommodation is needed;
- e.g., how early he can start to work and how many hours he can work each day;
- but may not ask for details about his epilepsy -- such as how long he has had epilepsy or whether he missed work in the past because of the condition.

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Title II Public Entities - Offers Contingent on Drug Tests Usually Not Permissible

- The Fourth Amendment prohibits unreasonable searches and seizures, and the Fourteenth Amendment makes these restrictions applicable to the states;
- Urinalysis drug tests are generally considered to be "searches and seizures" because they "intrude[] upon expectations of privacy that society has long recognized as reasonable."
- If the "search" is not based on "individualized suspicion of wrongdoing," the government has to show that it had a "special need" or that the testing served an "important governmental interest."

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Public Entities - Standard pre-employment drug test are not based on "individualized suspicion"

- A public entity would have to show that drug abuse was a problem with city employees or with applicants for city jobs, that the job is safety sensitive; e.g., requiring exposure to dangerous machinery;
- It would have to require employees in specified positions to be tested randomly for drug use.

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Title III Public Accommodations - Testing for Illegal Drug use Permissible

- A drug test is not considered a medical examination under the ADA;
- Employers may conduct testing of applicants or employees and make employment decisions based on the results; BUT -
- Employers may not make employment decisions based on drug test results that show medically necessary and legally prescribed drugs -- even if the drugs are known for causing adverse effects;
- Employers would be required to provide reasonable accommodations not imposing undue hardship or posing a direct threat.

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When was the last time you used illegal drugs?

- Employers cannot ask about past drug addiction, but they can ask if the person is currently using illegal drugs;
- A person currently using illegal drugs is not protected under the ADA.
- Employer can ask: Do you currently use illegal drugs?

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Job Offers Contingent on Medical Examination

An employer may condition a job offer on the results of a medical examination conducted prior to an individual's entrance on duty if –

1) All entering employees in the same job category, regardless of disability, are required to take the same medical examination, and
2) The results of the medical examination are not used to impermissibly discriminate on the basis of disability.

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May we request Workers' Compensation information Via a Workers Comp Release Form?

- Employers may not request workers' comp records to deny an employment opportunity or rescind a job offer because an applicant made a claim.
- Reason: in most States employees agree to forego personal injury lawsuits against employers in exchange for guaranteed participation in a workers' compensation system for securing prompt and fair settlement of employee claims for occupational injury and illness.
- It is impermissibly punitive to penalize a person who has exercised a lawful right in good faith and filed a valid claim. States have legislation restricting the use of workers' comp histories as part of job applicant or employee background investigations.

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A test for alcohol is a Medical Examination prohibited by the ADA

- Employers generally may not test job applicants for alcohol before offering a job.
- Current employees: employers may test for alcohol if they have a reasonable belief that they are under the influence of alcohol at work.
- They may test employees following a workplace accident.
- Employers may maintain and enforce rules prohibiting employees from being under the influence of alcohol or illegal substances in the workplace.

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Do you socially drink?

- Employers cannot ask about drinking habits because it digs into having a "record" or history of a disability;
- Example: treatment of alcoholism is protected under the ADA and people have no obligation to disclose disability information before an official job offer.

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Quiz: Which Interview Question is Appropriate?

A. Do you think your physical restriction would prevent you from lifting this heavy object?

B. How would you go about lifting this heavy object?

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Review of A and B

A- is incorrect. The question asks about a "perceived" disability and likely would run a "foul" of the ADA. (Smiley)

B- is correct. The second question simply asks the candidate how he or she would go about performing a specific task.

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Popular Inappropriate Employment Questions

- Have you ever been treated for drug addiction or alcoholism?
- Do you have a valid State Driver's License – Yes/No;
- Have you ever had or been treated for any of the following conditions or diseases? (See checklist);
- Have you ever been treated by a psychologist or psychiatrist? If so, for what reason?
- Do you suffer from any health-related condition that might prevent you from performing this job?
- How many days were you absent from work because of illness last year?

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Questions?

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Title II (Public Entities) and Title III (Public Accommodations)

- Title II and III both generally prohibit discrimination on the basis of disability in how government entities and private business make goods and services available to the public.
- Where some questions might be inappropriate, others will be appropriate depending on the situation.

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Illustration: Service Animal

- A customer accompanied by a service dog determined by staff to be legitimate comes to the restaurant and orders his food. The dog sits on a chair next to him. A server then notices that the customer is feeding the dog straight from the customer's own plate. The server asks the customer to please put the dog on the floor and that he please not feed the dog in the public dining area. The customer becomes angry and refuses to comply.

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Appropriate Service Animal Questions and Etiquette

- Is this dog necessary because of a disability?
- What tasks does the dog do for you?
- You will have to remove your dog if you do not keep it under control;
- Has your dog been vaccinated according to county regulations? (only if they ask everyone else the same questions about pets)

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Inappropriate Service Animal Questions

- Can you ***show*** us what tasks your dog does for you?
- Do you have documentation for your service animal?
- Is your dog certified to be a service animal?
- What breed is your service dog?
- We charge special use fees for anyone bringing any kind of animal to our hotel.

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Illustration: Safety and Risk Issues

- Jane tutors elementary school children in a volunteer mentor program operated by a local public school. One day a school nurse giving free flu shots to volunteers discovers that Jane has tuberculosis in the medical disclosure survey form. The nurse asks about the TB diagnosis and suspends the volunteer from the program. The volunteer complains that the medical inquiry and use of the disclosed information on the form violates the ADA.

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Eligibility Criteria Rule

- A public entity may not impose eligibility criteria for participation in its programs, services, or activities that either screen out or tend to screen out persons with disabilities –
- Unless it can show that such requirements are necessary for the provision of the service, program, or activity.

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Appropriate Inquiries and Notices

- Survey or disclosure forms for receiving vaccinations;
- If you have a disability and require a reasonable accommodation to participate in the program call this number;
- If you are deaf or hard of hearing and require a sign language interpreter to participate in court proceedings call this number or ask the clerk;
- We require 48 hours notice if you require a reasonable accommodation or an auxiliary aid or service.

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Inappropriate Inquiries and Notices

- We can only use a valid Driver's license for legal identification;
- Do you have a family member that can interpret for you?
- We charge a temporary $25 deposit fee in case of damage by guests who use a wheelchair in their room;
- Do you have a doctor's note to certify your use of an accessible parking placard?

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More Inappropriateness

- We cannot sell you a car unless you have a valid State Driver's License;
- If you use an interpreter for your doctor visit we require 48-hour notice to cancel your appointment;
- The ADA requires my city to remove snow from my sidewalk because I have a mobility impairment;
- Individuals with mobility impairments may not register for scuba diving classes.

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Equal Services for Everyone!

- No requirement for a State or local government entity to provide additional services for individuals with disabilities that are not provided for individuals without disabilities;
- Thus, no snow removal service for the private driveways of residents with disabilities;
- They may voluntarily offer services or programs for people with disabilities.

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Illustration: Box Store Accommodations

- Luis goes to his local Wal-Mart and becomes upset when he sees that out of the 5 available shopping scooters for customers with disabilities 3 are being used and 2 are broken. He demands that the manager provide him with a scooter so he can get his shopping done before the Thanksgiving rush, because it's an ADA obligation.

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Entities are not Required to Provide Personal Services or Devices

- Neither a "public entity" nor a "public accommodation" is required to provide individuals with disabilities with personal or individually prescribed devices -- such as wheelchairs, prescription eyeglasses, or hearing aids, or provide services of a personal nature -- such as assistance in eating, toileting, or dressing.
- Entities are free to provide such personal use devices as a matter of courtesy; e.g., shopping scooter.

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Illustration: Daycare Center

- Does your child have any communicable disease that could be transmitted through daycare incidental contact with other children and adults?

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A Daycare may Ask Applicants

- To find out whether a child has a medical condition that poses a significant health threat to others, child care providers may ask all applicants whether a child has any diseases that are communicable through the types of incidental contact expected to occur in child care settings.
- Providers may also inquire about specific conditions, such as active infectious tuberculosis, that in fact pose a direct threat.

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Quiz One:

A. As an applicant seeking an interstate truck driver job, do you have epilepsy?

B. How did you break your arm?

C. How well can you handle stress?

D. Do you take medication for any reason?

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Quiz Two:

A. Our take out location has steps to the front door. Can we bring the pizza to your car?

B. We charge $25 to any tenant wanting a reserved car space, including for disability accessible car spaces.

C. If you have difficulty using our online ordering form, please call 800-ADA-Ibuy.

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Questions?

Contact Your Regional ADA Center

- TOLL FREE – (800) 949-4232
- WEB: www.adata.org

To contact today's presenter, Diego Demaya

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Next ADA Legal Webinar Series Session:

Mark your Calendar for January 15, 2020 as we discuss

Drugs, Alcohol and the ADA

Registration will be available soon:
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