



Hiring, Fitness for Duty, and Reasonable Accommodation

Supplemental Information for DHS Managers

Five DHS Components (ICE, CBP, TSA, USSS, and USCG), in their role as law enforcement agencies, have specific physical requirements for their officers, such as the ability to pass a required physical fitness test and handle a firearm. In such contexts, reasonable accommodation requirements take on a slightly different meaning. This section of the course is intended to serve as an introduction to the way that medical inquiries and reasonable accommodation requirements intersect with fitness for duty.

The information included is not intended as legal guidance and **managers and supervisors at the Components are advised to contact their Office of General Counsel and Equal Employment Office before making any Fitness for Duty request.**

In general, fitness for duty requirements may become an issue at two stages of employment:

- the initial hiring of an employee and the later accommodation and
- retention of an existing employee.

Hiring

Before Making an Offer

When hiring, an agency *may not* ask disability-related questions *or* conduct medical examinations of an applicant until after it makes a conditional job offer to an applicant.

- A **disability-related question** is one that is likely to elicit information about a disability. They generally include questions regarding an applicant's need for a reasonable accommodation since they usually lead to questions about an applicant's disability.

- A **medical examination** is a procedure or test that seeks information about an individual's physical or mental impairments or health.
- **Except**, when an employer reasonably believes that an applicant will need reasonable accommodation to perform the functions of the job (such as when the disability is apparent or has been voluntarily revealed by the applicant), the employer may make a **limited inquiry** into the accommodation needed.

This prohibition helps ensure that a disability or history of a disability is not considered before an applicant's non-medical qualifications are considered. *See generally* Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act (ADA), available at: <http://www.eeoc.gov/policy/docs/preemp.html>.

An agency *may* make pre-employment inquiries into the ability of an applicant to perform **job-related functions** even before a conditional offer of employment. 29 C.F.R. § 1630.14(a). For example, an agency can inquire into an applicant's skills, qualification or credentials; it can question applicants on their ability to perform a specific job function; or even ask them to describe how they would perform job tasks in general.

Post Offer, Pre-Employment

After making a conditional offer of employment, an employer *may* condition such employment on the results of a medical examination or inquiries **so long as all employees for the same type of job are subjected to the same inquiry regardless of disability**. 29 C.F.R. § 1630.14(b). Medical examinations conducted after a conditional offer of employment do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity. 29 C.F.R. § 1630.14(b)(3). Furthermore, at this stage, performance of the essential job functions cannot be accomplished with reasonable accommodation. *Id.*

The following are two cases, which address the post offer, pre-employment context, are intended to be illustrative, but may not be applicable to your office. You should consult your Office of General Counsel for more specific guidance on applicable law.

- **2003** - In *Fuzy v. S&B Engineers & Constructors, LTD*, Plaintiff applied for a job as a pipefitter, and was given an offer conditioned on his completion of a number of physical capacity tests, including a lifting requirement. 332 F.3d 301 (5th Cir. 2003). When Plaintiff failed the lifting test, he sued claiming that the criteria used to exclude him were not related to an essential function of the job. *Id.* at 302. The Fifth Circuit Court of Appeals affirmed the district court's decision to grant summary judgment because Defendant presented evidence that a 100-pound lifting requirement for a pipefitter was "job-related and consistent with business necessity," and Plaintiff failed to rebut this evidence. *Id.* at 303.

- **2005** - An applicant for the Air Force failed a post offer, pre employment eye exam. The EEOC remanded the matter for a hearing to determine whether the vision requirement should be waived for this individual and whether he could be a direct threat to the safety of himself or others. *See Mortenson v. Roche*, EEOC Decision No. 01A24231 (2005).

Retention

After an employee has been hired and begun work with an agency, an employer *may* require a medical examination or inquiry as long as they are “**job-related and consistent with business necessity.**” 29 C.F.R. § 1630.14(c). The EEOC has interpreted “job-related and consistent with business necessity” to include when a supervisor “has a *reasonable belief based on objective evidence* that:

- (1) an employee’s *ability to perform essential job functions will be impaired* due to a medical condition; or
- (2) an employee *will pose a direct threat* due to a medical condition.”

See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the American with Disabilities Act, at 15-16 (emphasis added) (internal citations omitted), available at: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

The following cases are intended to provide an example of when courts have found such reasonable belief. These cases may not be applicable to your office, and you should consult your Office of General Counsel for more specific guidance on applicable law.

- **2002** - A supervisor noticed a postal employee’s limited mobility and dexterity when performing her duties, and received a Family Medical Leave Act (FMLA) request. *See Wright v. Potter*, EEOC Decision No. 01A12209, at 6 (2002).
- **2003** - Coworkers found an immigration inspector “wandering the airport in an incoherent state,” which required the intervention of paramedics, and a person familiar with the inspector wrote a letter “expressing concerns about [the inspector’s] driving ability,” among other things. *Arroyo v. Ridge*, EEOC Decision No. 01A21863, at 2 (2003).
- **2005** - A site manager observed an employee’s increased use of sick leave, “aggressive and confrontational behavior towards others,” and his “frequent headaches accompanied by nausea.” *Edmonds v. McCullogh*, EEOC Decision No. 01A53467, at 4 (2005).

Accommodation

Employers are required “to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship.” EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, available at: <http://www.eeoc.gov/policy/docs/accommodation.html>. EEOC’s guidance, however, points out that:

[a]n employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA.

Id. at 4.

Types of Reasonable Accommodations

There are three types of reasonable accommodations:

- (1) modifications or adjustments *to a job application process* that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (2) modifications or adjustments *to the work environment*, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (3) modifications or adjustments that enable a covered entity’s employee with a *disability to enjoy equal benefits and privileges of employment* as are enjoyed by its other similarly situated employees without disabilities.

See 29 C.F.R. § 1630.2(o)(1)(i-iii)(emphasis added).

Undue Hardship

An employer is not required to provide a reasonable accommodation when an accommodation represents an undue hardship to the employer. **Undue hardship** means:

significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship *refers not only to financial difficulty*, but to reasonable accommodations that are *unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business*.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, at 4-5 (emphasis added) (internal citations omitted), available at: <http://www.eeoc.gov/policy/docs/accommodation.html>.

Examinations Generally

Fitness for Duty Examinations must comply with EEOC regulations, including requests for reasonable accommodations. *See* 5 C.F.R. § 339.103. When conducting a medical examination, *remember to keep personal information confidential*:

Information obtained [from the medical examination or inquiry] regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (3) Government officials investigating compliance with this part shall be provided relevant information on request.

29 C.F.R. § 1630.14(c)(1)(i)(ii)(iii).

Contact Information and Guidance from Each Component

ICE

- Contact Information for the ICE Office of the Chief Diversity Officer, available at: <http://www.ice.gov/careers/eo/>.

CBP

- Guide to Processing Reasonable Accommodation Requests Based on Disability - Guidance for employees, managers, and supervisors regarding reasonable accommodation, available at: http://www.cbp.gov/linkhandler/cgov/admin/fl/eo/accommodation/reas_acomp_mou.ctt/reas_acomp_mou.pdf.
- Required Documentation of Disability for Accommodation of USCBP Pre-Employment Testing and Supervisory/Managerial Assessments - Outlines documentation guidelines for specific disabilities, available at: <http://www.cbp.gov/linkhandler/cgov/admin/fl/eo/accommodation/pre.ctt/pre.pdf>.

USSS

- Reasonable Accommodation - Provides guidance on reasonable accommodation for qualified employees and job applicants with disabilities adhering to applicable federal regulations and guidelines, available at: http://www.secretservice.gov/reasonable_accommodation.shtml.

USCG

- Civilian career diversity information - Discusses reasonable accommodation for people with disabilities, available at: <http://www.uscg.mil/civilian/diversity.asp>.
- Officer, Enlisted, Reserve, and Auxiliary USCG career information - Identifies the application requirements for serving in the USCG, available at: <http://www.uscg.mil/top/careers.asp>.

FEMA

- Reasonable Accommodation for FEMA - Sets for FEMA policy and procedures for reasonable accommodation, available at: http://www.fema.gov/txt/oer/1430_1.txt.

TSA

- TSA Management Directive No. 1100.73-4, Reasonable Accommodation Program - This management directive provides procedures for processing requests for reasonable accommodation made by qualified job applicants and employees with disabilities, available at: www.tsa.gov/assets/pdf/foia/TSA_MD_1100_73_4_FINAL_060125.pdf.

USCIS

- Q&A for People With Disabilities - Provides additional information on frequently asked questions concerning reasonable accommodation, available at: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cacca41a142c8110VgnVCM1000004718190aRCRD&vgnnextchannel=87d5b363bf568110VgnVCM1000004718190aRCRD>.

This informational flyer was created by the DHS Office for Civil Rights and Civil Liberties and was last reviewed for accuracy on March 10, 2011.

The information contained herein is largely based on the EEOC's Guidance concerning reasonable accommodation. Note, however, that the Americans with Disabilities Act Amendments Act of 2008 was signed into law on September 25, 2008, and became effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC has posted a notice that it will be evaluating the impact of these changes on the referenced documents and other publications. You may want to check for updates.

The flyer was created as part of a DHS course for managers "*Employment of People with Disabilities: A Roadmap to Success*." Together with other resources on similar topics, it is available on each component's Learning Management System.

Source: *DHS Office for Civil Rights and Civil Liberties*
March 10, 2011