Employees with Disabilities

Where everything checks out.

EMPLOYEES WITH DISABILITIES

The Americans with Disabilities Act (ADA), the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL) prohibit discrimination against persons with disabilities and/or impairments, and they require employers to provide reasonable accommodations to job applicants and employees. Further, the ADA, the NYSHRL, and the NYCHRL allow those who have been discriminated against to file complaints seeking monetary and injunctive remedies.

The ADA, as amended by the ADA Amendments Act, is the primary federal law protecting the rights of individuals with disabilities in the United States. The ADA is divided into five titles, each addressing a unique area:

1. Employment (Title I)
2. Public services (Title II)
3. Public accommodations (Title III)
4. Telecommunications (Title IV)
5. Miscellaneous provisions (Title V).

Title I of the ADA directly affects employers and is the focus of this chapter. Although the state law stands as an independent source of rights, courts interpreting the New York State Human Rights Law look to federal case law as key source of interpretive authority, unless there are special reasons grounded in the statutory language to construe the two laws differently. The following discussion, therefore, provides a broad overview of the key provisions of the ADA, with references to the New York State and New York City Human Rights Laws as appropriate.

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COVERAGE

The ADA applies to all private employers with 15 or more employees, including part-time employees. The ADA also applies to all public employers, labor organizations and employment agencies. The ADA does not apply to:

- employers with fewer than 15 employees
- the executive branch of the federal government
- private membership clubs
- churches
- parochial schools and
- Native-American reservations.

The NYSHRL applies to all employers as well as employment agencies that employ one or more employees. The New York City Human Rights law also has the same threshold for coverage.

Title I of the ADA requires employers to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment opportunities available to nondisabled individuals. Specifically, the ADA prohibits employers from discriminating against persons with disabilities who are able to perform the essential functions of a job, either with or without a reasonable accommodation. This protection extends to all areas of the employment relationship, including the application process, testing, hiring, training, assignments, evaluations, disciplinary actions, compensation, promotions, leave, benefits and all other terms, conditions and privileges of employment.

To be protected under the ADA, an employee must be considered a "qualified individual with a disability." A qualified individual with a disability is a person who meets all three of the following criteria: (1) has a disability (under one of the three definitions described in the following paragraphs); (2) is qualified for the job; and (3) can perform the essential functions of the job, either with or without a reasonable accommodation.

Courts have generally held that independent contractors and volunteers are not covered individuals under the ADA. However, a volunteer may be considered an employee if the volunteer is eligible to receive benefits such as a pension, group life insurance, workers' compensation, and access to professional certification, even if such benefits are provided by a

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third party. A volunteer also may be covered if the volunteer work is required for, or regularly leads to, employment with the same entity.

DEFINING DISABILITY

To understand individual coverage, employers must understand how the ADA defines disability. For purposes of accommodation, coverage nearly always requires that the individual have a physical or mental disabling condition. The ADA prohibits discrimination "on the basis of disability," which extends beyond individuals with actual disabilities, but does not require employers to accommodate individuals who are merely regarded as having a disability. Specifically, in addition to individuals with actual disabilities, the ADA prohibits discrimination against individuals:

- With a “record of disability,” and the regulations clarify that individuals with a record of disability are entitled to reasonable accommodation.
- “Regarded as” having a disability; however, individuals covered on this basis are not entitled to accommodations.
- With a relationship with or “associated with” a person with a disability; however, individuals covered on this basis are not entitled to accommodations.

Given the wide variety of possible disabilities, neither the statute nor the accompanying regulations list all diseases or conditions that are considered disabilities under the ADA. Rather, the definition of what is a disability is analyzed on a case-by-case basis utilizing functional abilities and not just labels or diagnosis codes.

An individual with a disability is a person who meets any one or more of the following criteria:

- has a physical or mental impairment that substantially limits one or more of that person's major life activities
- has a record of such an impairment
- is regarded as having such an impairment.

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QUALIFIED INDIVIDUAL

To be a qualified individual under the ADA, one must have the skills, experience, education, and other job-related requirements necessary for the position, and be able to perform the essential functions of the job with or without a reasonable accommodation.

SUBSTANTIALLY LIMITING IMPAIRMENTS

The first step in determining if an individual has a physical or mental impairment that substantially limits one or more major life activities is understanding what is considered an "impairment" under the ADA. The EEOC broadly defines the term “impairment” as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the body's multiple systems, including neurological, musculoskeletal, respiratory, cardiovascular, reproductive, digestive, genito-urinary and hemic and lymphatic.

The ADA further defines impairment as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Because impairment under the ADA is defined as a physiological or mental disorder, simple physical characteristics such as eye or hair color, left-handedness or height or weight within a normal range are not impairments. Physical conditions that are not the result of a physiological or mental disorder, such as pregnancy or a predisposition to a certain disease, are also not impairments. Similarly, personality traits such as poor judgment, quick temper or irresponsible behavior, are not considered impairments. Finally, environmental, cultural or economic disadvantages, such as lack of education or a prison record, are not impairments.

After it is established that an individual has an impairment, the second step is to determine whether the impairment substantially limits that individual. Just because an individual has an impairment is not the end of an analysis, because the individual may be operating without any need for an accommodation in the workplace. Thus, in the reasonable accommodation process, the employer must next determine if the impairment is substantially limiting. An impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person to perform the same activity. While there is no absolute standard, federal regulations provide three factors to consider in determining whether a person's impairment substantially limits a major life activity: (1) its

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nature and severity, (2) how long it will last or is expected to last, and (3) its permanent or long-term impact or expected impact.

These factors must be considered because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the effect of an impairment or condition on the life of a particular person. Some impairments, such as blindness and deafness, are by their nature substantially limiting, but many other impairments may be disabling for some individuals but not for others. For example, although cerebral palsy frequently significantly restricts major life activities such as speaking, walking and performing manual tasks, an individual with very mild cerebral palsy that only slightly interferes with his or her ability to speak and has no significant impact on other major life activities is not an individual with a disability under this part of the definition. Note, however, a different result exists under the NYSHRL and NYCHRL, as explained below.

MAJOR LIFE ACTIVITY

A major life activity includes the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. Additionally, the Americans with Disabilities Act Amendments Act (ADAAA) vastly expanded the term "major life activity" to include caring for oneself, talking, performing manual tasks, reading, lifting, concentrating, seeing, bending, thinking, hearing, breathing, communicating, eating, learning, working, sleeping, and speaking.

The inability to perform a specific job is not a disability; rather the employee must be limited with regard to a major life activity. Therefore, an individual with any of the following is considered a covered individual under the ADAAA: epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, and a specific learning disability. However, an individual with a minor, non-chronic condition of short duration, such as a sprain, broken limb or the flu, generally would not be covered under the ADAAA.

An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other

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implantable hearing devices, mobility devices or oxygen therapy equipment and supplies, use of assistive technology, reasonable accommodations or auxiliary aids or services, learned behavioral or adaptive neurological modifications.

On the other hand, the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses are considered in determining whether an impairment substantially limits a major life activity. As an example, an individual whose sole job is to type documents develops carpal tunnel syndrome and is no longer able to type but is not impaired in any other way. Because typing is not a major life activity, the individual is not protected under the ADA. If, however, the individual is impaired from caring for himself or herself due to the carpal tunnel syndrome, then he or she would be protected under the ADA, since caring for oneself is a major life activity.

A RECORD OF AN IMPAIRMENT

The ADA covers persons who have a history of a physical or mental impairment that substantially limits one or more major life activities. This also includes individuals who have been misclassified as having such an impairment. This “record of” category of the ADA would cover, for example, a person who has recovered from cancer or mental illness.

BEING “REGARDED AS” HAVING SUCH AN IMPAIRMENT

People who are perceived as having disabilities are covered by the ADA even if they are not actually impaired. In this context, disability applies to decisions based on unsubstantiated concerns about productivity, safety, insurance, liability, attendance, the cost of accommodation, accessibility, worker's compensation costs or acceptance by coworkers and customers. An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment. For example, this provision of the ADA would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or coworkers who might be exposed to the employee. An individual may be protected under this part of the definition in any one of the following three circumstances:

1. The individual may have an impairment that is not substantially limiting, but is treated by the employer as having such an impairment;

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2. the individual has an impairment that is substantially limiting because of attitudes of others toward the condition; or
3. the individual may have no impairment at all but is regarded by an employer as having a substantially limiting impairment.

If an employer makes an adverse employment decision based on unfounded beliefs or fears that a person's perceived disability will cause problems and cannot show a legitimate, nondiscriminatory reason for the action, that action would be discriminatory under this part of the ADA.

RELATIONSHIPS OR ASSOCIATIONS WITH PERSONS WITH A KNOWN DISABILITY

The ADA, the NYSHRL, and the NYCHRL specifically provide that an employer may not deny an employment opportunity or benefit to an individual, whether or not that individual is disabled, because that individual has a known relationship or association with an individual who has a disability.

The term “relationship” or “association” refers to family relationships and any other social or business relationship or association. Therefore, this provision of the law prohibits employers from making employment decisions based on concerns about the disability of a family member of an applicant or employee or anyone else with whom this person has a relationship or association. There are generally three situations in which this provision arises:

1. **When an employee is discriminated against because the disability of a family member may pose an increased expense to the employer.** For instance, an individual may not be denied employment because his or her spouse is disabled and is covered by the company health plan.

2. **When an individual is considered disabled because of a relationship with a disabled person.** For example, if an employee's spouse or partner is infected with HIV and the employer fears that the employee may also have become infected, the person is considered disabled by association. Likewise, if an employee's blood relative has a genetic ailment and the employee is likely to develop the disability as well, then the employee is deemed, in the eyes of the employer, to be disabled by association.

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3. **When an employee is distracted or otherwise unable to adequately perform job duties because of the disability of another.** For instance, if an employee is somewhat inattentive at work because a spouse or child has a disability that requires attention, the employee would be considered to be disabled by association.

Notably, this provision of the law does not obligate an employer to provide a reasonable accommodation to a nondisabled individual simply because that person has a relationship or association with a disabled individual. The obligation to make a reasonable accommodation applies only to qualified individuals with disabilities.

CONDITIONS THAT ARE NOT DISABILITIES

Certain impairments and conditions are not considered to be disabilities under the federal law. These include:

- current illegal drug use (includes the use of illicit drugs such as cocaine and the unlawful use of prescription drugs)
- temporary conditions such as broken limbs, sprains, concussions, appendicitis, influenza and common colds
- physical characteristics such as height, weight (other than severe obesity), eye color or hair color that are within normal ranges
- common personality traits such as poor judgment or quick temper
- other problems such as pyromania, kleptomania and compulsive gambling.

The EEOC does not consider complication-free pregnancies to be a disability under the ADA because pregnancy is not the result of a physiological disorder. If, however, a pregnant woman is substantially limited in a major life activity due to her pregnancy, she can be considered to be disabled under the ADA.

NEW YORK STATE HUMAN RIGHTS LAW

The New York State Human Rights Law defines a disability more broadly than the ADA. A disability is defined as a: (a) physical, mental or medical impairment resulting from anatomical,

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physiological, genetic or neurological conditions that prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; (b) record of such an impairment; and or (c) condition regarded by others as such an impairment.

The types of actual impairments included as disabilities under New York law differ markedly from the standard under the ADA. Specifically, it is easier to be considered disabled under New York law than federal law. The most important practical consequences are that it is not necessary under the New York State Human Rights Law that the impairment substantially limit the individual's normal activities. Unlike the requirement under the ADA, a major life activity need not be impaired to trigger protection as an actual disability. In all cases, however, New York law limits protection to those disabilities that, upon the provision of reasonable accommodations, do not prevent the individual from performing the activities involved in the job in a reasonable manner.

MEDICAL MARIJUANA USE

Under the New York Compassionate Care Act, a certified patient who has been prescribed medical marijuana is deemed to have a disability under the NYSHRL. This means that employers are prohibited from firing, refusing to hire or discriminating against an employee based on the individual's medical marijuana use and, further, employers may be required to provide reasonable accommodations for these employees. However, the law does not bar an employer from enforcing a policy that prohibits employees from performing employment duties while their abilities are impaired.

Additionally, as discussed in other parts of this book, under a relatively new New York City law, it is an unlawful discriminatory practice under the New York City Human Rights Law (NYCHRL) to require a prospective employee to submit to testing for the presence of any THC or marijuana in such prospective employee's system as a condition of employment. Some exceptions to the law include:

- certain law enforcement positions
- certain positions requiring supervision of children and medical patients
- positions requiring a commercial driver’s license (CDL)
- positions requiring federal drug testing

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- federal/state contractor positions.

Employers can still prohibit marijuana use at work and can still prohibit employees from working while impaired, as discussed in other chapters. Further, marijuana remains an illegal drug under federal law and the Compassionate Care Act specifically acknowledges that employers can avoid taking any action that would cause the employer to lose a federal contract or funding.

NEW YORK CITY HUMAN RIGHTS LAW

The New York City Human Rights Law covers employers of 4 or more employees, but it differs significantly from both the NYSHRL and the ADA in the definition of disability. Under the New York City Human Rights Law, disability is defined as "any physical, medical, mental or psychological impairment or history or record of such impairment." Physical and mental impairments are further defined to mean "an impairment of any system of the body." Therefore, to be covered under the New York City Human Rights Law, an individual's impairment need not be a "substantially limit a major life activity" as required under the ADA, or "prevent a normal bodily function" or be "demonstrable by medically accepted techniques" as required under the New York State Human Rights Law. Consequently, protection is far broader under New York City Law than under its state or federal counterparts.

DEFINING DISABILITY DISCRIMINATION

Title I of the ADA requires employers to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment opportunities available to nondisabled individuals. Specifically, the ADA prohibits employers from discriminating against persons with disabilities who are able to perform the essential functions of a job, either with or without a reasonable accommodation. This protection extends to all areas of the employment relationship, including the application process, benefits, leave, and evaluations.

To be protected under the ADA, an employee must be considered a "qualified individual with a disability." A qualified individual with a disability is a person who meets all of the following criteria:

- has a disability (under one of the three definitions described in the next section);
- is qualified for the job; and

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- can perform the essential functions of the job either with or without a reasonable accommodation.

QUALIFIED INDIVIDUALS

The ADA does not limit an employer's ability to establish or change the content, nature or functions of a job. It is in the employer's discretion to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability who is otherwise qualified for a job must be evaluated in relation to the essential functions of the position in the same manner as nondisabled individuals.

The EEOC defines a qualified individual as one who possesses all the "requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position." There are two basic steps in determining whether an individual is "qualified" under the Americans with Disabilities Act:

1. Determine if the individual meets the necessary prerequisites for the job, such as education, skills, experience, licenses, training, certificates, or job-related requirements, such as good judgment.

2. Determine if the individual can perform the essential functions of the job, with or without reasonable accommodation. The essential functions of the job generally include those duties that are fundamental to the performance of the job. Whether a job duty is an essential function is decided on a case-by-case basis. The following questions will help determine the essential functions of a job:

    a. **What standards have been set by the employer?** For example, an employer can require typists to type 75 words per minute or a cleaning person to clean 16 rooms a day. Employers are not required to show that the standards are necessary but may be required to show that all employees are, in fact, held to the stated performance standards.

    b. **Are employees actually required to perform tasks that the employer claims are essential?** An employer may list typing as an essential function of the job, but if the employer has never required someone in the position to type, that will indicate that typing is, in fact, not an essential function.

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c. **Does the position exist to perform a specific task?** An individual may be hired to proofread documents. The ability to proofread is an essential function since that is the only reason the job exists.

d. **How many employees are available to perform the job function?** If there are a limited number of employees who can perform the job function, it is more likely to be an essential job function.

e. **What functions did past employees in the job perform?** What do current employees in similar jobs do? The experience of those who have actually performed the job in question will highlight the essential job functions of that position.

f. **How much time is spent performing the function?** The more time that is spent on a particular function, the more likely it is to be an essential job function. For instance, if an employee spends the vast majority of work time at a cash register, that is evidence that operating the cash register is an essential function of the job.

g. **What is the consequence of not performing the job?** What will happen if the job is not performed? Airline pilots spend relatively small amount of their time landing planes. But the consequence of not being able to land a plane safely makes that an essential function of the pilot's job.

h. **Was a written job description prepared before advertising or interviewing for the position?** If the function is listed in the job description, there is a likelihood that the EEOC or the courts will consider it essential.

i. **Do the functions require special training or expertise?** Functions that require training or possession of a specialized skill or license are likely to be considered essential.

j. **Is there a collective bargaining agreement in place?** For employers of union workers, the terms of a collective bargaining agreement are relevant to determining the essential job functions of particular positions.

Job descriptions can help identify essential job functions. Although the ADA does not force employers to put job descriptions in writing, written job descriptions can help employers set forth educational, experience, skill, licensure and other requirements needed to perform a

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particular job. They can also identify any environmental factors that might be relevant, such working in an ambient temperature environment or on a night shift. Written job descriptions that were put in place before a challenged employment decision was made can also help employers establish that any qualitative or quantitative production standards are legitimate and that they are related to the essential job functions. Finally, written job descriptions also aid employers in determining whether a particular individual is qualified to perform a particular position. In short, a well-crafted, written job description can be the best evidence if your company has to defend against a charge of disability discrimination.

REASONABLE ACCOMMODATIONS

Reasonable accommodations are defined by the EEOC as modifications or adjustments to a job, the work environment, or the way that things are usually done that enable a disabled person to enjoy an equal employment opportunity. Reasonable accommodation is required in at least three situations:

1. to allow an employee or job applicant to perform the essential functions of a job;
2. in application and testing procedures; and
3. to permit an employee with a disability to enjoy privileges and benefits that are substantially equivalent to those given to nondisabled employees in similar situations.

This aspect of reasonable accommodation includes access to areas such as lunch and break rooms. It also guarantees that employees with disabilities can participate in employer-sponsored events, such as picnics and parties.

Employers are required to accommodate only known disabilities. Unless the need is apparent, such as an applicant or employee who is in a wheelchair, it is the responsibility of the individual with the disability to make known the need for an accommodation. This notice or request from the employee does not have to specifically cite either the ADA or use the term “reasonable accommodation.” Most individuals will present an employer with a set of facts that may indirectly indicate the need for an accommodation, and the employer will be obligated to act on that prompt from the employee. For example, an employee may tell a supervisor, "I am having trouble getting to work on time because of the medication I am taking," or an employee's doctor may send a note indicating that the employee cannot lift more than 30 pounds. After receiving

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this type of notice, the employer will be deemed to have received a request for an accommodation.

AFTER A REQUEST

Once an individual requests an accommodation, the employer must make a reasonable accommodation for known disabilities of the employee or job applicant unless (1) the accommodation would be an undue hardship to the employer, (2) accommodation would pose a direct threat to the health or safety of the individual for whom the accommodation is made or others, (3) the only available accommodation is to transfer the individual to a fully staffed position, and (4) the only available accommodation requires creating a new position for the individual.

TAKING ADVERSE ACTION

Before an employee can be denied a position based on a disability, the employer must be able to show clearly that the person cannot perform the job even with a reasonable accommodation. The employer must consider the possibility of providing reasonable accommodation before firing, demoting or refusing to hire or promote the individual if the decision is based on a belief that the person's disability precludes job performance. Examples of reasonable accommodations set forth in the regulations include: (1) making facilities used by employees readily accessible and usable by people with disabilities; (2) job restructuring, part-time or modified work schedules; (3) acquisition or modification of equipment or devices; and (4) job reassignment and other similar actions.

VERIFICATION OF NEED FOR REASONABLE ACCOMMODATION

When a disability or the need for an accommodation is not obvious, employers may ask for reasonable documentation about the disability and about any functional limitations. This can be done by obtaining documents from an appropriate healthcare provider or rehabilitation professional. Employers should take care in these situations not to request an employee's entire medical history or information unrelated to the existence of a disability. An employer may also choose to discuss with the individual the nature of the disability and the need for further information. Finally, an employer may arrange for the individual to see a healthcare or rehabilitation specialist (at the employer's expense) to determine the nature of the disability. If

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the need for an accommodation is not obvious and the individual refuses to provide reasonable documentation or information, then there is no entitlement to a reasonable accommodation.

In seeking information about an employee's medical condition that supports the request for an accommodation, employers should be careful so as not to make any inquiry prohibited by the Genetic Information Nondiscrimination Act (GINA).

ACCOMMODATIONS UNDER NEW YORK CITY LAW

The duty to accommodate persons with disabilities under the NYSHRL tracks the obligations under the ADA, but the New York City Human Rights Law ("NYCHRL") goes further in a few ways. First, under a law effective in 2018, New York City employers must document the "cooperative dialogue" in writing when an employee makes a request for accommodation due to religious needs, a disability, a reason related to pregnancy, childbirth or a related medical condition, or due to needs as a victim of domestic violence, sex offenses or stalking.

The cooperative dialogue requires the employer and employee to engage in a good-faith written or oral dialogue concerning the employee's accommodation needs, potential accommodations that may address those accommodation needs (including alternatives to a requested accommodation), and the difficulties that any potential accommodations may pose to the employer. After the dialogue has concluded, an employer must document in writing whether an accommodation was granted or denied.

Additionally, the NYCHRL requires an employer to accommodate not only known disabilities but also those that should have been known to the employer. Further, under the NYCHRL, no accommodation (including a need for an indefinite leave of absence) is categorically excluded from the universe of reasonable accommodations that an employer must evaluate.

The contrast between New York City and state law was further highlighted by the New York Court of Appeals in 2013 when it held that employees are never allowed to take an indefinite leave of absence as a reasonable accommodation under state law, but they might be entitled to do so under the NYCHRL, depending on the circumstances. By complying with the ADA, New York employers generally comply with the NYSHRL governing disabilities in the workplace (subject to limited exceptions), but care must always be taken by New York City employers to review the NYCHRL.

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SPECIFIC ACCOMMODATIONS

Specific reasonable accommodations may include part-time or modified work scheduling; job restructuring of nonessential job functions; reassignment of a disabled individual to a vacant position; modification or acquisition of equipment or devices (which may include making existing facilities readily accessible to individuals with disabilities); modification of examinations, training materials or policies; or providing qualified readers or interpreters. Reasonable accommodations, however, do not include personal items such as eyeglasses and hearing aids. Each request for accommodation must be analyzed on a case-by-case basis. A reasonable accommodation must always take into consideration the specific abilities and functional limitations of a particular applicant or employee with a disability and the specific functional requirements and essential functions of a particular job.

Both the employer and the employee should be involved in the interactive process of identifying the possible accommodations. An employer should consider, and document its consideration of, its resources and financial ability to provide an accommodation, the functional requirements of the job, the functional limitations of the employee, and the potential disruption that the accommodation may cause in the place of employment.

It is important to remember that the employer is not required to provide the best accommodation or the one requested or preferred by the employee. Rather, the accommodation need only be sufficient to meet the job-related needs of the employee seeking accommodation. Finally, during the process of determining a reasonable accommodation, the employer should record all attempts it makes to accommodate a disabled employee.

Employers should accommodate a current employee by reassignment to a different job only when the employee cannot be accommodated in his or her present position. If the employer does reassign an employee with a disability, the employer may only be required to reassign the employee to an available position. Under no circumstances is the employer required to remove another qualified employee from his or her position in order to accommodate another employee.

Sometimes, the ADA reasonable accommodation obligation conflicts with other obligations mandated in collective bargaining agreements. In unionized employment settings governed by a collective bargaining agreement, where job assignments and other conditions of employment are based on seniority, the US Supreme Court has ruled that a requested accommodation that conflicts with the seniority system is not a "reasonable accommodation." In other words, a disabled employee with less seniority, who seeks to be reassigned to an available position,

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cannot displace a nondisabled employee with greater seniority who has already applied for that position.

Additionally, the US Supreme Court has ruled that established seniority systems trump the reasonable accommodation obligation regardless of whether employees are represented by unions and covered by labor contracts. However, if numerous exceptions had been made in the past or if the seniority system has undergone frequent changes, it may be reasonable to make an exception to the seniority system to accommodate a disabled employee.

UNDUE HARDSHIP

Undue hardship is defined as an action that would create significant difficulty or expense to an employer. In determining whether an employer has experienced an undue hardship, the following factors are considered:

- The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding.
- The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed there, and whether the accommodation would also benefit other employees.
- The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities.
- The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity.
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

In contrast, the following factors are not considered when determining whether the accommodation would cause an undue hardship on the employer:

- A comparison of the cost of the accommodation to the salary level of the position.

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- A negative effect on the morale of coworkers, by itself, does not create an undue hardship.

Just as the EEOC and the federal courts determine whether to provide a reasonable accommodation on a case-by-case basis, they also determine whether the accommodation would create an undue hardship on a case-by-case basis. The burden of establishing an undue hardship is on the employer at all times.

DIRECT THREAT TO HEALTH AND SAFETY

An employer may also deny accommodation to an individual normally protected under the ADA when the individual poses a "direct threat" to the health and safety of others in the workplace. The US Supreme Court has ruled that an employer may consider not only the health and safety of other employees, but also the health and safety of the employee requesting reasonable accommodation.

The direct threat defense only applies in situations when a reasonable accommodation that would eliminate the risk or reduce it to an acceptable level is not available.

The EEOC defines a direct threat as a “significant risk of substantial harm.” In determining whether a direct threat exists, the EEOC and the federal courts examine the employer's reasonable judgments regarding the following:

- the duration of the risk
- the nature and severity of the harm
- the likelihood that the potential harm will occur
- the imminence of the potential harm.

These factors must be based on objective, factual evidence and cannot be founded on subjective fears or stereotypes regarding the nature or effect of a particular disability.

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LIGHT- OR RESTRICTED-DUTY POSITIONS

Sometimes, an employer may be required to provide a light- or restricted-duty position for an employee with a disability. It is important to remember that the ADA does not require the creation of a light-duty position for a disabled or injured employee, unless the heavier duties of the job are marginal functions that are not essential to the job. However, the employer may be obligated to create a light-duty accommodation to a disabled employee if the employer has created light-duty positions in the past. Furthermore, the ADA prevents employers from eliminating long-standing light-duty positions when the position is filled by a disabled employee.

If an employer is considering providing a disabled employee with a light-duty position, the employer should first determine whether the light-duty assignment will be permanent or temporary. If it is temporary, the employer should next decide how long it will last and follow up regularly to determine whether the light-duty assignment is still necessary or appropriate. This is important because employers could lose the ability to eliminate the temporary position if the disabled employee performs duties in that position for a lengthy period of time.

Once an employer places a disabled employee in a permanent light-duty position, the employee's ability to perform the essential functions of the job must be measured in relationship to the light-duty position and not to the previous position. Therefore, the employer cannot terminate an employee because the employee is unable to perform the essential functions of his or her previous position if the employee is able to fulfill the essential job functions of the light-duty position.

EMPLOYEE LEAVE FROM WORK

One form of reasonable accommodation that employers often overlook is a leave of absence beyond the employee's statutory entitlement under the Family and Medical Leave Act (FMLA). Even after an employee exhausts all available FMLA leave, the employer may be obligated to offer additional leave time if it can do so without an undue hardship. Creating an individual exception to the uniform application of an existing leave of absence policy will generally not qualify as an undue hardship. Rather, an individualized inquiry is required to determine if an additional leave would create such a hardship.

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DOCUMENTING ACCOMMODATION EFFORTS

Perhaps the most important thing an employer can do to protect itself from a failure to accommodate claim is to document carefully every step taken in the company's effort to accommodate a disabled individual's needs. Even before an accommodation request is received, it is beneficial to have in place a clearly defined procedure so that employees can request accommodations and so that managers can respond to those requests in an appropriate manner. Helpful provisions to include in such a procedure are:

- providing for a careful review of the job description to ensure that the employee is being evaluated against the real essential functions for the position;
- establishing a documented record of all steps in the interactive process, including all meetings with the employee, medical personnel or human resources staff;
- obtaining independent medical advice when the extent of a disability or the scope of a requested accommodation is in question;
- documenting all alternative accommodations considered by the company;
- establishing backup data on the hardships each proposed accommodation would impose;
- creating a contemporaneous record of the rationale for rejecting any requested accommodation; and
- communicating the company's decision to the affected employee.

DISABILITIES AND THE HIRING PROCESS

Pre-offer inquiries. The ADA prohibits an employer from requiring a medical examination or making disability-related inquiries before an offer is extended, even if the inquiry is job related. An exception exists if the employer needs specific information to make the application process accessible to someone with a disability, such as if an applicant needs an accommodation as part of the process of evaluating the applicant's qualifications for the job.

Post-offer inquiries and medical examinations. After an offer of employment, employers may inquire into an individual's prior sick leave usage, illnesses, diseases, impairments and general physical or mental health. Post-offer questions do not have to be related to the specific job for

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which the applicant has applied. However, the post-offer questions must follow a real offer and cannot mask any intent to question the applicant based on a tentative offer of employment.

An employer may require a medical examination only after an offer of employment has been made, but the employment offer can be conditioned upon the applicant's successfully passing the examination. The EEOC has defined a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health." The post-offer medical examination can include a complete medical history and does not have to be job-related. In contrast, it is important to remember that medical examinations of current employees must be job-related and consistent with business necessity. If disability-related inquiries made during a post-offer medical examination yield information about an applicant's disability and an employer withdraws a conditional offer of employment based on that information, the decision must be job-related and consistent with business necessity.

Even though an employer may require a physical agility test or a physical fitness test before an offer is extended to an applicant, an employer may not measure an applicant's physical or biological responses to any such test at the pre-offer stage. For example, an employer may measure how much an employee can lift or how fast he or she can run at the pre-offer stage. However, the employer may not measure an applicant's blood pressure or heartrate after performing the task. This would constitute a medical examination and is prohibited by the ADA.

Depending on whether the tests are intended to, or actually do, determine medical or biological data, psychological examinations may or may not be considered medical examinations under the ADA. For example, a test that measures whether an applicant has a compulsive disorder or depression is considered a medical examination for purposes of the ADA.

If an employer chooses to administer a pre-employment test, reasonable accommodations must be provided if an applicant requests accommodation or if the employer has reason to believe one is necessary. Under the ADA, employers must give applicants or employees with impaired sensory, manual or speaking skills tests that do not require the individual to use that impaired skill. For example, employers must give oral, rather than written, tests to individuals with dyslexia. Furthermore, individuals with impaired vision may require a large-print edition or Braille version. Deaf individuals may require sign language accommodation. However, if the employer is measuring a skill necessary to perform an essential job function of the position, the employer is not required to provide an applicant with an alternative method of testing. For example, where reading is an essential job function, the ADA does not require the employer to provide an oral test format.

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If the need for accommodation is not obvious, the employer may ask an applicant for documentation from a professional regarding the applicant's disability, the limitations that accompany that disability and the need for accommodation for testing purposes. Because employers may only request information necessary for accommodation during testing, it is important that employers specify to the applicant that it is only requesting the information to verify the existence of the disability and the need for accommodation.

DRUG TESTS

An employer may test an applicant or employee for current illegal drug use, as this test is specifically exempted from the ADA medical examination restrictions and is allowed at any time. Alcohol tests and tests for legal prescription drugs, however, are considered medical examinations under the Act — therefore, an employer is prohibited from administering these tests at the pre-offer stage of employment.

SPECIAL RULES FOR WELLNESS PROGRAMS

Many employers offer workplace wellness programs to encourage healthier lifestyles or prevent disease. These programs often require employees to complete medical questionnaires or involve health risk assessments and biometric screenings to determine an employee's health risk factors, such as body weight and cholesterol, blood glucose and blood pressure levels. Many of these programs offer financial and other incentives for employees to participate or to achieve certain health outcomes. The ADA and GINA generally prohibit employers from obtaining medical information from employees and job applicants, but one of the recognized exceptions is that employers may obtain health information and conduct medical examinations as part of a wellness program, so long as participation is voluntary.

The ADA rule requires that employers give participating employees a notice to advise them what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the way information will be kept confidential. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members.

Employers must keep the confidential medical information of employees and applicants separate from the individual's personnel files. Furthermore, employers may reveal medical information only in limited situations to the degree necessary for:

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- managers and supervisors when the information is necessary for reasonable accommodation purposes,
- first-aid and safety personnel in the event emergency treatment is necessary,
- state or federal government offices during an investigation for compliance with the ADA, and
- insurance purposes.

HEALTH BENEFIT PLANS

While the ADA prohibits employers from discriminating on the basis of disability when employers provide healthcare benefits to their employees, Congress has created a way to shield certain health benefit plans from inspection under the ADA. The determination of whether a health benefit plan is lawful under the ADA involves a two-step analysis.

The first issue is whether the employer's health benefit plan includes a "disability-based distinction." A disability-based distinction is a provision in a health benefit plan that singles out a particular disability from coverage. If the provision is not a disability-based distinction, it is probably lawful under the ADA. For example, the ADA has indicated the following benefit distinctions are not disability-based and are lawful under the ADA:

- providing fewer benefits for eye-care in comparison to other physical conditions,
- providing a lower level of benefits for the treatment of mental conditions in comparison to other physical conditions, and
- setting limits on or excluding from coverage entirely, benefits for experimental drugs or elective surgery.

At the second step, if the health benefit plan includes a disability-based distinction, the employer may be able to validate it by showing that the distinction is bona fide, such as demonstrating full compliance with ERISA reporting and disclosure requirements in developing the benefit plan. Not only must the employer show that the plan is bona fide, but the employer must also demonstrate that the disability-based distinction is not a subterfuge to avoid the ADA. An employer can show that a health benefit plan is not a subterfuge by demonstrating that the provision is necessary to keep any unacceptable or drastic change from occurring, either in the health benefit plan's coverage or in the premium charges for the plan.

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SUBSTANCE ABUSE

Under the ADA, alcoholism and past drug addiction are protected as disabilities. An alcoholic who is otherwise qualified to perform the essential functions of the job with or without accommodation would therefore be protected. An employer may, however, hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior as other employees, even if any unsatisfactory performance or behavior is related to the alcoholism. Additionally, an employer can prohibit the use of alcohol on the job.

An employer may not discriminate against a former drug addict, who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction. The ADA states that it should not be construed to exclude a qualified individual who meets any of the following criteria:

- has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- is incorrectly regarded as engaging in such use but is not.

While recovering addicts are protected under the ADA, the definition of a "qualified individual with a disability" does not include an individual who "is currently engaging in the illegal use of drugs." Additionally, employees may be required to follow the Drug-Free Workplace Act and rules set by federal agencies relating to drug and alcohol use in the workplace regardless of the ADA.

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PREGNANCY

The New York State Human Rights Law's prohibitions on pregnancy discrimination prohibit employment policies that treat pregnancy and childbirth less favorably than other physical or mental impairments. Employers must grant pregnant employees maternity leave to the same extent that they grant leave for other disabilities. Further, employees with pregnancy-related conditions are entitled to receive reasonable accommodations to the extent they do not create undue hardship for an employer. Additionally, an employer may not compel an employee to take a leave of absence because of the employee's pregnancy, unless the pregnancy prevents an employee from performing the activities involved in the job or occupation in a reasonable manner.

Under a local law in New York City, employers with at least four employees must provide a reasonable accommodation due to the needs of an employee's pregnancy, childbirth or related medical conditions that will allow the employee to perform the essential functions of the job, provided the employer knows or should know of the employee's pregnancy. The new law does not make pregnancy a "disability," but does require employers to provide the same reasonable accommodations as are provided for those with disabilities under the law. The law also gives the employer an undue hardship exception.

Also, as discussed previously, the New York City Human Rights Law requires employers to engage in a cooperative dialogue to accommodate the needs of an employee's pregnancy, childbirth or other related medication condition that must be documented in writing.

In a significant case decided in 2015, the US Supreme Court ruled that women affected by pregnancy, childbirth or related medical conditions must be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work. This does not mean that employers must compare a pregnant employee to all nonpregnant workers because that would give them a kind of "most favored nation" status that Congress did not intend in the Pregnancy Discrimination Act. On the other hand, if the employer's policies impose a significant burden on pregnant employees but nevertheless accommodate a large percentage of nonpregnant employees, the employer will have to show that its reasons are sufficiently strong for the distinction. Otherwise, the employer's actions could give rise to an inference of intentional discrimination.

The subtleties of the Supreme Court's distinctions place employers in a difficult position of trying to guess how their reasons will be evaluated in hindsight by a court or jury. Much of this uncertainty may be eliminated in individual cases if the employer focuses on the limitations that

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the employee's pregnancy causes. Under the expansive definition of disability under the ADA, if pregnancy impairments substantially limit an individual's ability to perform a major life activity such as lifting, standing or bending, the employer will be required to provide a temporary accommodation unless doing so would pose an undue hardship.

AIDS/HIV

Employers should be aware that an employee or job applicant with AIDS may be protected under the ADA and the NYSHRL as a qualified individual with a disability. If so, that person may not be discriminated against because he or she has, or is perceived to have, AIDS and must be offered any reasonable accommodation that would allow him or her to perform the essential functions of the position the individual holds or desires.

FOOD-HANDLING POSITIONS

The ADA requires the Department of Health and Human Services to prepare an annual list of infectious and communicable diseases that are transmitted through food handling such as salmonella or hepatitis A. The current list may be accessed through the Centers for Disease Control website. In situations where an individual with a disability has a disease on the list and has either applied for or works in a food-handling position, the employer must be sensitive to both the health concerns of others and the needs of the disabled individual. To do this, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease. If there is no reasonable accommodation, the employer may refuse to assign the individual to a position involving food handling. If the individual is a current employee, the employer must consider reassigning the employee to a vacant position that does not involve food handling.

PANDEMIC-RELATED INQUIRIES

As a result of the COVID-19 pandemic, the EEOC issued new guidance reinforcing long-standing ADA principles that relate to employers' response to the various situations implicated and caused by the pandemic, such as inquiries of employees concerning their COVID-19 status, conducting of medical exams of employees coming to work, issues surrounding the granting of work-related accommodations for employees who needed and/or requested such

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accommodations, and issues surrounding the administration of a COVID-19 vaccine to employees.

Regarding employees who request accommodations from in-person work attendance requirements, the EEOC has advised that there may be reasonable accommodations for employees who have disabilities that make them at a greater risk to contract COVID-19 and develop complications. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment. Those changes include designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible; or other accommodations that reduce chances of exposure. Further, temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment were also suggested by the EEOC as solutions that would allow an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

With respect to requiring employees to obtain a COVID-19 vaccine, the EEOC advised that the ADA allows an employer to have a qualified standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." The EEOC, thus, advised that employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.

If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. Thus, the EEOC prohibits an employer from automatically terminating a worker who refuses the vaccine.

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Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance.

GENETIC INFORMATION NONDISCRIMINATION ACT

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting, requiring or purchasing genetic information of employees or their family members. GINA further prohibits employers from disclosing or making employment-based decisions on any such information it has. Among others, GINA applies to private and state and local government employers with 15 or more employees.

GINA is enforced by the EEOC. Under GINA, it is illegal to discriminate against people because of genetic information. Employers cannot make employment decisions using such information, for example failing to hire, promote or choosing to demote or fire someone. It is also illegal to harass a person because of his or her genetic information.

Like other employment discrimination statutes, GINA also contains provisions making it unlawful to retaliate against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (i.e., a discrimination investigation or lawsuit) or otherwise opposing discrimination.

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Under GINA, the definition of an employee and a family member is broader than other laws. Under GINA, family members extend to an individual's fourth-degree relatives. That means that the term "family members" includes such distant relatives as great-grandparents and children of first cousins. Family members also include adopted family members even though they do not share a common genetic makeup with the employee.

"Genetic information" includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services. Genetic information about a family member's disease or disorder is considered one's "family history."

Genetic tests include any analysis of an individual's DNA, RNA, chromosomes, proteins or metabolites that detect genotypes, mutations or chromosomal changes. Generally speaking, these can include any number of tests that may reveal an increased risk of acquiring a particular disease. Tests that are not considered genetic tests are tests for HIV, cholesterol and tests for the presence of drugs or alcohol. These all involve analysis of proteins or metabolites that does not detect genotypes, mutations or chromosomal changes.

GINA Prohibitions. Employers generally may not request or require genetic information, even nondeliberately. According to EEOC regulations, a request for genetic information includes "conducting an internet search in a way that is likely to result in obtaining genetic information, as well as 'actively listening' to third-party conversations or making requests for information about an individual's current health status in a way that is likely to result genetic information."

Acquiring Genetic Information. There are circumstances when an employer may legitimately come into possession of genetic information without violating GINA's prohibition on requesting, requiring or purchasing genetic information. However, any such acquired information must be kept confidential and not used by the employer. These circumstances include:

- when information is acquired inadvertently;
- when information is acquired as part of health or genetic services, including wellness programs;

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- when information is acquired in the form of family medical history in order to comply with Family Medical Leave Act (FMLA) or other local leave laws or policies requiring (for example, return to work certification);
- when information comes from sources that are commercially or publicly available, such as newspapers, books, magazines and even electronic sources;
- when information is gathered as part of a legitimate genetic monitoring program required by law or provided on a voluntary basis (e.g., employers may be required to perform such tests to see if employees are being harmed by substances or energies in the workplace); and
- when information is collected by employers who do DNA testing for law enforcement purposes as a forensic lab or for human remains identification.

Whenever lawfully requesting information (e.g., on a physician's confirmation of medical condition form) employers should include the following disclaimer on the request:

> *The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

Whenever the notice is properly given, it will provide a safe harbor for employers and any such acquisition will be considered inadvertent and therefore not a GINA violation.

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