INVESTIGATING DISABILITY DISCRIMINATION

Interagency Committee on Disabilities ("ICED") Presentation

November, 2016

WHAT CONSTITUTES A DISABILITY?

DEFINITION OF DISABILITY

The Illinois Human Rights Act ("Act") defines a "disability" as:

- A **physical or mental characteristic** of a person,
- The **perception of such characteristic** by the person complained against, or
- The **history of such characteristic**.

DEFINITION OF DISABILITY

- Which may result from **disease**, **injury**, **congenital** condition of birth or **functional** disorder and which characteristic:
  - Is unrelated to the person's ability to perform the duties of a particular job or position.

DEFINITION OF LIABILITY

There are 3 forms of disability discrimination which may form the basis of a charge:

(1) Actual;

(2) Perceived; &

(3) Historic.

ESTABLISHING PRIMA FACIE CASE FOR ACTUAL DISABILITY

ACTUAL DISABILITY PRIMA FACIE CASE

To establish a **prima facie case** for **actual disability** discrimination, Complainant must show:

(1) S/he is disabled within the meaning of the Act;

(2) Disability is unrelated to the performance of the job which s/he was hired to perform; and

(3) Respondent took an adverse action against him/her.

WHO IS DISABLED UNDER THE ACT?

WHO IS DISABLED UNDER THE ACT?

In order to be disabled within the meaning of the Act, Complainant must:

(1) Have a determinable physical or mental characteristic;

(2) Resulting from disease, injury, congenital condition of birth or functional disorder;

(3) That is unrelated to his/her ability to perform.

DETERMINABLE PHYSICAL OR MENTAL CHARACTERISTIC

DETERMINABLE PHYSICAL OR MENTAL CHARACTERISTIC

- In order to prove a "determinable physical or mental characteristic," Complainant must show that his/her condition is **a medically diagnosed condition**.
- The definition specifically excludes:
  - Conditions which are **transitory AND insubstantial**; and
  - Conditions which are not **significantly debilitating** or disfiguring.

TRANSITORY
&
INSUBSTANTIAL
DEFINED

TRANSITORY & INSUBSTANTIAL DEFINED

- A "transitory" condition is defined as: "existing only briefly or short-lived."
  - To be excluded, a transitory condition must also be **insubstantial**.
- An "insubstantial" condition is defined as: "lacking substance or reality; imaginary. Not firm or flimsy."

MEDICAL DOCUMENTATION

MEDICAL DOCUMENTATION

- Since no one at the Department is medically trained to make diagnoses, the Department must obtain medical documentation to support and verify Complainant's alleged disabled condition.

- Complainant must prove that s/he is disabled under the Act, i.e. his/her condition must be "determinable" by recognized clinical or laboratory diagnostic techniques.

RESULTING FROM DISEASE, INJURY, CONGENITAL CONDITION OF BIRTH OR FUNCTIONAL DISORDER

RESULTING FROM DISEASE, INJURY, CONGENITAL CONDITION OF BIRTH OR FUNCTIONAL DISORDER

- EXAMPLES:
  - Employee diagnosed with HIV. Raintree Health Care Center v. HRC, 173 Ill. 2d 469, 673 N.E. 2d 1136 (1996).
  - Employee who suffered from dysmenorrhea (severe menstrual pain) due to endometriosis. Illinois Bell Telephone Co. v. HRC, 190 Ill. App. 3d 1036, 547 N.E.2d 499 (1989).
  - Employee with cancer. Lake Point Tower v. HRC, 291 Ill. App.3d 897 (4th Dist. 1997).

UNRELATED TO ABILITY TO PERFORM JOB

UNRELATED TO ABILITY TO PERFORM JOB

- A condition is “unrelated to a person’s ability to perform” if it merely affects the person’s ability to perform tasks or engage in activities that are **apart** or only **incidental** to the job in question.

INCIDENTAL DUTIES
VS.
ESSENTIAL DUTIES

INCIDENTAL DUTIES VS. ESSENTIAL DUTIES

- The Act protects a Complainant whose condition only affects **incidental** duties.

- If a Complainant's condition affects an **essential** duty of the job – the Complainant's condition **IS** related to his/her ability to perform, and the Complainant is **NOT** disabled within the meaning of the Act.

INCIDENTAL DUTIES VS. ESSENTIAL DUTIES

- **EXAMPLE:**
  - A secretary whose job requires a substantial amount of typing. Typing would be an essential duty of his/her job.
  - If the secretary's medical condition prevents him/her from typing, s/he is not disabled within the meaning of the Act, because s/he cannot perform the essential functions of the job.

INCIDENTAL DUTIES VS. ESSENTIAL DUTIES

- **EXAMPLE:**
  - A nurse whose job requires him/her to lift patients, walk up and down stairs and lift medical equipment.
  - If the nurse's medical condition prevents him/her from performing these job duties, s/he is not disabled within the meaning of the Act, because s/he cannot perform the essential functions of the job.

INCIDENTAL DUTIES VS. ESSENTIAL DUTIES

- **EXAMPLE:**
  - A secretary whose job requires that s/he type, but incidentally requires him/her to lift boxes weighing 10 pounds. If the secretary has a medical condition which prevents him/her from lifting anything over 10 pounds, the secretary would be disabled within the meaning of the Act. Why? Because lifting is only an incidental job duty and is not related to the secretary's ability to perform the job for which s/he was hired.

COMPARATIVES

COMPARATIVES

- In disability investigations, it is important not only to obtain medical documentation verifying the disability, you must also obtain **comparative information**.
  - If the disability charges involve attendance issues, then the Department needs to obtain the Complainant's attendance records and compare them to those of non-disabled employees.

ESTABLISHING PRIMA FACIE CASE FOR PERCEIVED DISABILITY

PERCEIVED DISABILITY
PRIMA FACIE CASE

- To establish a **prima facie case** for **perceived disability** discrimination, Complainant must show:

1. **Respondent <u>perceived</u> Complainant to be <u>disabled</u>.**
   a. Respondent erroneously perceived that Complainant had a disability; or
   b. Respondent incorrectly concluded that Complainant's condition was equivalent of a disability; or

PERCEIVED DISABILITY PRIMA FACIE CASE

c. Respondent attributed certain characteristics to Complainant's condition that the condition does not manifest, ex. contagiousness.

2. **Respondent took an <u>adverse action</u> against Complainant <u>based on the perception</u> that Complainant is disabled.** This element can be established through direct or indirect evidence.

PERCEIVED DISABILITY

- The perception of a disability may occur when:
  - misdiagnosed,
  - misclassified, or
  - erroneously viewed as one who has or has had a disability.

PERCEIVED DISABILITY

- The perception of a disability may also occur in connection with a person whose current non-disabled condition is viewed as creating the potential for future disability.

PERCEIVED DISABILITY

- EXAMPLE:
  - Complainant suffered an on the job back injury that required a medical leave of absence. Complainant returned to work with a full medical release and was told by Respondent to return the next day for assignment. Upon returning the next day, Respondent informed Complainant that he was being laid off due to lack of work. Respondent allowed a laid-off co-worker to return to work a few days after Complainant was laid off for lack of work. Based on timing of events, the Commission held that Complainant established a case of perceived disability. Green v. Cisco Trucking Co., ___ Ill. HRC Rep. ___, Charge No. 1988SN0570 (October 28, 1994).

PERCEIVED DISABILITY

- EXAMPLE:
  - Complainant had a heart attack and requested a leave of absence. Respondent suddenly changed Complainant's performance evaluation and discharged him. Based on timing of events, the court held that Respondent discharged Complainant based on the perception of a future disability. Kenall Mfg. Co. v. HRC, 152 Ill.App.3d 695, 504 N.E.2d 805 (1st Dist. 1987).

PERCEIVED DISABILITY

- EXAMPLE:
  - Complainant informed Respondent during a pre-entrance interview that she suffered from an ankle injury. Respondent subsequently dismissed Complainant from its Cadet training class based on her inability to perform minimum physical requirements for a police officer position. Respondent did not dismiss other cadets who were also unable to perform the minimum physical requirements for the police officer position. The court found that Respondent discharged Complainant because it concluded that Complainant's ankle condition could lead to the possibility of a permanent disability. Hathaway v. Illinois Dept. of Law Enforcement, ___ Ill. HRC Rep. ___, Charge No. 1986CN1083 (June 2, 1989).

PERCEIVED DISABILITY

- DEFENSES
  - Respondent denies that it perceived Complainant to be disabled;
  - Respondent articulates a legitimate, non-discriminatory reason for its action.

ESTABLISHING PRIMA FACIE CASE FOR HISTORY OF DISABILITY

HISTORY OF DISABILITY PRIMA FACIE CASE

1. To establish a **prima facie case** for **history of disability** discrimination, Complainant must show:
   a. S/he has a ***history of a disability***;
   b. ***Respondent was aware of*** Complainant's history;
   c. Respondent took an ***adverse action*** based on Complainant's history of disability; and
   d. Respondent failed to take a similar action against a ***similarly situated individual without a history of a disability***.

HISTORY OF DISABILITY

- An individual has a history of a disability if s/he is restored or recovered from a prior affliction or if the individual's symptoms are currently in remission.

HISTORY OF DISABILITY

- For example, this may apply to individuals who have previously suffered:
  - a mental condition,
  - heart attack,
  - back injury,
  - cancer,
  - heart disease,
  - Stroke, or
  - orthopedic problems.

HISTORY OF DISABILITY

- **DEFENSES**
  - Respondent denies that it had knowledge of Complainant's history;
  - Respondent articulates a legitimate, non-discriminatory reason for its action.

REASONABLE ACCOMMODATION IN EMPLOYMENT

REASONABLE ACCOMMODATION IN EMPLOYMENT

- Pursuant to the Act, employers must make reasonable accommodations of the known physical or mental limitations of otherwise qualified, disabled applicants or employees, unless the accommodation would be prohibitively expensive or would unduly disrupt the ordinary conduct of business.

ESTABLISHING PRIMA FACIE CASE FOR REASONABLE ACCOMMODATION IN EMPLOYMENT

REASONABLE ACCOMMODATION IN EMPLOYMENT

To establish a **prima facie case** for **failure to accommodate**, Complainant must show:

(1) S/he is disabled under Section 1-103(I) of the Act;

(2) Respondent was aware of his/her disability;

(3) S/he requested an accommodation or the need for an accommodation was obvious;

(4) Respondent failed to accommodate him/her;

(5) S/he was qualified to perform the job duties with or without an accommodation.

IS COMPLAINANT DISABLED?

REASONABLE ACCOMMODATION IN EMPLOYMENT

- Before determining whether a person is entitled to a reasonable accommodation, it is necessary to ensure that the individual seeking the accommodation **is disabled** pursuant to Section 1-103(I) of the Act.

- If the individual is not disabled pursuant to Section 1-103(I) of the Act, the employer is **not required to accommodate** the individual.

DUTY OF EMPLOYEE TO REQUEST AN ACCOMMODATION

REASONABLE ACCOMMODATION IN EMPLOYMENT

- It is the duty of the employee seeking an accommodation to:
  - **Initiate the request** for the accommodation;
  - **Cooperate** in any ensuing discussion and evaluation aimed at determining the possible or feasible accommodation; and
  - **Submit** any necessary **medical or other documentation** to the employer.

INTERACTIVE PROCESS

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Interactive Process:**
  - Complainants and Respondents must be willing to participate in an **"interactive process"** of determining whether an accommodation request is appropriate.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- Respondent may ask for proof of a disability and that Complainant be evaluated to determine not only whether Complainant has a disability, but also whether Complainant needs an accommodation and which accommodation would be appropriate.

- Respondent must allow and consider Complainant's suggestions as to what reasonable accommodation is appropriate.

EXAMPLE OF RESPONDENT'S FAILURE TO PARTICIPATE IN "INTERACTIVE PROCESS"

REASONABLE ACCOMMODATION IN EMPLOYMENT

- EXAMPLE:
  - A correctional officer, who suffered from an injury which rendered her unable to fire a shotgun from her right shoulder, sought a reasonable accommodation. Respondent violated the Act by failing to take the appropriate steps to determine whether it could reasonably accommodate Complainant. Respondent did not contact Complainant to discuss the accommodation request and Respondent failed to consider whether it could retrain Complainant to use her non-dominant arm and shoulder to shoot a shotgun, despite Respondent successfully retraining other employees. (The Department of Corrections v. HRC, 298 Ill.App.3d 536 (3d Dist. 1998).

EXAMPLES OF POSSIBLE REQUESTS FOR ACCOMMODATIONS

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLES:**
  - An employee who announces to her supervisor, “I am having trouble getting to work at my scheduled starting time because of medical treatments.”
  - An employee tells his supervisor “I need six weeks off to get treatment for a back problem.”

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLES:**
  - A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.
  - An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. This is *not a request* for a reasonable accommodation because his statement is insufficient to put his employer on notice that he is disabled and is requesting a reasonable accommodation.

ACCOMMODATION CATEGORIES

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Accommodation Categories:**
  - Modifications or adjustments:
    - to a **job application process** that enable a qualified applicant with a disability to be considered for the desired position.
    - to the **work environment**, or to the how **the position is customarily performed**, that enable a qualified individual with a disability to perform the essential functions of the position.
    - that enable a disabled employee to enjoy equal **benefits and privileges of employment** as other similarly situated employees without disabilities.

EXAMPLES OF POSSIBLE ACCOMMODATIONS

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLES:**
  - **Alteration of a work site**
    - accessible equipment
    - accessible work spaces
  - **Modification of work schedules or leave policies**
  - **Acquisition of equipment**

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLES:**
  - **Job restructuring**
  - **Provision of readers or interpreters**
  - **Changing entrance exams, training materials or policies**
    - providing larger print for persons with sight difficulties
    - providing extra time for persons with dyslexia

EXCEPTIONS

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXCEPTIONS:**
  - The duty to accommodate only extends to the employee's **present position**.

EMPLOYERS ARE NOT REQUIRED TO:

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Employers are <u>not required</u> to:**
  - **Reassign or transfer** a disabled employee to another position because his/her disability precludes him/her from performing his/her job.
    - <u>Fitchpatrick v. HRC</u>, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785 (4th Dist. 1994).

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Employers are <u>not required</u> to:**
  - **"Bump"** an employee from a position to make room for the disabled employee.
  - **Eliminate an essential function** or fundamental duty of the position.
  - **Lower production standards** for the disabled employee.
  - **Hire 2 full-time employees to perform 1 job**.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Employers are <u>not required</u> to:**
  - Make an **after-the-fact accommodation** by forgiving a violation of a valid work rule after the employee has engaged in such a violation, because the employee is disabled. (<u>Milan v. HRC</u>, 169 Ill.App.3d 979, 523 N.E.2d 1155, 120 Ill.Dec. 244 (1st Dist. 1988), <u>app.</u> <u>den.</u>, 122 Ill.2d 578, 530 N.E.2d 249, 125 Ill.Dec. 221 (1988)).

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Employers are <u>not required</u> to:**
  - Retain an employee who is **medically unable to return** to his/her assigned position. (<u>LaPorte v. Jostens, Inc.</u>, 213 Ill.App.3d 1089, 572 N.E.2d 1209, 1212, 157 Ill.Dec. 745 (3d Dist. 1991)).
  - Accommodate a disabled employee in an **alternate position**, other than the position for which the employee was hired. (<u>Caterpillar v. HRC</u>, 154 Ill.App.3d 424, 429-30, 506 N.E.2d 1029, 1033, 107 Ill.Dec. 138 (3d Dist. 1987).

ACCOMMODATIONS OF PERSONAL NATURE NEED NOT BE PROVIDED TO INDIVIDUAL SEEKING AN ACCOMMODATION

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Accommodations of personal nature need not be provided to individual seeking an accommodation.**
  - **EXAMPLES:**
    - Employers *not required* to provide employees:
      - Eyeglasses;
      - hearing aids; or
      - prosthetic limbs.

ACCOMMODATIONS THAT ARE SUPERFLUOUS NEED NOT BE PROVIDED TO INDIVIDUAL SEEKING AN ACCOMMODATION

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Accommodations that are superfluous need not be provided to individual seeking an accommodation.**
  - **EXAMPLE:**
    - Employers *not required* to provide a chauffeur to employee with vision difficulties in order to accommodate that person's traveling difficulties.

DEFENSES

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Defenses:**
  - Once a disabled individual has requested an accommodation, the employer must provide the necessary accommodation unless:

REASONABLE ACCOMMODATION IN EMPLOYMENT

(1) Complainant would be unqualified even with the accommodation;

(2) Requested accommodation would be prohibitively expensive; or

(3) Requested accommodation would be unduly disruptive.

COMPLAINANT WOULD BE UNQUALIFIED EVEN WITH THE ACCOMMODATION

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Complainant Would Be Unqualified Even With The Accommodation**
  - An employer's duty to accommodate only attaches once it is determined that the employee can perform the essential functions or duties of the position.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLE:**
  - A complainant with a visual impairment, who sought a position as a social worker at an alternative high school, was found incapable of performing the essential functions of the position because her poor eyesight rendered her unable to recognize the subtle facial expressions or hand gestures that precede violent behavior. (Truger v. DHR, 293 Ill.App.3d 851, 688 N.E.2d 1209, 228 Ill.Dec. 232 (2nd Dist. 1997).

PROHIBITIVELY EXPENSIVE

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Prohibitively Expensive**
  - Determining whether an accommodation would be prohibitively expensive involves weighing the costs and inconvenience against the immediate and potential benefits of providing it.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- Respondents must do more than assert that they "think" the requested accommodation would have cost too much.
- Respondents bear the burden of demonstrating that the accommodation request was "prohibitively expensive."

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLE:**
  - An employee, with a mobility impairment caused by polio, requested that his employer modify its plant in order to provide him with easy access to canteens, telephones, showers, parking and break rooms. Respondent complied by widening the parking spaces and by adding additional signage reflecting that the spaces were for disabled parking. However, with respect to the telephones, canteens and break rooms, Complainant had access to the downstairs facilities and was also able to access the upstairs facilities although it took longer.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- Complainant contended that the upstairs facilities were superior and that he wanted Respondent to relocate the "nicer" facilities downstairs. Respondent responded by allowing Complainant additional time to access the upstairs facilities, by lengthening Complainant's break and lunch periods. Further, Respondent hired a contractor to estimate the costs of redesigning the plant to accommodate Complainant's request. The cost of redesigning the plant in conjunction with Complainant's request would have been $35,000.00.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- The Department dismissed the charge for lack of substantial evidence because Complainant had access to all of the facilities, Complainant was given a longer time to access the upstairs facilities, and Respondent provided substantially similar facilities on both floors. Further, Respondent provided evidence that the accommodation requested by Complainant was prohibitively expensive.

UNDULY DISRUPTIVE

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Unduly Disruptive**
  - If the evidence reveals that an accommodation request would unduly disrupt the conduct of business, the accommodation would not be considered reasonable.
  - Respondent bears the burden of proving that the accommodation request is unduly disruptive.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **EXAMPLE:**
  - A complainant with a heart disorder (who worked at a hospital), requested that Respondent give him additional breaks and rest during his shift after he was found sleeping while on duty.
  - Respondent granted Complainant unpaid additional breaks as long as Complainant informed his manager that he needed to take the break, so that there would be no disruption in the work performed.
  - Complainant ignored Respondent's request and took unauthorized breaks in which he called home, watched television and slept.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- When Respondent terminated Complainant for sleeping on the job and insubordination, he alleged that Respondent failed to accommodate his disability.
- Respondent contended that allowing Complainant to take unauthorized breaks caused disruption and risked patient care and safety.
- The Department made a finding of lack of substantial evidence, as Complainant's accommodation request would have unduly disrupted the employer's operations.

NON-DISCRIMINATORY PERSONNEL POLICIES

REASONABLE ACCOMMODATION IN EMPLOYMENT

- **Non-Discriminatory Personnel Policies**
  - Although an employer may not legally be required to provide certain accommodations, an employer may be liable for providing an accommodation because of how **the employer treated other similarly situated individuals**.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- EXAMPLE:
  - Complainant is a correctional officer who (for the past 5 years) has been assigned to the sole duty of transporting prisoners to court hearings. In his assignment, Complainant performs no lifting. Complainant sustains a permanent injury to his back which qualifies as a disability. Complainant seeks to return to work with a permanent lifting restriction. Respondent denies Complainant's request for an accommodation because it says that Complainant must be able to lift as a part of his job as a correctional officer.

REASONABLE ACCOMMODATION IN EMPLOYMENT

- Respondent has allowed another disabled employee to return to work as a correctional officer in a permanent desk-job assignment, with a permanent lifting restriction because the employee had his leg amputated. In this case, Respondent may have violated the Act because Respondent accommodated one disabled individual who could not perform lifting while rejecting Complainant's accommodation request to not perform lifting of more than 20 pounds.

BONA FIDE OCCUPATIONAL QUALIFICATION

BONA FIDE OCCUPATIONAL QUALIFICATION

- Under the Act, an employer is not prohibited from hiring or selecting between persons for **bona fide occupational qualifications.**

- The Burden is on Respondent to raise the Defense and to show that a **Bona Fide Occupational Qualification** Applies to the Performance of the Job in Question.

BONA FIDE OCCUPATIONAL QUALIFICATION

- **EXAMPLES:**
  - Sight for school crossing guards
  - Speech for radio announcers
  - Hearing for air traffic controllers

PRE-EMPLOYMENT INQUIRIES

PRE-EMPLOYMENT INQUIRIES

(1) An employer may make disability-related inquiries of applicants if the inquiry is:

(a) **Related** to whether an individual has a physical or mental disability that will *impair his/her abilities* to acceptably perform the position sought, **and**

(b) Only if the **same inquiry is made of all** similarly situated applicants.

PRE-EMPLOYMENT INQUIRIES

(2) A question is disability-related if it is **likely to elicit information** about a disability.

(3) Employers are permitted to make pre-employment disability-related inquiries if the inquiries are used to **obtain information** about conditions that **affect job performance**.

EXAMPLES OF PERMISSIBLE PRE-EMPLOYMENT DISABILITY-RELATED INQUIRIES

PERMISSIBLE PRE-EMPLOYMENT DISABILITY-RELATED INQUIRIES

- **EXAMPLES:**
  - Asking whether an individual has a specific mental or physical disability which relates to fitness to perform the particular job.
  - Asking whether an individual has a disability which should be taken into account in deciding job placement or job structuring.

EXAMPLES OF IMPERMISSIBLE PRE-EMPLOYMENT DISABILITY-RELATED INQUIRIES

IMPERMISSIBLE PRE-EMPLOYMENT DISABILITY-RELATED INQUIRIES

- **EXAMPLES:**
  - Asking whether an individual has a disability, when s/he became disabled, or what is the nature or extent of the disability.
  - Asking about an individual's prior Workers' Compensation history.
  - Asking whether the individual has taken any prescription drugs or medications in the past.

EXAMPLES OF PERMISSIBLE PRE-EMPLOYMENT NON-DISABILITY-RELATED INQUIRIES

PERMISSIBLE PRE-EMPLOYMENT NON-DISABILITY RELATED INQUIRIES

- **EXAMPLES:**
  - Asking generally, about an individual's well being, such as "how are you" or "do you have a cold or allergies" when an individual is sneezing or coughing.
  - Asking an applicant whether s/he can perform job functions.

PERMISSIBLE PRE-EMPLOYMENT NON-DISABILITY RELATED INQUIRIES

- **EXAMPLES:**
  - Asking an applicant to provide the name and telephone number of a person to contact in case of a medical emergency.
  - An employer *may not* ask any or all applicants *to list all disabling conditions* because such a question is over broad and may elicit information regarding disabilities that are not job related.

PRE-EMPLOYMENT EXAMINATIONS

PRE-EMPLOYMENT EXAMINATIONS

- Employer may require **pre-employment physical and/or psychological examinations** if:
  - Purpose of examination is to determine **if individual is capable of acceptably performing** activities necessary to the performance of the job in question,
  - Employer **requires all applicants** who are otherwise fully qualified **to submit** to the examination, **and**

PRE-EMPLOYMENT EXAMINATIONS

- Employer can demonstrate that each subsequent evaluative procedure is *more expensive or burdensome* than the physical or mental examination.

PRE-EMPLOYMENT EXAMINATIONS

- Physical or psychological pre-employment examinations may also be used to determine the *nature of an accommodation* that may be necessary to enable an applicant to perform a job acceptably.

- However, physical and psychological pre-employment examinations *may not* be used to *disqualify an applicant* who is revealed to have a condition or characteristic that merely presents a **risk of future injury** or **disqualification**.

PRE-EMPLOYMENT EXAMINATIONS

- The *results* of any pre-employment physical or psychological examinations must be made *available to the applicant* upon request.

THE END