

The Americans with Disabilities Act (ADA) and Medical Examinations

A Self-Advocacy Guide

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Federal and state law can change at any time. If there is any question about the continued validity of any information in the handbook, contact the Arizona Center for Disability Law or an attorney in your community.

The purpose of this guide is to provide general information to individuals regarding their rights and protections under the law. It is not intended as a substitute for legal advice. You may wish to contact the Arizona Center for Disability Law or consult with a lawyer in your community if you require further information.

- This guide is available in alternative formats upon request.

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TABLE OF CONTENTS

A.	Introduction to the Americans With Disabilities Act (ADA) and this Guide.....	1
1.	<i>What the ADA covers</i>	<i>1</i>
2.	<i>How the Arizona Center for Disability Law Assists People with Disabilities.....</i>	<i>1</i>
3.	<i>This Guide is not a Substitute for Legal Advice.....</i>	<i>2</i>
4.	<i>Why the ADA Includes Employment Protections.....</i>	<i>2</i>
5.	<i>When the Employment Protections of the ADA Apply.....</i>	<i>3</i>
6.	<i>Employers Covered By the Employment Protections of the ADA.....</i>	<i>3</i>
7.	<i>Applicants or Employees With a Disability</i>	<i>5</i>
8.	<i>Scope of this Guide</i>	<i>5</i>
9.	<i>An Overview of Medical Examinations under the ADA.....</i>	<i>6</i>
B.	Commonly-asked Questions About Medical Examinations and the ADA	8
1.	<i>What is a medical examination under the ADA?</i>	<i>8</i>
2.	<i>For purposes of the ADA, how can one tell which procedures or test are medical examinations?</i>	<i>9</i>
3.	<i>Who is protected by the ADA’s rules on medical exams and inquiries?</i>	<i>9</i>
4.	<i>Is a strength or agility test a medical exam?</i>	<i>10</i>
5.	<i>Is a vision or hearing test a medical exam?</i>	<i>11</i>
6.	<i>Is a psychological examination a medical exam?.....</i>	<i>12</i>
7.	<i>Is a drug screening test a medical examination under the ADA?.....</i>	<i>12</i>
8.	<i>Can an employer lawfully require a job applicant to undergo a medical exam?.....</i>	<i>13</i>
9.	<i>Can an employer lawfully require an employee to undergo a medical examination?</i>	<i>14</i>
10.	<i>Can an employer lawfully withdraw a job offer if an applicant does not pass a medical examination?.....</i>	<i>15</i>
11.	<i>What are some examples of lawful reasons an employer may require a medical examination?.....</i>	<i>16</i>
12.	<i>Can an applicant/employee lawfully refuse to take a medical examination?.....</i>	<i>17</i>

13.	<i>Can an employer lawfully require an employee to provide past medical records as part of a medical examination?</i>	<i>18</i>
14.	<i>If an applicant/employee provides past medical records as part of a medical examination, can the employer release those records to others?.....</i>	<i>19</i>
15.	<i>How many times can an employer lawfully require a medical examination?</i>	<i>20</i>
16.	<i>When an employer requires a medical examination, who has the responsibility to pay for the medical examination?</i>	<i>21</i>
17.	<i>Can an employer be liable for simply violating the ADA’s rules on medical exams and disability inquiries?</i>	<i>21</i>
C.	Summary.....	22
D.	Sources of More Information about the ADA and Medical Examinations	25

A. Introduction to the Americans With Disabilities Act (ADA) and this Guide

1. What the ADA covers

On July 26, 1990 the ADA was passed by Congress. The ADA provides major civil rights protections to individuals with disabilities. The intent of this federal law is to reduce barriers to persons with disabilities and provide equal opportunity in employment, public accommodations, public services, transportation, and telecommunications. The various titles of the ADA affect many aspects of the lives of people with disabilities.

- Title I makes it unlawful to discriminate against qualified people with disabilities in employment.
- Title II makes it unlawful for state and local governments and their agencies to discriminate in programs and services, including state or county medical services and substance abuse clinics.
- Title III prohibits discrimination in access and enjoyment of public accommodation and commercial facilities, such as hotels, motels, restaurants, professional offices, lawyers' offices, convention centers, stores, banks, museums, parks, schools, and recreation facilities, and substance abuse clinics.
- Title IV requires accessibility of telecommunication services to people who are deaf or hearing impaired.

2. How the Arizona Center for Disability Law Assists People with Disabilities

If you believe you have been discriminated against on the basis of a disability in employment or access to public services, public accommodations, public transportation or telecommunication services, staff at the Arizona Center for Disability Law can provide you with information about the ADA and enforcing your rights under the ADA. The Arizona Center for Disability Law is a non-profit, public interest law firm providing free advocacy, information and referral services, legal research, community legal education, and, in selected cases, legal representation to individuals with disabilities and advocacy organizations throughout Arizona.

The Center is the designated protection and advocacy (P&A) system providing services for Arizonans with a wide range of physical and mental disabilities, including people with drug addictions and alcoholism. Assistance is provided for disability-related issues in established priority areas.

Information about the eligibility requirements and priorities are available from the Center upon request. Assistance is provided according to program eligibility requirements, priorities and staff availability.

3. This Guide is not a Substitute for Legal Advice

The Arizona Center for Disability Law recommends that persons obtain professional legal advice to resolve a legal dispute regarding discrimination on the basis of a disability. This guide is not a substitute for legal advice. This guide is meant to provide people with disabilities with information and examples about employment protections under the ADA.

4. Why the ADA Includes Employment Protections









Oftentimes, people with disabilities do not have an equal opportunity to work or advance in their employment. People with disabilities are often restricted in employment opportunities by many different kinds of barriers. For example, some are excluded because of rigid work schedules or leave policies which do not permit flexibility for people to get necessary treatment for alcoholism or drug addiction.

In some cases, people are denied opportunities because of prejudice. These are the barriers in other people's minds: fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or lack of acceptance by co-workers and customers.

Congress enacted the ADA to eliminate these barriers to equal opportunity in employment. The ADA makes it unlawful for an employer covered by the ADA to discriminate against applicants and employees with disabilities. The United States Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the employment protections of the ADA. People with disabilities also have the right to bring private lawsuits against employers who discriminate against them if they first file a charge of discrimination with the EEOC within the time limits set out by the ADA. See the Center's guide, ***How to Enforce Employment Rights under the ADA***, for more information about the requirements for filing a charge. However, the U.S. Supreme Court recently ruled that private individuals may not sue state employers for

money damages under the ADA. Individuals may still file charges of discrimination with the EEOC against their state employer for other relief, such as court orders to stop discrimination. The U.S. Government can still file lawsuits against states for violating the ADA.

This guide will provide the reader with information about how the ADA applies to medical examinations in an employment situation. The list of guides available through the Center about employment rights under the ADA include:

-  ***An Overview of the Employment Protections of the ADA***
-  ***The ADA and the Job Applicant***
-  ***The ADA and Reasonable Accommodations***
-  ***How to Enforce Employment Rights under the ADA***
-  ***Drug & Alcohol Testing Under the Americans With Disabilities Act (ADA)***
-  ***The ADA and Medical Examinations***
-  ***The ADA and Confidentiality of Medical Records***
-  ***The ADA and Disability-Related Harassment***

5. When the Employment Protections of the ADA Apply

The ADA does not cover every employment situation between an applicant or employee and an employer. For the ADA to apply to an employment situation each of the following has to be true:

- * the employer is a ***covered employer***;
- * the employee or applicant has a ***disability*** according to the ADA;
- * the employee or applicant is ***qualified*** to perform the job; and
- * the employer ***discriminates*** against an applicant or employee ***on the basis of disability***.

The terms "covered employer" and "disability" are discussed below.

6. Employers Covered By the Employment Protections of the ADA

- * **The ADA applies to private employers with 15 or more employees.**
 - Includes employment agencies and labor unions.
 - Includes a location or facility of a business with less than 15 employees whose total number of employees for the company in all locations and

facilities combined equals 15 or more.

Other local laws may apply to persons with disabilities who are employed by smaller businesses. For more information contact the Arizona Center for Disability Law or a private attorney.

* **The ADA applies to state and local governments.**

* Includes all state and local governmental agencies, departments and entities regardless of their size or number of employees. Although the ADA applies to state employers, the U.S. Supreme Court recently ruled that employees (and applicants) cannot sue state employers in court for money damages. Individuals can still file charges of discrimination with the EEOC against their state employer. Individuals can still sue to require state employers to take action or stop discriminatory action. The U.S. Government can still file lawsuits against state employers under the ADA.

* Examples of state or local employers include: public schools, public universities, police and fire departments, public libraries, public museums, public parks and recreation facilities, and social welfare offices. (The U.S. Supreme Court decision discussed above does not apply to local government agencies, such as cities and counties.)

* **The ADA does NOT apply to the federal government.**

The ADA does apply to employees of the U.S. Senate. However, generally if a person with a disability works or applies for a job with the federal government, a federal agency, or a fully owned U.S. Government corporation, then the ADA does not apply. However, the Rehabilitation Act of 1973 is another anti-discrimination law that offers employment protections for people with disabilities.

For example, employees and applicants of the U.S. Department of Labor and civilian employees of the U.S. Department of Army are covered by the Rehabilitation Act. For more information about the Rehabilitation Act, contact the Arizona Center for Disability Law, an Equal Employment Opportunity Counselor (EEO) for the federal agency, or a private attorney.

* **Title I (Employment) of the ADA does NOT apply to Indian Tribes.**

However, tribes may have their own affirmative action or anti-discrimination laws

which may address discrimination on the basis of disability. Some tribes have adopted tribal laws or entered into agreements to abide by federal discrimination laws similar to the ADA. Contact a tribal legal office for more information about the tribal laws or agreements that may apply.

7. Applicants or Employees With a Disability

The ADA protects qualified individuals with a disability. Disability is defined under the ADA as:

(1) **a physical or mental impairment that substantially limits an individual in the ability to perform major life activities, such as:**

- * seeing
- * hearing
- * walking
- * working
- * learning
- * thinking
- * reading
- * lifting
- * concentrating
- * reproduction
- * performing manual tasks
- * interacting with others
- * engaging in sexual relations

(2) **a history of a substantially limiting impairment, or**

(3) **being regarded as having a substantially limiting impairment.**

However, persons who are currently illegally using drugs are generally not protected under the ADA. A person is qualified under the ADA if s/he has all of the skills, education, and experience required for the position and is able to perform the essential functions of the job with or without reasonable accommodations. For more information about what these special terms mean, see the Center's guide, *An Overview of the Employment Protections of the ADA*.

8. Scope of this Guide

The information in this guide applies to the employment protections of the ADA, and specifically medical examinations. Closely related to medical examinations are disability-related questions. Also available from the Center is another guide which addresses whether an employer can ask disability-related questions. If you have questions, ask for a copy of the Center's guide, *The ADA and the Job Applicant*. This guide, however, does **not** cover discrimination by social service agencies, medical facilities, educational facilities, or professional licensing agencies. If you believe that you have been discriminated against in an area outside of employment, you should contact the Center staff for more information about your rights. Also, this guide does **not**

cover employment laws other than the ADA. It is possible that individuals may have other claims related to medical examinations in the workplace. You should contact a private attorney specializing in employment law to determine if you have other claims and the deadlines for making those claims. If you need assistance locating an attorney, ask for a copy of the Center's Employment Attorney Referral List.

9. An Overview of Medical Examinations under the ADA

The ADA has rules about when an employer can require a medical examination. The rules change at different stages of the employment process. To understand the rules, it is necessary to know the three stages:

- before a job offer (applications, interviews, background checks, references);
- after a job offer (but before the first day of employment); and
- after the first day of employment.

It is important to know the stage at which an employer requests a medical examination to determine whether a medical examination is prohibited or permitted. Below is a discussion of the rules during each stage of employment.

Before a Job Offer

An employer may not lawfully require an applicant to undergo a medical examination or answer disability-related inquiries before a job offer. When applying for a job, an employer **cannot** ask an applicant on an application or in an interview if s/he is disabled, what type of disability s/he has, or how seriously the disability impairs his/her daily activities. Nor can an employer seek this information in background investigations or reference checks made before a job offer. However, an employer **can** ask if an applicant can do the job "with or without reasonable accommodation." Also, an employer **can** ask the applicant to describe or demonstrate how s/he will perform the duties of the job. If an applicant needs an accommodation to participate in the application process, then the employer will need to be told about the disability and the accommodation needed. Obviously, once an accommodation is requested, the employer will be aware of the disability. An employer may tell applicants of the steps in the application process (such as completing an application form, participating in an interview, or taking a competency test) and **may** ask at that time whether the applicant needs an

accommodation to participate.

After a Job Offer (but before the first day of employment)

During this stage, an employer may condition a job offer on successfully completing a medical examination as long as (1) the employer asks all new hires entering that job category to take a medical examination, and (2) the employer agrees to keep the medical information collected during the medical examination confidential as required by the ADA's confidentiality rules.

At this stage, an employer **can also ask** whether the applicant needs an accommodation to perform the job and **can ask** for documentation of the applicant's need for reasonable accommodation(s). If an employer withdraws a job offer following a medical exam, the employer must show that the reason the job was withdrawn was:

- a business necessity (see the answer to Question #18 for examples of business necessity);
- job related (e.g., eye exam for airline pilot); and
- the applicant could not perform the job even with reasonable accommodation(s).

Humberto, the manager of Automated Office, Inc., has offered the job of computer network administrator to Sasha if she passes a medical examination. Humberto also calls Samuel to tell him that "just in case" the selected applicant doesn't pass her physical, he would like to hire Samuel if he can pass a medical examination. Humberto explains to Sasha and Samuel that they must go to Dr. Know for their physical exam. Humberto may require Sasha to take a physical exam because he has made an offer of employment and as long as the physical exam is required of all employees in the same job category. Further, Humberto may require Sasha to take her medical examination by the physician chosen by the employer. Humberto may not ask Samuel to take the physical unless Sasha turns down the job or is rejected for the job and Samuel is offered the job.

After the First Day of Employment

After an employee begins working, an employer may lawfully ask an employee to undergo a medical examination if the examination is job-related and a business necessity. Examples of lawful reasons for an employer insisting upon an employee undergoing a medical examination are included in the Answer to Question #11.

B. Commonly-asked Questions About Medical Examinations and the ADA

1. What is a medical examination under the ADA?

Under the ADA, a medical examination is any test or procedure that seeks information about an individual's health and/or physical or mental impairments. Requests often come in the form of examinations, procedures, or tests, or as inquiries into an individual's past medical history. For example, a psychological examination is medical if it provides evidence that would lead to identifying a mental disorder or impairment. It is not a medical exam, however, if it is designed and used only to measure things like honesty, taste and habit. Following are a few more helpful examples.

Bally's Total Fitness requires all aerobic instructor applicants to teach a one hour aerobic class prior to being hired for the position. This is not a medical examination because it only tests the applicant's ability to do the task. If, however, Bally's tests the applicants' blood pressure and heart rate at the end of the activity, this would be considered a medical examination because it is measuring the applicants' physical response to the activity rather than their ability to do the activity. It would be a violation of the ADA for Bally's Total Fitness to require applicants to take this medical examination before a job offer.

Joshua applies to a department store for a customer service position. During his interview he is asked, "What current or past medical problems might limit your ability to do a job?" In this situation, the question is not allowed under the ADA because it tends to lead to a disclosure of a disability and is asked before a job offer.

A motion picture company employs several thousand people. In search of a new health care provider, they contact Health Care Partners and Kaiser Permanente to do a cost comparison survey. Both Health Care Partners and Kaiser have the employer circulate a questionnaire that asks several questions including 1) have you or your family been hospitalized or had medical expenses in excess of *3,000.00 in the past five years, if yes state the details; and 2) have you or a member of your family been under the care of a physician for a medical condition in the past five years, if yes give the details. These inquiries are allowed under the ADA because they are asked for the purpose of providing health-related services and are connected to a legitimate business purpose of underwriting the expense of these services.

2. For purposes of the ADA, how can one tell which procedures or tests are medical examinations?

It is not always easy to determine whether a procedure or test is a medical examination as defined by the ADA. The EEOC publishes guidance for employers and people with disabilities to understand these protections of the ADA. In that guidance, the EEOC lists the following factors to help in determining whether a procedure or test is a medical examination under the ADA:

- ✎ Is the examination administered by a health care professional or someone trained by a health care professional?
- ✎ Are the results interpreted by a health care professional or someone trained by a health care professional?
- ✎ Is it designed to reveal an impairment or physical or mental health?
- ✎ Is the employer trying to determine the applicant's physical or mental health or impairments?
- ✎ Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- ✎ Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?
- ✎ Is it normally given in a medical setting (for example, at a health care professional's office)?
- ✎ Is medical equipment used?

In many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a medical examination. In some cases, one factor may be enough to determine that a procedure or test is medical.

3. Who is protected by the ADA's rules on medical exams and inquiries?

In most cases involving the ADA, only people who have a disability within the meaning of the statute are covered. However, with regard to medical exams and disability-related inquiries, all applicants and employees may be covered, regardless of their disability status. Thus, even a person who is not disabled can file a charge of discrimination and probably bring a lawsuit under the ADA if unlawfully required to take a medical exam. The confidentiality requirements of the ADA may also protect all applicants and employees.

Joe files a lawsuit against a computer company which was a prospective employer because of disability-related questions on the job application. Joe does not contend that he is disabled in his charge of discrimination with EEOC. Joe is entitled to file a charge of discrimination under the ADA.

Eleanor works for a hotel resort. Her employer institutes a broad drug and alcohol testing policy that requires employees to report to their supervisors any type of prescription medication they use. Although Eleanor is not disabled under the ADA, she takes several prescription drugs, including birth control. She may file a charge and complaint under the ADA against the company.

Sylvia is a computer programmer at Softbiz Computer Company. Sylvia does not have a condition that would qualify her as a person with a disability. Softbiz asks Sylvia to take a medical exam that is not legal under the ADA because it is not job-related or a business necessity. Sylvia's employer may not lawfully require her to take a medical exam and she is protected by the ADA's provisions on medical exams, despite the fact that she is not disabled within the meaning of the statute.

Henry, Louis, and Helen, three members of the support staff at the law firm of Mattingly & Dykstra, are found looking through the results of medical exams that four attorneys were required to take because of business necessity. Two of the attorneys have disabilities. Two are not disabled. All four attorneys may seek relief from the law firm for failing to keep the records of their medical exams confidential.

4. Is a strength or agility test a medical exam?

No. Tests of strength and agility are not medical exams if the sole purpose of the test is to determine whether the applicant is able to perform tasks required by the position. However, if the employer measures the applicant's response to the physical exertion, then it is a medical exam. Therefore, an employer may request an applicant to perform an exercise or task which is related to the job without violating the ADA. However, after the physical test, if an employer attempts to analyze the applicant's bodily reaction to the exertion, then the test becomes a medical exam and the ADA rules apply. Strength or agility tests that measure the body's reaction are not lawful under the ADA prior to a job offer. There are no specific limits or restrictions under the ADA on agility tests that do not measure the body's physical response.

The City's police department requires its applicants to successfully complete an obstacle course which simulates a foot pursuit of a suspected criminal within a specific period of time. This is NOT a medical examination.

Applicants for a bike messenger service are required to bike a route in a specific amount of time to simulate the continuous motion required to deliver parcels. This is a strength test and does not violate the ADA.

A moving company may require and test the ability of mover applicants to move a fifty pound box thirty yards. This is NOT a medical examination.

Firefighter applicants are required to carry heavy equipment and drag a hose up six flights of stairs. At the end of the exercise, the applicants are given a pulmonary test to determine if their breathing is within normal limits. This is a medical examination and is NOT lawful prior to a job offer.

5. Is a vision or hearing test a medical exam?

Yes. An employer may not measure the percentage of hearing loss or the strength of an applicant's eyesight prior to a job offer. If a hearing specialist gauges the hearing of an applicant, this observation is a medical exam. Also, an assessment of the eyesight of an applicant by reading an eye chart is a medical exam. Similarly, an observation by a optometrist of an applicant's eyesight is a medical exam.

An applicant for a position as a library clerk is asked to organize books based on the labels on a spine of a book as a pre-employment test. Such an exercise is NOT a medical exam.

An applicant for a telephone service representative position is asked to answer questions over the phone to determine his demeanor. This pre-employment test is NOT a medical exam either.

An applicant for a detention officer in a juvenile facility is asked to get a hearing test before taking the pre-employment written test. Only people with a score of 85 on the test are considered for vacant positions. The hearing test IS a medical examination and is NOT permitted under the ADA at this stage because there has not been a job offer.

6. Is a psychological examination a medical exam?

Yes. An employer may not ask an applicant to take a test which would lead to the diagnosis of a mental disorder or impairment prior to an offer of employment. A test which attempts to determine whether an applicant has certain characteristics which are likely related to a mental or psychiatric condition is a medical exam. A test which measures only personality traits is not a medical exam. A test which examines the integrity, tendencies, and inclinations of an applicant is not a medical exam. An individual's characteristics may be tested as long as there is no attempt to diagnose a mental impairment or disorder.

SPECIAL NOTE ABOUT POLYGRAPH TESTS

Polygraph examinations are not considered medical examinations because they only test honesty. However, an employer may not asked disability-related questions during a polygraph. Beware that federal and state laws prohibit many employers from using polygraph tests. You should obtain legal advice before agreeing to a polygraph test as a condition of employment.

Psychological exams which attempt to identify mental conditions contained in the American Psychiatric Association's most recent Diagnostic and Statistical Manual of Mental Disorders are medical exams.

7. Is a drug screening test a medical examination under the ADA?

No. Although a drug test meets the ADA's definition of a medical examination, Congress specifically excluded drug testing from these rules on medical examinations. For purposes of the ADA, drug testing is not a medical examination. The ADA specifically states that an employer may conduct drug tests to determine an individual's current illegal use of controlled substances. The illegal use of drugs includes use which is unlawful under the Controlled Substances Act and the misuse of prescription drugs that are "controlled substances." Drug tests may be required of an applicant prior to an offer of employment and/or a current employee. Drug tests are allowed because employers subject to the ADA are authorized to prohibit the influence and illegal use of drugs at the workplace. However, both job applicants

and employees who are lawfully using medication and whose use of medication is revealed in a drug screening test are protected by the ADA.

8. Can an employer lawfully require a job *applicant* to undergo a medical exam?

An employer is prevented from requiring medical examinations until after it makes a real job offer to an applicant. The job offer, however, can be conditioned on passing the medical examination. Since medical examinations can lawfully be required only after a job offer has been made to an applicant, it is important to determine if the job offer is a real offer. A job offer is real if the employer has evaluated all relevant non-medical information that it reasonably could have obtained and analyzed before it made the job offer to the applicant. An employer cannot lawfully require a medical examination before it makes an offer to an applicant even if the applicant consents to the medical examination. Likewise, an employer cannot lawfully require a medical examination even if the employer agrees not to review examination results until after an offer of employment is extended. An employer, however, can require that an applicant undergo tests, such as strength and agility tests, to determine if the applicant can perform job-related functions, so long as the test is not “medical.”

After a real, conditional job offer has been made to the applicant and before the applicant has begun the job, an employer may require a medical examination so long as (1) the medical examination is required of all entering employees in that job category, regardless of disability, (2) the employer agrees to keep the medical records confidential, and (3) the results of the examination are not used to discriminate against people with disabilities. See the Answer to Question #14 of this guide for more information about the confidentiality requirements of the ADA.

At this stage, the medical examinations do not have to be related to the job. However, an employer may only withdraw a job offer under limited circumstances. See the Answer to Question #10 of this guide for more information about when an employer can lawfully withdraw a job offer.

A school interviews applicants for a teaching position. The school requires each applicant to undergo a psychiatric test before an offer for the position is made. The school says that it will place the test results in a sealed envelope and not review the test results until after an offer for the position has been made. The school claims that it wants to have the tests completed before an offer is made to speed up and simplify its hiring process. Mary, one of the applicants, refuses to take the psychiatric test. The school cannot require her to take the test before it offers the job to her. After the school has offered Mary the job, it may require her to take the psychiatric test as long as all other teachers undergo the same test. At this stage, the school does not have to show either job-relatedness or business necessity. However, if the school does withdraw the job offer after the medical examination, then the school will need to be able to show that the reason for the withdrawal was job-related, was a business necessity, and that the factor that led to the withdrawal cannot be overcome by reasonable accommodation.

9. Can an employer lawfully require an employee to undergo a medical examination?

An employer may not lawfully require a medical examination of an employee who has already begun his/her employment, unless the examination is related to the job the employee holds and is a business necessity. Some lawful reasons for an employer requiring an employee to take a medical examination are as follows. An employer may ask an employee to get a medical exam or provide medical information to show s/he needs an accommodation. An employer may also require an employee to undergo a medical examination where the employee works in a position that his/her medical condition could result in a direct safety threat to the public or to other employees. An employer may require employees to get a medical examination to find out if the employee is capable of doing his/her job when the employee's job performance has declined and the change may be due to his/her health problems. Another example is an employer may lawfully conduct voluntary medical examinations of employees, including voluntary medical histories, which are part of an employee health program available to employees at that work site. Also, the requirement of a medical examination does not violate the

ADA when done to obtain group health insurance. Examinations required solely for the purpose of underwriting, classifying and administering risks in conjunction with an employer's search for a group health plan do not violate the ADA. This is the case where an employer seeks to establish, sponsor, observe, or administer the terms of a bona fide benefit plan based on underwriting, classifying or administering risks. This is known as the ADA's "safe harbor" provision.

Dana has multiple chemical sensitivity and has an allergic-like reaction to various cleaning materials. She has asked her employer to instruct the cleaning crew to clean her office and the bathroom on the floor where her office is located with "safe" cleaning products. Dana has not provided any medical documentation. It is lawful for her employer to ask her to see a medical consultant familiar with these types of conditions.

10. Can an employer lawfully withdraw a job offer if an applicant does not pass a medical examination?

Yes, the job offer may be conditioned on the results of a post-job offer medical exam. These post-offer medical exams do not have to be related to the job for which the applicant has been selected. An employer can lawfully withdraw the job offer if an applicant does not pass the medical exam. However, if the withdrawal of the job offer is due to an applicant's disability, the employer must be able to show that the reasons for the withdrawal are job-related, consistent with business necessity, and that the factor that led to the withdrawal of the job cannot be overcome by reasonable accommodation. Where safety considerations are the reason for the withdrawal of the offer, the job offer cannot be lawfully withdrawn except to avoid a "direct threat" to health or safety of others. A direct threat is a *significant* risk of *substantial* harm to the health or safety of others that *cannot be eliminated or reduced by reasonable accommodation*.

ACME Furniture Moving Company has two openings for a mover/driver. Jonathan and Abe are offered the positions based on passing a medical exam. During the medical exam, it is discovered that Jonathan has a serious back impairment. Because of the severity of the impairment, he is unable to lift more than 30 pounds. ACME lawfully withdraws the job offer because Jonathan cannot perform an important job duty even with accommodations. During the history of the medical examination, Abe discloses that he had a history of a cocaine addiction ten years ago for which he recovered and has abstained since his rehabilitation. ACME cannot lawfully withdraw the job offer based on the results of the physical examination because this past disability will not affect his ability to perform the job.

11. What are some examples of lawful reasons an employer may require a medical examination?

An employer may require an employee to take a medical exam if the exam is job related and consistent with business necessity. An exam is job related if it concerns the ability of the employee to perform the functions of his or her job. An exam is consistent with business necessity if the exam is meant to diagnose a problem that is seriously affecting the efficiency of the business, is needed to ensure the safety of co-workers and/or customers, or is useful in showing that an employee needs an accommodation because of a disability. An employer also may offer voluntary medical examinations which are part of an employee health program available to employees at the work site. In addition, an employer may require a medical examination if it is related to the administering of a group benefit plan.

Javier, a custodian at Happy Day Elementary School, has been exhibiting paranoid and agitated behavior at work. He has, without basis, accused co-workers of trying to sabotage him and he threatened at one time to “boobytrap” the school office. Happy Day may require Javier to undergo a psychiatric evaluation. The examination is job related because it relates to his ability to perform his job, and it is consistent with business necessity because an elementary school has a significant interest in protecting its children. This example comes from *Miller v. Champaign School District*, a 1997 case decided in the United States District Court for the Central District of Illinois.

Paula, a claims processor for Pimco Insurance Company, has been employed by Pimco for three years and has consistently missed more work than any of her co-workers. The absences have mostly been related to severe bouts of fatigue caused by Post Polio Syndrome. She has missed an average of 1.5 days per week during her employment and has been gone for two to three weeks at a time on six different occasions. Pimco may require Paula to take a medical exam, because Paula's absences are affecting the efficiency and work product of the company. This example is similar to a case decided by the 9th Circuit Court of Appeals, *Yin v. State of California*.

Joe, a bank teller at Bank of the Southwest, has appeared tired and run down at work for the past several weeks. However, he has attended regularly and finished his work. The manager at Bank of the Southwest becomes concerned and tells Joe to go take an AIDS test. Under these circumstances, the bank may not lawfully require Joe to take such a test because it is not consistent with business necessity. The bank is unlawfully trying to determine whether Joe has a particular disability even though his condition is not affecting his work.

A framing store in the mall hires individuals to frame posters and art in the store. The framers work around glass and glass cutters. Recently, the employer became concerned about HIV and safety in the workplace. He decided he would like to ask all framers he now has working to get a test to determine if they are HIV positive or have AIDS. The owner is concerned about the transmission of HIV in the workplace in case of a medical emergency caused by an injury while cutting glass. A blood test to determine if a framer is HIV positive is a medical examination under the ADA. There is probably not a business necessity for the test because the employer can eliminate the risk of transmission by training framers about universal precautions in the event of an injury which would avoid transmission making it unnecessary to know who is HIV positive.

12. Can an applicant/employee lawfully refuse to take a medical examination?

Yes, an applicant or employee can lawfully refuse to undergo a medical examination if the medical examination is unlawful. For example, a medical examination prior to a job offer is unlawful. An employee may lawfully refuse to undergo a medical examination if the employer requested the medical examination simply to discover whether the employee suffered from a particular disability or because the employer harbored either a special bias against individuals with a given disability or a general bias against all persons with disabilities. A new employee can lawfully refuse to undergo a medical examination if the examination is not required for all entering employees in the employee's job category. If an employee is asked to undergo a

medical examination that is neither job related or required as a business necessity, the employee can also lawfully refuse the medical examination. However, if an employee refuses to take a medical examination and has no basis for the refusal under the ADA (that is, the employee cannot prove the medical examination would violate the ADA) the employer may lawfully terminate the employee for insubordination. Before making a decision to refuse a medical examination requested by an employer, an employee or applicant should get legal advice.

John works in Tucson as a disc jockey. John's employer, who is a major contributor to the fights against AIDS, requires all of the radio station's disc jockeys to undergo medical examinations to detect the AIDS virus. John's refusal is lawful, since the medical examination is unrelated to his job as a disc jockey and is not a business necessity, and the examination is designed to detect a condition which is a disability.

13. Can an employer lawfully require an employee to provide past medical records as part of a medical examination?

An employer may require documentation of an employee's disability if that employee is requesting a reasonable accommodation under the ADA. An employer's ability to lawfully request medical records is different depending upon the stage of employment. First, an employer may not request medical records of an applicant prior to a job offer. After a job offer before the first day of work, an employer may request medical records related to the medical examination to the extent that other employees in the same category must supply medical records. Additionally, an employer **may** require additional information after obtaining basic medical information. For example, if an employer asks all new hires in a particular job category if they have had back injuries and learns that some of them have had such injuries, the employer may require additional information related to those injuries. A request for medical records to follow up on information learned during the exam is lawful if it is related to the medical exam. Finally, an existing employee only has to provide medical records related to the scope of the employer's inquiry which must be job-related and a business necessity. For example, a person who is undergoing tests for a possible psychiatric disability does not have to provide records from obstetrician visits.

SPECIAL NOTE ON MEDICAL RELEASES

Before signing a medical release of information, an applicant or employee should seek legal advice. Generally, the language of the release of information should be written to release only those records related to a legitimate inquiry. For example, if any employee is requesting an accommodation for a hearing impairment, the release should be limited to those records relating to the hearing impairment. The release should also indicate the period of time covered by the release. For example, if only the last year of records is needed, that should be requested rather than every visit in the last 10 years. The release should also expire on a specific date.

14. If an applicant/employee provides past medical records as part of a medical examination, can the employer release those records to others?

Employers are required to keep any medical information about applicants or employees confidential. This rule applies to medical information that the employer required the employee/applicant to provide as well as information volunteered by the employee/applicant. Also, the confidentiality requirement continues even after the employment ends. However, there are some important exceptions to this confidentiality rule.

1. *Supervisors or managers who must be informed about work limitations or the need for accommodations posed by a disability.*
2. *First aid and safety personnel can be told about disabilities that might require emergency treatment.*
3. *Government officials investigating compliance with the ADA must be given medical information upon request.*
4. *Employers may give medical information to worker's compensation offices, state second injury funds, and worker's compensation insurance carriers.*
5. *Employers may use an employee's or applicant's medical information for insurance or benefit plan purposes.*

Adriana works as a cashier at a grocery store. There is a rule against keeping drinks at the cashier's work station. Adriana asked for a modification of that rule because she takes a mood stabilizer prescribed for a bipolar condition. Adriana must drink water to keep her medication from rising to a toxic level. At her employer's request, she provides medical records showing she has a diagnosis of bipolar and takes Lithium. Adriana is allowed to have water at her work station as a result. When two co-workers complain to the supervisor, the supervisor tells the co-workers this is an ADA accommodation for Adriana because she takes Lithium for a psychiatric disability. The supervisor has violated the ADA because co-workers are not on the list of exceptions for release of medical records.

John applied for a job. As a condition of employment, the employer requires John to have a medical examination. During the examination, the doctor determines that John has a disorder that can cause seizures. As part of the medical history, John tells the company physician about all of the anti-convulsant medication that he takes. One day at work, John suffers from an unexpected seizure that is very intense. John remains unconscious following the seizure. John's employer calls the paramedics. The paramedics ask about medications John takes in order to treat him. In this situation, the employer may lawfully release information from John's medication to the paramedics.

15. How many times can an employer lawfully require a medical examination?

There is no definite answer to this question. Under the ADA, an employer can require a medical examination if the conditions explained in this guide are met. If a follow-up examination or inquiry is medically related to the previously obtained medical information, then the additional examination will be permissible under the ADA. If additional medical examinations are required to adequately analyze a changing medical condition, they too will be allowed under the ADA. For example, a hospital attempting to accommodate a doctor suffering from diabetes and partial amputations may require more than one medical examination to determine appropriate work modifications. In contrast, however, an additional medical examination that is requested and cannot be tied to a previous examination or legitimate business purpose may fail under the ADA. Since there is no definitive answer on the number of medical examinations an employer can require, the answer will depend on the facts of that situation. Numerous medical examinations for information already available may not be lawful, especially if done to harass or intimidate an employee from exercising their rights under the ADA.

16. When an employer requires a medical examination, who has the responsibility to pay for the medical examination?

The ADA and other federal legislation and regulations are silent on this issue, and a court has yet to decide this issue. However, the answer probably depends, in part, on why the medical examination is taking place. If the medical examination is taking place to determine reasonable accommodation for an employee, then the employee probably has to pay for the examination. The employee has the responsibility to show that s/he has a disability and needs an accommodation because of his/her disability. If the medical examination is taking place as part of a routine procedure of the employer, then the employer probably has to pay for the procedures, especially if the employer pays for medical examinations in similar situations for other employees or applicants.







17. Can an employer be liable for simply violating the ADA's rules on medical exams and disability inquiries?

There is a difference of opinion among courts whether an employer can be held liable for an ADA violation of asking a disability-related inquiry or requiring an unlawful medical exam. Some courts will require an individual to prove s/he was not hired or suffered some other negative employment action (such as failure to promote or a termination). Other courts only require that the applicant or employee be harmed by the illegal question or examination. Harm can mean that the person was embarrassed, humiliated or distressed by the discriminatory conduct. Some courts have also awarded punitive damages against employers for recklessly violating the protected right of an individual to not be subjected to unlawful disability-related inquiries or medical examinations. Punitive damages do not depend upon whether the individual was harmed, but are awarded to punish an employer. For more information about punitive damages, see the Center's guide, *How to Enforce Your Employment Rights Under the ADA*.

Alfred, who is applying for a driving position with the On-Time Parcels Company, is asked during his interview if he has ever received treatment for an addiction to alcohol. This is a prohibited inquiry under the ADA. On-Time Parcels ultimately doesn't hire Alfred because they say that he was not personable during the interview. Some courts would hold On-Time liable to Alfred for simply asking the question, even if On-Time had some other reason for not hiring him if Alfred could show that being asked the question caused him distress, humiliation, or embarrassment. Other courts would not make On-Time liable because Alfred was not ultimately selected and did not lose the employment opportunity because of the question. Courts would order On-Time to stop asking questions that violated the ADA. The same is probably true for medical examinations.









C. Summary

In this guide, the Arizona Center for Disability Law has provided information about medical examinations in employment situations under the Americans with Disabilities Act. Here are the basic rules to refer to if you think discrimination has occurred.

-  A medical examination is any test or procedure that reveals information about your health, physical disability, or mental/emotional impairment.
-  A test of strength or agility is not a medical exam if it is only used to determine your ability to perform a job function. However, taking blood pressure, pulse, or other physical data during the test is a medical exam.
-  Vision and hearing tests are medical exams, but reading tests are not medical exams.
-  Psychological tests are medical exams, but tests that measure personality traits or characteristics are not medical exams.
-  Drug screening for illegal use of controlled substances is not a medical exam, but testing for use of alcohol is a medical exam.
-  Whether a medical exam is permitted and if so, under what circumstances the examination is permitted depends upon the stage of employment.

PHASE OF EMPLOYMENT	EMPLOYER CAN ASK	EMPLOYER CANNOT ASK
<p align="center">Application and Prior to Job Offer</p>	<ul style="list-style-type: none"> <input type="checkbox"/> if you can do the job “with or without reasonable accommodation”. <input type="checkbox"/> you to describe or demonstrate how you will perform the duties of the job. <input type="checkbox"/> for a physical fitness test to determine whether applicants can perform the physical requirements of the job. 	<ul style="list-style-type: none"> <input type="checkbox"/> on application form or directly, if you are disabled, what type of disability you have, or how seriously the disability affects your daily activities. <input type="checkbox"/> questions pertaining to medical history, ongoing treatment, medications taken, hospitalization, or other questions designed to find out about a disability. <input type="checkbox"/> about workers’ compensation claims.
<p align="center">After Job Offer but Before Beginning Work</p>	<ul style="list-style-type: none"> <input type="checkbox"/> questions pertaining to disability and may condition job on passing medical examination if all employees hired for a specific job category are subject to medical examination. <input type="checkbox"/> whether you need accommodation to perform the job. <input type="checkbox"/> for documentation of your entitlement to reasonable accommodation. <input type="checkbox"/> for medical exams as part of an employee health benefit plan. 	<ul style="list-style-type: none"> <input type="checkbox"/> for medical exams of only certain employees hired for the same job category.
<p align="center">After Employee Begins Working</p>	<ul style="list-style-type: none"> <input type="checkbox"/> for medical exams if job-related and business necessity. <input type="checkbox"/> for documentation of your 	<ul style="list-style-type: none"> <input type="checkbox"/> for medical exams unrelated to the employee’s job. <input type="checkbox"/> for medical exams that are

PHASE OF EMPLOYMENT	EMPLOYER CAN ASK	EMPLOYER CANNOT ASK
	entitlement to reasonable accommodation. <input type="checkbox"/> for medical exams as part of an employee health benefit plan.	not a business necessity.

-  Follow-up or additional medical examinations are allowed under the ADA as long as they are related to a previous exam.
-  Medical exams for determining reasonable accommodation usually are paid for by the employee. Medical exams as part of the employer’s hiring practices are usually paid for by the employer.
-  Medical exam results are strictly confidential and can only be released to supervisors and managers who need to provide accommodations or respect work limitations, health or safety personnel (such as paramedics or firefighters), and government officials in the course of conducting an investigation.
-  Employees may refuse to undergo an unlawful medical exam. However, refusing a legitimate request for a medical exam can result in termination for insubordination.
-  Employers may withdraw a conditional job offer if an applicant does not satisfy the requirements of the medical examination only if the reason for the withdrawal of the offer is job-related and consistent with business necessity; and the individual cannot perform the job even with reasonable accommodations.
-  Waivers or releases of these rights under the ADA may not be lawful.
-  People with disabilities are protected by the ADA’s rules on medical exams.
-  People who are not disabled may also be protected by the ADA’s rules on medical exams.

D. Sources of More Information about the ADA and Medical Examinations

“Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations,” U.S. Equal Employment Opportunity Commission, EEOC Notice No. 915.002, Oct. 10, 1995.

“The ADA: Your Employment Rights as an Individual with a Disability,” U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/facts/ada18.html>.

“Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act,” U.S. Equal Employment Opportunity Commission, Mar. 1, 1999, <http://www.eeoc.gov/docs/accommodation.html#contents4>.