

ADA: Frequently Asked Questions (2)

Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](http://www.mtas.tennessee.edu)). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Q11. Is time off under ADA a reasonable accommodation? What if the employee already exhausted all other protected forms of leave such as FMLA?

Generally, the FMLA gives eligible employees up to 12 weeks of unpaid leave per year. Employers are free to discharge employees who cannot return to work after that time is up — that's legal under the FMLA. (Note: In some cases FMLA can go up to 26 weeks). But before you fill out that pink slip, consider whether the employee may be disabled under the ADA. If so, he may be entitled to more time off as an accommodation. The FMLA allows leave for a serious health condition, which may or may not be a disability under the ADA. That's because "serious health condition" and "disability" aren't synonymous. Under the ADA, disability is defined as a condition that substantially limits a major life activity. Thus, a disabled employee (even one who wasn't eligible for FMLA leave because he hadn't worked for his employer for a year or more, or for 1,250 hours in the last year) may be eligible for leave as a reasonable accommodation under ADA.

Q12. Should we be using an ADA request form?

An ADA Reasonable Accommodation Request form for current employees is helpful for your organization. It will also allow you to put a GINA disclaimer on there if necessary. Have your legal counsel review any forms prior to use. A sample form from the state of Alaska uses is available. [1]

Q13. Can an employer use additional information such as scientific, medical or statistical evidence to help determine if a condition is covered under ADA?

According to <http://askjan.org> [2], the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing prohibits the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

Q14. As an employer, may I ask for medical documentation for a condition that is not obvious?

Yes, employers can ask for documentation when an employee requests an accommodation and the disability and or need for an accommodation is not obvious. The documentation required should not be excessive. Instead, the employer's focus should be on the accommodation, determining if it is reasonable and whether there are other accommodations that could be considered.

Q15. I keep reading that the focus should be on the accommodation and not the condition. Does this mean we should just assume all requests are legitimate without checking to see if their impairment falls under the definition of an ADA disability?

No. You should still be sure that the condition or impairment qualifies under the present law. Each situation must be determined on a case by case basis because conditions affect individuals differently. However, the law is clear in that the employer should not have to do extensive research to see if a condition qualifies.

Q16. My employee has an impairment that substantially limits his immune system however, this major life activity is not one that is required to perform his job. Do we still have to accommodate him?

Yes. Don't confuse the definition of disability with an accommodation. Even though he doesn't need his "immune system" working normally to perform work, the employee still has a covered disability and is entitled to an accommodation for any limitations associated with the disability whether significant or not. Perhaps in this case a reasonable accommodation is a plastic panel that helps protect him from germs and infections.

Q17. Am I required to allow a pregnant employee to work from home?

Many courts have held that telecommuting is a reasonable accommodation under ADA. If a pregnancy qualifies under ADA and telecommuting is not an undue burden on the employer then you may be required to allow it as a reasonable accommodation. If your organization allows other disabled employees to telecommute or allows similar positions the option of telecommuting it is likely that you would need to approve such a request.

Q18. When can an employer ask an applicant to "self-identify" as having a disability?

Federal contractors and subcontractors who are covered by the affirmative action requirements of

section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the section 503 affirmative action requirements. Employers who request such information must observe section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records. A pre-employment inquiry about a disability is allowed if required by another federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services. (Source: www.ada.gov [3])

Q19. Can we offer pregnant employees more leave than we offer employees with other temporary disabilities?

Although employers may not treat pregnant employees worse than other temporarily disabled employees, some preferential treatment of pregnant employees may be lawful. In *California Federal Savings and Loan v. Guerra*, 479 U.S. 272 (1987), the Supreme Court held that a state can require employers to provide a benefit to pregnant employees, such as additional leave, which is not granted to other temporarily disabled employees. This decision appears to allow employers to give pregnant employees more leave than is given to other employees.

One caveat should be noted. This preferential treatment may apply only during the period when the employee is actually disabled as a result of the pregnancy. Employers generally must give the same leave benefits to both male and female employees who take parental leave to care for a newborn. Therefore, if you offer female employees leave for childcare when no disability exists, you also should offer male employees equivalent leave.

Q20. Can we discipline a pregnant employee for performance and attendance problems?

Generally, yes. Although a pregnant employee is protected from discrimination, you do not have to tolerate poor performance or attendance simply because she is pregnant. You may hold her to the same work standards as other employees, as long as you apply them consistently. If her performance or attendance problems are related to her pregnancy (for example, she is late to work because of morning sickness or cannot lift boxes as required to perform her job), the PDA requires only that you treat her the same as you would any other employee with a temporary medical condition. Thus, if you allow employees with temporary medical conditions to be late because of their conditions or accommodate their lifting restrictions, you should apply the same standards to a pregnant employee. Note, however, if she is covered under the FMLA, you should take her pregnancy into consideration if her attendance problems are caused by pregnancy-related medical conditions. Absences that qualify as FMLA leave should not be counted when determining whether an employee's attendance problems warrant discipline or discharge.

Q21. Is drug testing permitted under the ADA?

Yes. Public entities may utilize reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs. (Source: www.ada.gov [3])

Links:

[1] <http://doa.alaska.gov/ada>

[2] <http://askjan.org>

[3] <http://www.ada.gov>

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