



NATIONAL EMPLOYMENT LAW INSTITUTE

1101 WASHINGTON AVENUE • GOLDEN, COLORADO 80401
P. O. BOX 1189 • GOLDEN, COLORADO 80402

www.neli.org
neli@neli.org
303-861-5600
(F) 303-861-5665

CHECKLISTS FOR HANDLING ADA ISSUES¹

Prepared for the
National Institutes of Health

(October 22, 2020)

David K. Fram, Esq.
Director, ADA Services
National Employment Law Institute
Golden, Colorado

¹

Nothing in this paper is to be construed as legal advice from Mr. Fram, or NELI.

Checklists for Handling ADA Issues

Table of Contents

ADA Checklist A: Determining Whether Individual Has a Disability	2
ADA Checklist B: Determining Whether Individual is Qualified	6
ADA Checklist C: Whether Individual is Entitled to Reasonable Accommodation ...	8
ADA Checklist D: Determining Whether Individual Poses a Direct Threat	11
ADA Checklist E: Disability-Related Questions and Medical Examinations	14

Checklists for Handling ADA Issues

Author's Note

The following checklists are guides for lawyers, human resource personnel, and supervisors to use when dealing with a variety of ADA issues. The checklists provide the most important questions to be asked and information to be gathered.

ADA Checklist A: Determining Whether Individual Has a Disability

Definition of Disability (for cases arising on or after January 1, 2009): A physical or mental impairment that substantially limits a major life activity, or a “record” of such a condition. The ADA also covers an individual who has been “regarded as” having a disability, which means that s/he was subjected to an allegedly discriminatory action because of an impairment (unless the impairment was minor and transitory).

• Does individual have a current disability?

Does s/he have an impairment? Yes ___ No ___

If yes, what is the impairment? _____

Discuss evidence of the impairment.

Is a major life activity affected by the impairment? Yes ___ No ___

If yes, what is the alleged major life activity?

Walking ___

Speaking ___

Breathing ___

Hearing ___

Seeing ___

Thinking ___

Sitting ___

Standing ___

Reaching ___

Interacting with Others ___

Communicating ___

Learning ___

Performing Manual Tasks (including household chores, bathing, brushing teeth) ___

Bending ____
Caring for Oneself ____
Concentrating ____
Lifting ____
Sleeping ____
Working ____
Reproduction ____
Sexual Functions ____
Eating ____
Controlling Bowels ____
Reading ____
Running ____
Major Bodily Functions ____
Other ____ (Describe)

Does the impairment *substantially limit* the major life activity?

Yes ____ No ____

Discuss what the individual cannot do, as well as what the individual is able to do. Compare the individual's abilities/limitations to those of the average person. [NOTE: For cases arising pre-January 1, 2009: *If* the individual takes medications, uses prosthetic devices, or has learned behavioral modifications to compensate for the impairment, discuss the individual's condition as medicated or otherwise controlled. For cases arising on or after January 1, 2009: Discuss what the individual's condition would be like without medication, mitigating measures, or behavioral modifications.]

How long is condition expected to last?

If the major life activity is "working," identify the class of jobs or broad range of jobs that the individual cannot perform because of the impairment. Also, identify the jobs that are still available to the individual.

• **Does individual claim s/he has a "record of" a disability?**

Does s/he have a record of an impairment? Yes ___ No ___

If yes, what was the impairment? _____

Discuss evidence of the impairment.

Was a major life activity affected by the impairment?

Yes ___ No ___

If yes, what is the alleged major life activity?

Walking ___

Speaking ___

Breathing ___

Hearing ___

Seeing ___

Thinking ___

Sitting ___

Standing ___

Reaching ___

Interacting with Others ___

Communicating ___

Learning ___

Performing Manual Tasks (including household chores, bathing,
brushing teeth) ___

Bending ___

Caring for Oneself ___

Concentrating ___

Lifting ___

Sleeping ___

Working ___

Reproduction ___

Sexual Functions ___

Eating ___

Controlling Bowels ___

Reading ___

Running ____
Major Bodily Functions ____
Other ____ (Describe)

Did the impairment *substantially limit* the major life activity?

Yes ____ No ____

Discuss what the individual was unable to do (in the past), as well as what s/he was able to do. Compare the individual's abilities/limitations to those of the average person. [NOTE: For cases arising pre-January 1, 2009: *If*, in the past, the individual did not take medications, use prosthetic devices, or modify his/her behavior to compensate for the impairment, discuss the individual's condition as unmedicated or otherwise uncontrolled. For cases arising on or after January 1, 2009: Regardless of whether the individual controlled his condition in the past, analyze what the individual's condition would have been without medication, mitigating measures, or behavioral modifications.]

How long did the condition last?

If the major life activity was "working," identify the class of jobs or broad range of jobs that the individual was unable to perform because of the impairment. Also, identify the jobs that were still available to the individual.

• **Has individual been "regarded as" having a disability?**

Does s/he claim that s/he has been subjected to an allegedly discriminatory employment action because of an actual or perceived impairment?

Yes ____ No ____

Is the impairment minor and transitory? Yes ____ No ____

ADA Checklist B: Determining Whether Individual is Qualified

Definition of Qualified: The individual with a disability has the background required for the job, and he/she can perform the *essential functions* of the job (either without any accommodations, or with a reasonable accommodation).

- **Does the individual have the required skill, education, and experience for the job, and does s/he meet other qualification standards? Yes ___ No ___**

If no, does the individual claim that s/he is being denied the position because of a qualification standard that screens him/her out because of disability? Yes ___
No ___

If yes, what is the qualification standard at issue? (Describe)

Why does the individual claim his/her disability keeps him/her from meeting the qualification standard? (Describe)

If the qualification standard screens out the individual because of disability, is it "job-related and consistent with business necessity" (i.e., is it necessary to perform an essential function of the job or to prevent direct threat)? (Discuss)

- **What are the "functions" of the job (as distinguished from the ways of performing those functions)?**

- **What are the "essential" functions of the job?**

What evidence/documentation supports this determination?

Employer's judgment ____

Written job description ____

Amount of time spent performing function ____

Consequences of not performing function (Discuss) ____

Terms of collective bargaining agreement (Discuss) ____

Experience of current employees in position ____

Experience of past employees in position ____

Nature of work operation (Discuss) ____

Organizational structure (Discuss) ____

Other (Discuss) ____

• **What are the "marginal" functions of the job?**

What evidence/documentation supports this determination?

• **Can the individual perform the essential functions of the position, either without a reasonable accommodation or with a reasonable accommodation (if needed)?**

Yes ____ No ____

If yes, does individual need a reasonable accommodation? Yes ____ No ____ (If yes, fill out Checklist C on Reasonable Accommodation).

ADA Checklist C: Whether Individual is Entitled to Reasonable Accommodation

Definition of Reasonable Accommodation: A workplace modification so the individual with a disability can apply for a job, perform the essential functions of the job, and enjoy the job benefits. An employer doesn't need to provide a reasonable accommodation that causes an "undue hardship."

- **What category of "disability" does the individual claim ("current," "record of," or "regarded as")? (See Checklist A for Determining Disability)**
- **Has the reasonable accommodation process been triggered because the individual has requested a job modification because of a medical condition that could be a disability? Yes ___ No ___ (Describe)**
- **Has the reasonable accommodation process been triggered because the employer knows the individual has a disability and has reason to know that the individual needs a reasonable accommodation? Yes ___ No ___ (Describe)**

If the reasonable accommodation process has been triggered:

- **In which aspect of employment is reasonable accommodation needed?**

Application process ___

Performance of job (including leave) ___

Benefits and privileges of employment ___

• **What accommodation (if anything specific) was requested?**

- Equipment or Machinery ____
- Reader ____
- Interpreter ____
- Modification of Policy (including Leave Policy) ____
- Accessibility ____
- Job Restructuring (Reallocation of Marginal Functions) ____
- Modification to Work Schedule ____
- Examinations/Training Materials ____
- Reassignment ____
- Other ____

Describe accommodation requested:

• **Is the reasonable accommodation needed *because of* disability? Yes ____ No ____**
(Discuss)

• **Did you engage in "interactive process" to identify an effective accommodation?**
Yes ____ No ____

Did you discuss accommodation with the individual? Yes ____ No ____

If yes, document discussions (include attachments, if necessary).

Did you request assistance in determining accommodation from any outside source (e.g., the Job Accommodation Network)? Yes ____ No ____

If yes, document discussions (include attachments, if necessary).

• **Has accommodation been provided? Yes ____ No ____**

If yes, is accommodation effective (i.e., does it work?) Yes ____ No ____ (Discuss)

- **Do you claim that providing reasonable accommodation would impose an undue hardship? Yes ___ No ___**

If yes:

What evidence exists to support undue hardship?

Nature and net cost of accommodation (taking into account availability of tax credits and deductions, and/or outside funding) ___

Overall financial resources of facility/facilities, number of employees at facility, and effect on expenses and resources ___

Overall financial resources of covered entity, overall size of business of covered entity with respect to the number of employees and the number, type and location of facility/facilities ___

Type of operation(s) of covered entity, including composition, structure, and functions of the workforce of covered entity, and geographical separateness and administrative or fiscal relationship of facility/facilities in question to the covered entity ___

Impact of the accommodation on the operation of the facility, including impact on other employees' ability to perform duties and facility's ability to conduct business ___

Terms of a collective bargaining agreement (Discuss how the accommodation would affect the rights of other employees, and whether you tried to negotiate a change to CBA) ___

Describe and document evidence supporting undue hardship:

ADA Checklist D: Determining Whether Individual Poses a Direct Threat

Definition of Direct Threat: The individual with a disability poses a *significant risk of substantial harm* to him/herself or others, and there is not a reasonable accommodation that would lower the risk or harm below that level.

- **Is the employee being screened out for safety-related reasons? Yes ___ No ___**

If yes:

Is the specific risk identified? Yes ___ No ___

What is the risk (e.g., contagion, injury, etc.)? (Describe)

Is the risk significant (i.e., highly probable)? Yes ___ No ___

What is the duration of the risk? (Describe)

Is the specific harm identified? Yes ___ No ___

What is the harm? (Describe)

Is the harm substantial (i.e., serious)? Yes ___ No ___

Is the harm imminent? Yes ___ No ___

- **Can the risk or the harm be reduced by providing reasonable accommodation?
Yes ___ No ___**

- **Did you engage in "interactive process" to identify an effective accommodation?
Yes ___ No ___**

Did you discuss accommodation with the individual? Yes ___ No ___

If yes, document discussions (include attachments, if necessary).

Did you request assistance in determining accommodation from any outside source (e.g., the Job Accommodation Network)? Yes ___ No ___

If yes, document discussions (include attachments, if necessary).

Has an accommodation been provided? Yes ___ No ___

If yes, is the accommodation effective (i.e., does it work?) Yes ___ No ___
(Discuss)

- **Do you claim that providing reasonable accommodation would impose an undue hardship? Yes ___ No ___**

If yes:

What evidence exists to support undue hardship?

Nature and net cost of accommodation (taking into account availability of tax credits and deductions, and/or outside funding) ___

Overall financial resources of facility/facilities, number of employees at facility, and effect on expenses and resources ___

Overall financial resources of covered entity, overall size of business of covered entity with respect to the number of employees and the number, type and location of facility/facilities ___

Type of operation(s) of covered entity, including composition, structure, and functions of the workforce of covered entity, and geographical separateness and administrative or fiscal relationship of facility/facilities in question to the covered entity ____

Impact of the accommodation on the operation of the facility, including impact on other employees' ability to perform duties and facility's ability to conduct business ____

Terms of a collective bargaining agreement (Discuss how the accommodation would affect the rights of other employees, and whether you tried to negotiate a change to CBA) ____

Describe and document evidence supporting undue hardship:

ADA Checklist E: Disability-Related Questions and Medical Examinations

The Basic Rules on Asking Questions and Requiring Examinations:

- 1. Before an offer of employment, applicants can't be asked disability-related questions, and can't be given medical exams.**
- 2. After the employment offer and before the person starts work, these questions don't violate the ADA if asked of everyone coming on board into that position.**
- 3. After an employee starts work, the employer may only ask disability-related questions and give medical exams if they're job-related and consistent with business necessity.**

The Basic Rules on Confidentiality:

“Medical” information must be kept confidential with the following limited exceptions:

- 1. Supervisors and managers may be told about work restrictions and about necessary accommodations.**
- 2. First aid and safety workers may be told *if* the disability might require emergency treatment.**
- 3. Information may be given to government officials investigating ADA compliance, to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers, and may be used for insurance purposes.**
- 4. EEOC also allows employers to provide relevant information to a union if the employer is seeking to provide an accommodation that conflicts with a collective bargaining agreement.**

- **Is the question "disability-related" (i.e., is it likely to elicit information about a disability)?** Yes ___ No ___ (If "no," then this section of the ADA is not implicated.)
- **Is the examination "medical"?** Yes ___ No ___ (If "no," then this section of the ADA is not implicated.)

Identify factors below that support this determination:

Is the test administered by a health care professional or someone trained by a health care professional? Yes ___ No ___ (Discuss)

Are the test results interpreted by a health care professional or someone trained by a health care professional? Yes ___ No ___ (Discuss)

Is the test designed to reveal an impairment or physical or mental health? Yes ___ No ___ (Discuss)

Is the employer is trying to determine the applicant's physical or mental health or impairments? Yes ___ No ___ (Discuss)

Is the test invasive (for example, does it require the drawing of blood, urine or breath)? Yes ___ No ___ (Discuss)

Does the test measure an applicant's performance of a task, *or* does it measure the applicant's *physiological responses* to performing the task? (Discuss)

Is the test normally given in a medical setting (for example, a health care professional's office)? Yes ___ No ___ (Discuss)

Is medical equipment used for the test? Yes ___ No ___ (Discuss)

· **If the question is "disability-related" or if the examination is "medical," at which stage of the employment process is the question asked or the examination given?**

Pre-Offer Stage ____

Post-Offer Stage ____

Employment Stage ____

What evidence supports the conclusion that this is the stage of the employment process?

· **Does the individual claim that the employer has violated the ADA's obligation to hold medical information "confidential"? Yes ____ No ____**

If so, to whom does the individual claim that medical information has been disclosed? (Discuss)