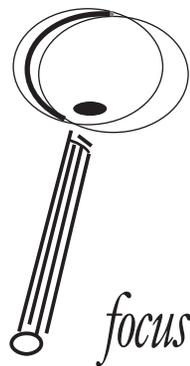


# 1

## Legal Considerations in the Hiring Process



### *Learning Objectives*

By the end of this chapter, you will be able to:

- Identify the key employment laws related to hiring.
- Describe your organization's responsibilities regarding negligent hiring and retention.
- Determine what records relating to hiring and firing you must keep and for how long.
- Complete Immigration Eligibility Form I-9 correctly for all employees.
- Determine whether your organization is obligated to have an affirmative action plan and, if so, what it must contain.
- Determine appropriate and necessary "reasonable accommodations" that must be made under the Americans with Disabilities Act (ADA).

Estimated timing for this chapter:

Reading	1 hour 20 minutes
Exercises	70 minutes
Review Questions	10 minutes
Total Time	2 hours 50 minutes

### LEGAL ISSUES IN HIRING

Before we can describe the step-by-step process of locating, recruiting, and hiring new employees, we need to describe the legal and regulatory environment in which it happens. The ways in which you search for candidates, the

process by which you interview and research your candidates, and the decisions about which candidates to hire all have potential legal consequences.

HR professionals and hiring managers both need to know the requirements under which they operate. Please note that the list here is not necessarily exhaustive; in addition, laws, court decisions, and regulations all evolve over time. Keeping up to date with the legal environment takes constant vigilance.

## **KEY EMPLOYMENT LAWS RELATED TO HIRING**

The proliferation of worker protection laws over the past forty years has severely limited employers' discretion in their dealings with individual workers. To see how far we've come in the past half century, all we need to do is think back to the 1930s, when company foremen chose hungry and unemployed workers off lines outside the facility gate for a day's work. One mistake and the worker was fired—only to be replaced by the next poor soul waiting in line.

Flash ahead to the 1960s: Thirty-three black sanitation workers were fired for seeking union representation, bringing Martin Luther King, Jr., to Memphis to meet his untimely death. Even today, labor laws are still changing to meet the needs of particular employee groups: doctors and engineers contemplate union representation to improve working conditions, wages, and benefits. The Americans with Disabilities Act continues to be refined and clarified, allowing greater benefits to American workers through stricter interpretation of its standards.

The blistering pace of technology unleashes new tools like cell phones and the Internet, which were supposed to make life easier for all of us. Instead, they have accelerated our expectations for work turnaround. Techno-stress led to workers' compensation stress claims and unparalleled incidents of workplace violence. The breakdown of the modern nuclear family led to the passage of the Family and Medical Leave Act (FMLA), a labor standard and leave law that mandated that employers allow employees time to take care of family medical emergencies. And on top of all this, legislators increased penalties against employers by including punitive damages that could render an organization bankrupt for failing to meet any of a multitude of laws enacted to protect individuals.

Although we employers may see ourselves as the victims of the law of unintended consequences and a judiciary run amok, with overly aggressive plaintiff attorneys looking for unlawful motives in even our most benevolent actions, we could all agree that we wouldn't want to go back. The twentieth century was one of stunning progress for American workers. The pace of legal change continues faster than ever. The key, however, remains in our finding a balance between companies' prerogatives and employees' rights.

### **Employment Laws According to Company Size**

For the most part, the laws that govern our companies are fair and practical. Of course, all it takes to file a lawsuit in many venues is a simple form and a nominal application fee. Still, we need to understand the umbrella of laws

that govern the workplace—not only to avoid or minimize lawsuits but also to be perceived as fair employers who look to increase profits and productivity while respecting our workers’ needs for privacy, respect, and satisfaction.

The easiest way to classify employment laws is according to company size. The larger your company, the more the laws that govern it. The laws in Exhibit 1-1 apply to all organizations as long as they employ even a single person. The laws in Exhibit 1-2 are sorted according to company employment size, starting with fifteen or more people.

# E

## Exhibit 1-1

### Key Employment Laws for All Employers Regardless of Size

Laws and Other Employment Provisions That Govern Your Company	General Guidelines
Federal and state wage and hour laws	When state and federal laws conflict, generally the law that is more generous to the employee must be followed. Federal wage and hour law is regulated by the Fair Labor Standards Act (FLSA) and is enforced by the U.S. Department of Labor’s Wage and Hour Division.
Unemployment and disability insurance	With few exceptions, federal and state unemployment insurance laws cover all employers.
Immigration Reform and Control Act (IRCA)—employment verification	Form I-9 must be completed for every employee hired after November 6, 1986, in order to verify eligibility to work in the United States.
Child labor laws	Employers generally must acquire a work permit before employing a minor.
Time-off provisions	All states require employers to provide time off for certain activities like jury duty, voting, emergency duty as a volunteer firefighter, and military service.
Posting and notice requirements	All employers are required to display certain posters relating to harassment/discrimination, safety and health, unemployment and disability insurance, and state and federal minimum wage requirements. Other notices may include information sheets regarding sexual harassment and workers’ compensation claims.
Occupational Safety and Health Administration (OSHA)	All employers must comply with both federal and state health and safety laws.
Uniformed Services Employment and Re-Employment Rights Act (USERRA) of 1994	Congress provides additional benefits and job protection for individuals returning to civilian employment after serving in the military (including those with military-related disabilities).

**E****Exhibit 1-2  
Employment Laws by Employer Size**

<b>Company Size</b>	<b>Laws and Other Employment Provisions That Govern Your Company</b>	<b>General Guidelines</b>
Fifteen or more employees	Title VII of the Civil Rights Act of 1964	Title VII stipulates that employers may not discriminate on the basis of race, color, religion, sex, or national origin. The Civil Rights Act of 1991 amended Title VII to include the right to jury trials and punitive damages.
	Sexual harassment prohibitions	The sexual harassment provisions of the Civil Rights Act apply to employers with 15 or more workers. Employers must take all reasonable steps to prevent harassment from occurring. Harassment on the basis of sex generally includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical condition.
	Pregnancy Discrimination Act of 1978	Broadens the definition of sex discrimination under Title VII to include pregnancy, childbirth, or related medical conditions. Prohibits employers from discriminating against pregnant women in employment benefits if they are capable of performing their job duties.
	Americans with Disabilities Act (ADA) and the important 2008 ADAAA (Americans with Disabilities Act Amendments Act)	The ADA requires that companies accommodate qualified individuals with disabilities. Note that this law covers not only employees but also extends to job applicants. The ADAAA of 2008 broadens the definition of a "disability" in response to a series of Supreme Court decisions that narrowed coverage earlier in the decade.
	The Genetic Information Nondiscrimination Act of 2008 (GINA)	Employers may not discriminate against employees or job applicants based on genetic information. The Act also strictly limits the disclosure of genetic information.

**Exhibit 1–2 continues on next page.**

**Exhibit 1-2** continued from previous page.

<b>Company Size</b>	<b>Laws and Other Employment Provisions That Govern Your Company</b>	<b>General Guidelines</b>
Twenty or more employees	Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and Health Insurance Portability and Accountability Act (HIPAA) of 1996	Any employer with a group insurance plan who has twenty or more employees must extend COBRA rights to continued benefits under the plan to all qualified beneficiaries. COBRA allows employees who might otherwise lose their health coverage to continue coverage through their ex-employer's group plan at their own expense. HIPAA requires employers to provide terminating employees with a notice advising them of the availability of continued health insurance coverage.
	Age Discrimination in Employment Act of 1967 (ADEA)	Prohibits discrimination in employment against persons forty years of age or older. Exceptions are permitted where age is a bona fide occupational qualification. All public sector employers are covered regardless of the number of employees. For private sector employers to be covered, however, they must employ twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year.
	Equal Pay Act of 1963	The Equal Pay Act requires all employers covered by the FLSA to provide equal pay for equal work, regardless of sex.
Fifty or more employees	Family and Medical Leave Act (FMLA)	Companies are required to provide unpaid leaves of absence to a maximum of twelve weeks and to guarantee employees the right to return to their jobs if they need to tend to their own or a family member's serious health condition or to bond with a newborn child.
	Affirmative Action Plans (AAP)	Federal and state contractors with fifty employees and \$50,000 or more in government contracts must develop a written affirmative action plan.
100 or more employees	Worker Adjustment and Retraining Notification Act (WARN)	Companies must provide sixty days' notice before laying off or terminating fifty or more employees.

This section will serve as a primer and overview of the pertinent laws. You'll find more information about these laws throughout the text. Remember that the legislature's intent in passing these laws was to protect American workers from company abuses; however, plaintiff attorneys will use these same statutes *against* your company as proof that you violated the law. As a result, special consideration should be given to any employee who falls within the protections of the laws listed in the tables.



### Exercise 1-1 Which Laws Apply to You?

In each space, write "Yes" if the law applies to a company with that many employees, and write "No" if it does not.

*Answers to this exercise and most subsequent exercises can be found in the section of this course titled "Answers to Exercises and Case Studies," located at the back of the course.*

Law	9 employees	22 employees	117 employees
FMLA			
Title VII			
IRCA			
WARN			

## NEGLIGENT HIRING AND RETENTION

Before the recent upswing in negligent hiring and negligent retention lawsuits, companies were generally held liable only for the negligent and intentional acts of their employees committed during the course and scope of employment. However, during the 1990s, the negligent hiring/negligent retention doctrine dictated that injured third parties could sue employers if an employee committed a crime even if the employee was not engaged in the furtherance of the employer's business.

In other words, employers may now be generally held liable for the criminal or violent acts of their employees that occur outside the workplace, after working hours, or outside the course and scope of employment. Therefore, it is critical to conduct pre-employment background investigations before extending employment offers to job applicants. In addition, an employer's failure to take appropriate disciplinary measures against existing employees in the form of retraining, reassignment, rescheduling, or termination may likewise subject a company to legal exposure.

Hiring candidates without performing reference or background checks

is like having a loose cannon on the deck of your ship. Not only do you have a legal duty to select fit and competent employees, but you should also be aware that punitive damages may be awarded if it is determined that you hired or retained an employee with a “conscious disregard of the rights or safety of others” or because you “knew or should have known of the employee’s unfitness for the job.” Therefore, conduct thorough reference and background checks. Likewise, the best way to combat negligent retention claims is to conduct timely and thorough investigations of complaints and to reach a reasonable conclusion.

### **Importance of Reference and Background Checks**

The most effective way to combat exposure to a negligent hiring claim is to conduct reference and background checks on all finalist job applicants. Whereas reference checks are business communications between companies regarding applicants’ job performance track records, background checks rely on outside agencies to research court records for information related to criminal convictions, DUIs, and the like.

It’s critical that you document your reference check feedback and place that information in the job requisition folder—not the new hire’s personnel file. (After all, employees have access to their personnel files, and information shared by past employers about their strengths or weaknesses is confidential.) This way, should you ever be charged with negligent hiring, you can demonstrate that you acted responsibly in checking with past employers, confirming dates and titles of employment, accounting for gaps in employment, and investigating the applicant’s performance history.

Background investigation reports may likewise be placed in job requisition folders. However, it is advisable to ask your background investigation company to retain all records related to individual searches. This way, there is less likelihood that the information will be misplaced or inappropriately discovered. Simply stated, there may be highly sensitive information in a background check that you simply don’t want any coworkers to have access to.

Legal liability also exists when companies fail to investigate or to appropriately discipline or terminate an employee once they learn (actual knowledge) or should have learned (constructive knowledge) of an employee’s criminal actions, history of drug or alcohol abuse, or other problems involving an unreasonable risk of harm to others. An employer’s failure to take appropriate disciplinary action may be viewed as an authorization or ratification of the employee’s conduct after the fact.

Negligent hiring and retention claims represent a serious threat to your business operations, especially if you hire individuals whose work activities may affect the health and safety of coworkers and the public (such as employees who deal regularly with customers in their homes or who operate motor vehicles). Such claims may surface any time you hire a new job applicant or learn of harm that results from an employee’s negligent or reckless conduct. Treat such instances seriously by exercising reasonable care and taking appropriate remedial action before others are placed at risk.

## RECORD-KEEPING REQUIREMENTS

Records retention is a critical part of the hiring (and for that matter, termination) process. The paper record that you create and save as an employer will help you avoid legal liability or at least reduce its risk. Federal as well as state law governs retention of information gathered or evaluated in the employee selection or termination process. Sometimes these laws stipulate conflicting requirements. As a result, you should use caution when discarding any routine or nonroutine records that will help you substantiate any employment-related decision that could later be challenged.

### Specific Employment Laws Relating to Hiring with Record-Keeping Requirements

The following laws stipulate different, and sometimes conflicting, record retention requirements:

- Title VII of the 1964 Civil Rights Act
- Fair Labor Standards Act (FLSA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Americans with Disabilities Act (ADA)
- Immigration Reform and Control Act of 1986 (IRCA)
- Unemployment insurance codes
- Employee Retirement Income Security Act of 1974 (ERISA)
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

Exhibit 1-3 summarizes the types of records that must be retained and the length of time you must retain them. For the sake of simplicity, we'll choose the longest time retention requirement period that these sometimes-conflicting laws stipulate. For example, Title VII requires that employers retain payroll records for one year; FLSA requires three years; the Unemployment Insurance Code requires four years. Therefore, the appropriate line in Exhibit 1-3 stipulates that four years is the appropriate minimum time period to retain these records.

Be aware, however, that certain records, such as pension plan documents, should be retained permanently. Speak with qualified counsel regarding your specific questions and about your state's particular requirements.

**E****Exhibit 1-3  
Record-Keeping Requirements**

<b>Type of Employment Data</b>	<b>Retention Requirement</b>
Job applications, résumés, and employment referral records	Two years
Help wanted advertisements, job posting notices sent to employment agencies or labor unions	Two years
Employment eligibility verification (Form I-9)	Three years
Individual employee contracts	Five years (state law governs the retention period for individual contracts and generally varies from five to fifteen years after the contract expiration)
Employee personnel files, including disciplinary notices, promotions, demotions, discharge, training, tests, transfers, layoffs, or performance evaluations	Two years (although many employment experts recommend retaining such documents for seven years after an employee leaves your company)
Company policy and procedure manuals or employee handbooks	Ten years after they have been superseded or replaced by another manual or by other policies
Payroll records	Four years
Union contracts/collective bargaining agreements	Six years after contract expiration (in case the union challenges the employer on its failure to bargain properly)
Layoff selection criteria and the necessary post-layoff statistical analysis of the remaining workforce	Five years
ERISA (related to severance packages or early retirement incentive plans) notification	Six years (should actions alleging breach of fiduciary duty arise)
COBRA notification	Six years



## Exercise 1-2 Cleaning Day

Your company has just acquired one of its competitors, and you have to consolidate the personnel records of both companies. The acquired company was ten years old, and has never had a records retention policy, so they've kept everything. What should you do with the following records?

Type of Record	Disposition
Collective bargaining agreement between the old company and its union that expired at the time of the acquisition	
Payroll records for all employees of the old company	
General employee files for all employees of the old company	
Copies of I-9 forms for employees of the old company	

## IMMIGRATION ELIGIBILITY FORM I-9

As an employer, you are responsible for completing a Form I-9 for everyone you have hired after November 6, 1986. I-9s appear to be an administrative burden for most employers, but that's because many companies fail to appreciate their responsibility in protecting our heritage of legal immigration. America has always been and will always be a melting pot, but the goal of the Immigration Reform and Control Act of 1986 (IRCA) is to ensure that American companies employ only persons who have the legal right to work in the United States. That way, illegal aliens will not displace competent, qualified American workers or undermine prevailing wage standards.

IRCA also attempts to prohibit discrimination against "protected individuals," including citizens or nationals of the United States, lawful permanent residents, temporary residents, and persons granted refugee status or asylum status. Employers may not discriminate against employees on the basis of national origin or citizenship status. Note, however, that on an individual basis, you have the right to hire a U.S. citizen or national over an equally qualified alien to fill a specific position. However, you may not adopt a blanket policy of *always* preferring a qualified citizen over a qualified alien.

### Requirements of the Immigration Reform and Control Act of 1986 (IRCA)

Specifically, the IRCA requires that you:

1. Ensure that your new hires fill out Section 1 of Form I-9 on the day they start work.
2. Review documents that are presented to you in order to establish each employee's identity and eligibility to work.
3. Properly complete Section 2 of Form I-9 within seventy-two hours of a new hire's start date.
4. Retain Form I-9 for three years after the date of hire or one year after the person's employment is terminated, whichever is later.

Make Form I-9 available for inspection to an officer of the U.S. Immigration and Customs Enforcement, Department of Labor (DOL), or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) upon request.

### Documentation Requirements

When new hires fill out Section 1 of the I-9 form, they must be sure to sign and date the document (in the middle of the page above Section 2) on their first day of employment. Furthermore, they must be sure to check one of the three check boxes indicating whether they are:

- Citizens
- Lawful permanent residents (those authorized to work via a green card)
- Aliens authorized to work here for a specified period of time (for example, those on H-1B worker visas)

When new hires present you with documents that establish their identity and eligibility to work, you must examine the documents personally. If they appear on their face to be genuine, you must accept them. If you unnecessarily challenge a new hire's documentation or demand more than what Form I-9 asks for, you could be engaging in an unfair immigration-related employment practice. That could be seen as a form of unlawful discrimination. On the other hand, if the documents don't appear to be genuine or to relate to the person presenting them, then you must not accept them.

Okay, easy enough, but what should you do if the person is unable to provide you with the required documents? If the employee lost her Social Security card, simply inform her that as a means of demonstrating employment eligibility, she must produce a *receipt* showing that she has applied for a replacement document. For example, she can fill out Form SS-5 at the local Social Security Administration in order to receive a receipt of application for the Social Security card. Once hired, that individual must present the actual document to you within ninety days of hire. In addition, the new hire must confirm that she is already eligible to be employed in the United States.

Furthermore, if the individual doesn't produce the original document or a receipt within three days of hire, you have the right to terminate employment. Similarly, if the employee has presented a *receipt* for a document but isn't able to produce the *original* document by the ninetieth day of employment, you again have the right to terminate employment. However, you're obliged to apply these practices uniformly to all employees.

## Inspection of Records

Finally, if someone from U.S. Immigration and Customs Enforcement shows up at your door, be ready. The officer will typically give you three days' (seventy-two hours') notice of an inspection. The officer does not need to show you a subpoena or warrant at the time of the inspection. You may request an immediate extension of time in which to produce the I-9s, but you should consider calling a qualified attorney who specializes in immigration law immediately. In addition, penalties for prohibited practices can be stiff and include both civil and criminal fines and/or imprisonment.

The lesson here? Be careful, folks—this law has sharp teeth! Awareness of the requirements and a few simple precautions should help eliminate the risk of penalties should your company incur an unwanted INS visit. For more information, contact your local INS office for a copy of the free booklet *Handbook for Employers: Instructions for Completing Form I-9*.

## AFFIRMATIVE ACTION

Are you obligated to have an affirmative action plan? Possibly.

Simply stated, an affirmative action plan is a management tool designed to ensure equal employment opportunity. Affirmative action plans aren't required of all employers. However, employers and subcontractors who enter into contracts with the federal government and certain public sector employers such as community colleges and school districts are required to have such plans. In addition, affirmative action obligations may be imposed on companies as part of a court-approved agreement (for example, following the finding of employment discrimination in a class-action lawsuit). Finally, companies may voluntarily elect to have affirmative action plans in an effort to correct imbalances against protected classes in traditionally segregated job categories.

More specifically, government contractors and subcontractors with fifty or more employees and contracts of \$50,000 or more are prohibited from discriminating against any employee or applicant for employment on the basis of race, color, religion, sex, or national origin. These employers are required to have a written plan and to take affirmative efforts in employment and promotions so that minorities and women will be employed at all levels in the workforce.

Affirmative action imposes on employers the duty to take positive steps to identify discrimination against protected classes and to improve work opportunities for women and minorities. Affirmative action, as its name implies, requires a company to proactively reach out to qualified members of groups that were formerly excluded from hiring and promotional opportunities. The concept is fairly simple: Unless companies aggressively combat the effects of unintended discrimination, the status quo will remain, and protected groups of employees will continue to be excluded from equal employment opportunities.

The mechanics of affirmative action plans are complicated and go well beyond the scope of this course. However, suffice it to say that one of the key

challenges in any company's affirmative action plan is quantifying the results of its outreach efforts. That, in turn, involves determining areas of workforce underrepresentation via a current workforce analysis, geographic labor force analysis by race and sex, a corrective action plan with goals and timetables for correcting any underutilization, and a self-audit system.

### **Developing an Affirmative Action Plan**

If your company already has or needs to develop an affirmative action plan, chances are that you'll retain the services of a law firm or qualified consulting firm. One of the most common challenges you'll face on a day-to-day basis, however, will lie in your applicant flow log. An applicant flow log records all the information used by the Office of Federal Contract Compliance Programs (OFCCP) to determine what positions were open during a reporting period, who applied for them, their race, sex, and who was ultimately hired to fill the position. Under federal equal opportunity and affirmative action laws as well as the laws of many states, companies are obligated to maintain personnel activity data, including data on the race and sex of applicants.

The reason for this is that government audits and discrimination investigations partially focus on gathering information on all applicants who have applied for positions and comparing those flow statistics to current workforce demographics. In addition, employers must also analyze these applicant flow statistics for adverse impact. Adverse impact occurs when the selection rate for any protected group is less than 80 percent of the rate of selection for the group with the highest selection rate (for example, white males). A protected group or class is any group of people who are protected by the law against discrimination (for example, women and minorities).

### **Defining "Applicant"**

Defining what an "applicant" is takes on critical importance in cases of audits and investigations. The EEOC doesn't help much here. Historically, federal enforcement agencies like the Equal Employment Opportunity Commission (EEOC) and OFCCP have looked to the EEOC's *Uniform Guidelines on Employee Selection Procedures* for a definition.

The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form or might be expressed orally, depending on the employer's practice.

Furthermore, in the eyes of the OFCCP, "Whether an individual will be considered an applicant turns on the employee selection procedures designed and utilized by the contractor." This definition serves employers well because the newer interpretation has generally said: Look to the employer's definition of an applicant when determining applicant flow statistics.

On the other hand, these definitions are susceptible to review and redefinition over time. As a matter of fact, in the absence of an employer's defining just who is an applicant, courts may use their own discretion in formulating a definition. Of course, that's bad for employers because mass mailings, online résumé dissemination, and Internet job database retrieval all expand the pool

of candidates to a point of distortion. Therefore, your best bet is to define an applicant in writing and to apply that definition on a consistent basis. For example, you might define an applicant as “an individual who applies in person by completing an official company employment application or by delivering a résumé and thus whose race and sex may be determined.” You can also add wording to specify that “an applicant is also an individual who is interviewed by an authorized company representative.”

By employing such a practical, focused definition, you'll avoid having to include job applicants in your applicant flow log who:

- Have had their résumés downloaded from the Internet but haven't been called in for an interview.
- Have forwarded unsolicited résumés on their own volition but haven't been called in for an interview.
- Have forwarded “solicited” résumés in response to an advertisement but weren't called in for an interview.

These individuals are screened out of the applicant flow log according to the definition given earlier because their race and sex cannot be identified (unless and until they are called in for an interview). Of course, you'll still need to retain those résumés; you can't just discard them. But you'll make your life a whole lot easier at the time of an EEO audit or investigation by restricting the number of “applicants” who must be counted in your flow log.

There are volumes of information relating to affirmative action plans. As in all matters with such serious legal implications, refer your specific questions to qualified legal counsel for further information.

## **AMERICANS WITH DISABILITIES ACT (ADA)**

The Americans with Disabilities Act (ADA) is a civil rights-oriented antidiscrimination law. It is intended to bring disabled individuals into the workplace by promoting and expanding employment opportunities for approximately 43 million Americans who have one or more physical or mental disabilities. In addition, the ADA doesn't merely prohibit discrimination against people with disabilities. It imposes additional affirmative obligations upon businesses to accommodate the needs of the disabled and to facilitate their economic independence.

As far as job applications and tests are concerned, employers are obligated to accept and consider applications from disabled individuals equally with nondisabled persons. The ADA doesn't prohibit companies from establishing job-related qualification standards, including education, skills, work experience, or physical or mental standards necessary for job performance, health, and safety. However, companies may not use those standards to screen out individuals on the basis of a disability unless those standards are consistent with a particular business necessity.

It follows that the Equal Employment Opportunity Commission (EEOC)

will closely scrutinize the job relatedness of any written or physical tests given to disabled job applicants that are not also given to nondisabled candidates. Still, your company retains the right to hire an applicant without a disability over one with a disability if the nondisabled applicant is more qualified for the job. In such cases, the determination of superior qualifications must be based on objective hiring criteria, not on criteria that could discriminate on the basis of disability.

The Americans with Disabilities Act (ADA) has made the hiring process a legal minefield for employers. Not only must the employer phrase interviewing questions with extreme care, employers are also required to make reasonable physical accommodations for disabled job applicants.

### **Reasonable Accommodations**

Whether job applicants have mobility limitations or sight or hearing impairments or suffer from chronic conditions like degenerative muscular disorders, your company should be able to provide assistance while allowing individuals to maintain their self-respect. These are known as “reasonable accommodations,” and they’re required under ADA.

Examples of such “reasonable accommodations” might include providing sign readers or interpreters for the mute or deaf or providing a reading enlarger machine or exams in Braille for the blind or nearly blind. In addition, blind candidates may be given exams orally rather than in writing. The bottom line is that if someone is capable of doing the job with this kind of help, you may not discriminate against them in employment and you must make the accommodation.

### **Interviewing Issues Under ADA**

When it comes to interviewing questions, the ADA requires that employers phrase their questions with extreme care. For example, it is unlawful to ask the following questions of job applicants:

- Are you disabled?
- Do you have any disability that would prevent you from doing this job?
- Will you need any sort of accommodation or special equipment to perform the job duties?
- How many days were you sick last year?
- Have you ever attended a drug or alcohol rehabilitation program?
- Are you capable of lifting two-pound cans?

Okay, now that you know what you *can't* ask; what *can* you ask? The simple litmus test is this: ADA interviewing questions must focus on a candidate's *ability* to get the job done, not on the likelihood that the *disability* will get in the way. Consequently, the question, “Can you perform the essential functions of this job with or without accommodation?” is allowable. Furthermore, you can ask, “Are you capable of lifting two-pound cans and placing them on five-foot shelves in the order of their date of receipt?”

Phrasing the question this way (as opposed to how it's phrased earlier,

“Are you capable of lifting two-pound cans?”) is allowable because it relates to the actual job duties. Focusing on specific abilities relative to job performance is allowable; focusing on abilities in general could land you in hot water if a rejected applicant files a complaint with the EEOC or pursues a private lawsuit.

You also can't ask how many *sick days* the employee took that year. However, you have the right to ask, “How many days of unscheduled leave have you incurred this year?” The difference in phraseology is simply this: “Sick days” relate directly to medical conditions that may be covered by the Act. “Unscheduled leave days,” on the other hand, may have nothing to do with illness or injury; instead, they may have to do with taking unscheduled vacation days or an unapproved personal leave of absence.

An additional note of interest: Once an applicant is given a conditional job offer, you are permitted to require the individual to undergo a physical or medical exam. Physical fitness tests are not medical exams. These types of tests measure abilities, not disabilities, and may therefore be given in the pre-employment process (before extending a conditional employment offer). For example, physical fitness tests often include strength, speed and power, flexibility, and endurance assessments. Similarly, a test to determine whether an employee is using drugs is not considered a medical exam under the ADA. You may likewise conduct drug tests designed to accurately identify illegal drugs before a conditional job offer is made. Of course, you must ensure that such exams are given uniformly to all candidates. The results of the exam must be kept in a separate, confidential file and used only for legally permissible purposes of evaluating candidates' suitability for the job.

Finally, if a medical exam screens out an applicant from employment, you must be able to demonstrate that the requirements that excluded the individual from employment are job-related and consistent with business necessity. Furthermore, you must also be able to demonstrate that the individual can't perform the job duties even with a reasonable accommodation. Remember, however, that the ADA is still a relatively new and untested law. Because the courts are still evaluating plaintiff attorneys' interpretations of particular ADA provisions and because it is unclear what is required of employers to demonstrate “business necessity,” you should discuss the merits of particular cases with qualified legal counsel.



### Exercise 1-3 Interview Questions Under ADA

For each question, write “Yes” if it is legal to ask under ADA and “No” if it is not legal to ask under ADA.

Question	Is it legal?
Have you ever received workers' compensation benefits?	
Can you perform the duties of this job with or without reasonable accommodations?	
Are you taking any prescription drugs?	
Will you take a test for illegal drug use?	
Are there any special accommodations you may need to do this job?	
Is your health up to the demands of this job?	
Can you lift five-pound weights?	
Can you operate a 500-ton widget press?	



A number of laws at federal, state, and local levels govern the hiring process, and both human resource professionals and hiring managers must know them in order to avoid substantial potential liability. Laws—and court decisions—change over time, so it's critical to keep up with the latest developments.

Organization size determines which laws apply. Some laws apply no matter how small the organization: one employee is enough. Examples include federal and state wage and hour laws, the Equal Pay Act of 1963, employment verification under the Immigration Reform and Control Act, and child labor laws.

Some laws only apply when the organization grows beyond a certain size. Title VII of the Civil Rights Act of 1964 applies to any organization with fifteen or more employees. COBRA rights to health insurance for departing employees kick in at twenty employees. The Family and Medical Leave Act (FMLA) applies to companies with at least fifty employees, and the Worker Adjustment and Retraining Notification Act (WARN) applies to companies with at least one hundred employees.

Litigation also puts demands on employers. An upswing in negligent hiring and negligent retention lawsuits has established a doctrine that companies can be held liable in some cases for employee conduct that occurs outside the course and scope of employment. This has made background checks even more important.

Each law adds record-keeping requirements. Paper records (and/or their online equivalents) must be kept for varying amounts of time, and it may be appropriate to ensure that older records are removed or destroyed.

Of particular interest to employers is the requirement under the Immigration Reform and Control Act of 1986 (IRCA) to complete the immigration eligibility form I-9 to ensure that workers have appropriate legal standing. Knowing which documents qualify and which do not is vital.

Only some companies and organizations are legally required to have affirmative action plans; others may do so voluntarily. If you establish such a plan, for whatever reason, it's important to use qualified counsel to ensure it is set up properly. Such questions as determining who is and who is not an "applicant" can be of surprising significance.

Finally, the Americans with Disabilities Act (ADA) requires that employers avoid discriminating against those with disabilities in the interview process as well as on the job, and that "reasonable accommodations" be made so that qualified disabled applicants can do the job. It's vital to focus questions on the job and to avoid questions that may elicit information on disabilities.



## Review Questions

*INSTRUCTIONS: Here is the first set of review questions in this course. Answering the questions following each chapter will give you a chance to check your comprehension of the concepts as they are presented and will reinforce your understanding of them.*

*As you can see below, the answer to each numbered question is printed to the side of the question. Before beginning, you should conceal the answers by placing a sheet of paper over the answers as you work down the page. Then read and answer each question. Compare your answers with those given. For any questions you answer incorrectly, make an effort to understand why the answer given is the correct one. You may find it helpful to turn back to the appropriate section of the chapter and review the material of which you were unsure. At any rate, be sure you understand all the review questions before going on to the next chapter.*

1. If your company employs seventeen people, which of the following laws apply to you? 1. (d)
  - (a) Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
  - (b) Family and Medical Leave Act (FMLA)
  - (c) Age Discrimination in Employment Act of 1967
  - (d) Pregnancy Discrimination Act of 1978
  
2. Where should you place information gained through reference and background checks on a new employee? 2. (c)
  - (a) You must place all such information in the new hire's personnel file.
  - (b) You should destroy this information as soon as the new employee comes on board.
  - (c) You should place information from reference checks in the job requisition folder, and ask your background investigation company to retain records of their searches.
  - (d) Keep all background information in the job requisition folder and do not permit outsiders to have access to it.
  
3. What kinds of interview questions are permitted under the Americans with Disabilities Act (ADA)? 3. (c)
  - (a) Questions about sick days, absences, or work interruptions are permitted, but questions about hearing, vision, and mobility are not permitted.
  - (b) Questions about disabilities are permitted as long as you provide preferences or establish quotas for hiring under ADA.
  - (c) Questions must focus on the candidate's ability to do the job, not on the likelihood that the disability will get in the way.
  - (d) Questions about disabilities are acceptable to help you decide whether it is cost-effective to make any reasonable accommodations that will be necessary.

4. Which applicant should be eliminated from a company's applicant flow log? 4. (b)
- (a) The applicant who has applied in person by completing an official company application
  - (b) The applicant who has forwarded a solicited résumé in response to an advertisement but hasn't been called in for an interview
  - (c) The applicant who has been interviewed by an official company representative
  - (d) The applicant who has applied in person by delivering a résumé but hasn't been called in for an interview
5. Which employer is required to have an affirmative action plan? 5. (a)
- (a) A government contractor or subcontractor with fifty or more employees and contracts of \$50,000 or more
  - (b) A company with one hundred or more employees and more than \$1,000,000 in annual revenues
  - (c) A company in which more than 85% of employees are of the same race, gender, or ethnicity
  - (d) A company engaged in interstate commerce