

Mind over matter: questions about intellectual disabilities

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According to the Equal Employment Opportunity Commission (EEOC), an estimated 2.5 million people in the United States have intellectual disabilities; that's about one percent of the entire population. An estimated 31 percent of those individuals are employed. According to the EEOC, however, many more of those individuals want to work but claim they encounter discrimination when they try to enter the workplace. In October 2004, the EEOC issued written guidelines to help you make decisions about hiring, accommodating, and firing employees with intellectual disabilities. Here we give you a summary of some of the topics the EEOC tackled in its guidance document titled "Questions and Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act [ADA]."

Who's disabled?

Let's face it — that can be a very difficult question. Not all of us are smart enough to be designing rocket ships for NASA's space program. On the other hand, most employees can read and write and comprehend basic tasks without too much difficulty. But what if you have an applicant or an employee who seems to have trouble with even the most basic of assignments? Does that necessarily mean your employee is disabled?

The answer is no. The EEOC considers a person to be intellectually impaired when that person's IQ falls below 70 to 75, the person has significant limitations in "adaptive skill areas" (skills needed for everyday life, such as communicating, self-care, home living, social skills, leisure, health and safety, self-direction, reading, writing, basic math, and work), and the disability originated before the age of 18. Individuals who meet those three criteria will be considered to have an intellectual disability.

The EEOC is quick to point out, however, that not everyone with an intellectual impairment will be covered by the ADA. Only individuals whose impairment substantially limits one or more major life activities are protected under the ADA. Major life activities are activities an average person can perform with little or no difficulty, for example, walking, seeing, hearing, thinking, speaking, learning, concentrating, performing manual tasks, caring for oneself, and working.

To assist you in determining whether an employee has an intellectual impairment covered by the ADA, the EEOC offers examples in its guidance materials. In one example, the commission describes a person with an intellectual impairment as someone who's capable of living on his own but requires frequent assistance from family, friends, and neighbors with cleaning his apartment, grocery shopping, getting to doctor's appointments, and cooking. That type of person is unable to read at a level higher than the third grade and therefore needs someone to read his mail and help him pay his bills. Such a person would be considered substantially limited in caring for himself and would qualify for protection under the ADA because he's disabled.

Also, it's important to point out that an individual may have two or more impairments that may not be substantially limiting *by themselves* but taken together may substantially limit one or more of the person's major life activities. For example, an employee may have a mild intellectual disability and a mild form of attention deficit disorder (ADD). Neither impairment by itself would significantly restrict any major life activity. Taken together, however, the two impairments may substantially limit the employee's ability to concentrate, learn, and work. Therefore, the employee may be considered disabled.

Another thing to keep in mind is that the ADA extends its protections to people who don't have actual disabilities but are discriminated against on the basis of their association with a person with a disability. The association may be with family members, friends, or any other person. For example, the parent of a child with an intellectual disability may apply for a position and mention to the interviewer that her child has an intellectual disability. If she's denied employment because the employer believes the child's disability will cause the applicant to be absent from work and affect her productivity, the parent is protected by the ADA, and the employer may have a tough lawsuit on its hands.

What can you ask? Timing is important

Before an offer of employment is made. The ADA limits the kind of medical information you can seek from a job applicant. You *may not ask* the following questions:

- whether or to what extent the applicant has an intellectual disability;
- whether the applicant has ever filed for workers' compensation;
- whether the applicant takes medication; or
- whether the applicant has been hospitalized in an institution or whether the applicant is receiving psychiatric treatment.

Well, what can you ask? Questions relating to the performance of the job in question, *e.g.*, whether the applicant can lift a 45-pound load, whether she can put files in alphabetical order, and whether she can place items in numerical order. What if an applicant voluntarily tells you that she has an intellectual disability or if the disability is extremely obvious? Ask whether she would need a reasonable accommodation to be able to perform the job duties at issue and what that accommodation might be.

For example, an applicant voluntarily discloses during an interview that she has an intellectual disability requiring her to be reminded of her work duties. You may ask the applicant questions about reasonable accommodations such as whether she would need a detailed checklist or some type of computer with a touch screen that gives her verbal instructions to guide her through the required steps necessary to complete a task. You *may not ask* questions about the applicant's medications or whether she'll have problems with her attendance or job performance because of her intellectual disability.

After an offer of employment is made. Once you make a job offer, you then can ask job-related questions about the applicant's disability and you may ask for (or require) a medical examination *so long as you require it of all applicants in similar positions*. In other words, you must ask all applicants the same job-related questions about their disabilities and require all applicants to undergo the same type of medical examination. Keep in mind that all medical information must be kept confidential and maintained in files separate from the employee's personnel file.

What do you do if you've already hired an employee with an intellectual disability and then begin noticing performance problems? Can you then ask for a medical examination? Not unless you have a

reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee's performance problems. It's possible that the performance issues have absolutely nothing to do with the intellectual disability.

Consider, for example, a bathroom attendant with an intellectual disability and ADD who has performed his job successfully for five years but suddenly begins showing up late and appears anxious and emotional. The employee's supervisor notices that those changes began soon after the employee moved into his brother's house. The supervisor can ask the employee why his performance has declined and may talk with him about ways to improve his performance. The supervisor may not, however, ask questions about the employee's intellectual disability unless there's objective evidence that his poor performance is related to the disability. Objective evidence may include his express statement that the disability is the reason for the problem, for example.

Who can you tell? It depends on who's doing the asking

You already know you have to keep medical information separate from employees' personnel files, but who can you tell, if anyone, about the nature of an employee's disabilities? Tread carefully here. The EEOC says you may disclose the nature of the employee's disabilities in very limited circumstances — for example, to supervisors and managers who are required to provide reasonable accommodations, to first-aid and safety personnel if the employee would need special emergency treatment, to individuals investigating compliance with the ADA (like EEOC investigators), and to those who administer your workers' comp or insurance policies, for example, to process a claim.

Notice that that list *doesn't include* other employees who work with the disabled employee. That issue typically arises when coworkers start asking their supervisors why so-and-so gets "special treatment." In that circumstance, a supervisor may not tell coworkers that the employee is receiving a reasonable accommodation because that would amount to disclosing the employee's disability. The EEOC considers that to be a violation of the disabled individual's right to privacy. It may also present privacy issues regulated by other state and federal laws.

In its guidance, the EEOC tells you what you *can't* say, but it doesn't tell you what you *can* say. In such a scenario, it appears the best approach would be to simply tell coworkers that they should focus on performing their own jobs, that the supervisor is aware of the situation and will note the employees' concerns, and that you keep employees' individual work situations confidential. Tell the inquiring minds that you'd give them the same consideration if they were the subject of inquiries by their co-workers.

What can you do? Accommodating persons with intellectual disabilities

You're required to provide reasonable accommodations to employees who suffer from intellectual disabilities, just as you are for employees with physical disabilities. Often, a third party may be the one to request accommodation on behalf of the person with an intellectual disability. If that happens, you must respond to the request as if the employee or applicant requested the accommodation. You need to consider providing reasonable accommodations during the application process, such as providing someone to read or interpret the application materials; modifying tests, training materials, and/or policy manuals; and conducting a more lengthy verbal interview in place of a series of written questions.

Sometimes, you may be the first one to realize the disabled employee needs a reasonable accommodation even though he hasn't asked for one. If that situation arises, you have an obligation to initiate a discussion with the employee about his need for an accommodation and to provide one if you (1)

know the employee has a disability, (2) know or have reason to know the employee is experiencing problems because of the disability, and (3) know or have reason to know that the disability is what's preventing the employee from requesting a reasonable accommodation.

But remember, you don't have to grant every request for accommodation. The decision depends on each individual situation and whether the request may cause "undue hardship" to your company. Undue hardship means significant difficulty or expense when considered in light of your company's size, its financial resources, and the nature and structure of its operation. You don't have to take away fundamental job duties as an accommodation, such as lowering production standards or excusing violations of conduct rules that are job-related and consistent with business necessity. Furthermore, you aren't required to provide employees with "personal use items" such as wheelchairs, eyeglasses, hearing aids, and other devices the employee needs both on and off the job.

You also don't have to provide the specific reasonable accommodation the disabled employee requests. If there are several options to choose from, you don't necessarily have to go with the one the employee wants. When there are two possible reasonable accommodations and one costs more than the other or is otherwise more burdensome, you can choose the less expensive option as long as it's effective. You may, however, be required to provide more than one reasonable accommodation if that becomes necessary. Also, it's important to keep in mind that your obligation to provide reasonable accommodation to a disabled employee is ongoing, so if the employee's disability-related needs change or his job duties change, you'll need to revisit the accommodations you have in place.

What else do you need to know?

This article gives you just a few of the highlights from the EEOC's newly issued guidance on intellectual disabilities in the workplace. You can find this and other guidance on the commission's website, www.eeoc.gov. The new guidance gives very detailed examples of "real-life" situations and explains, in the EEOC's opinion, how you should deal with them. For the really sticky issues, of course, you should contact an experienced attorney to provide you with legal advice, and keep in mind that the guidance is just that — guidance — and that it's subject to scrutiny by the courts.

Find out more about ADA accommodations in the subscribers' area of HRhero.com, the website for Louisiana Employment Law Letter. You have access to an HR Executive Special Report on the subject: "ADA from A to Z: Everything You Need to Know About the Americans with Disabilities Act." Just log in and scroll down to the link for all the Special Report titles. Need help? Call customer service at (800) 274-6774.