

AT THE JOB INTERVIEW EMPLOYMENT DISCRIMINATION FAQ'S

1. Is it legal for a job interviewer to ask me if I have a disability?

No. The Americans with Disabilities Act (ADA) prohibits questions about medical conditions; past hospitalizations; nature and severity of disabilities; and other related matters on job applications and in job interviews.

Unfortunately, some employers persist in asking questions that are prohibited under the ADA. This places job applicants in the uncomfortable position of deciding how to respond.

2. What type of question is an interviewer allowed to ask?

An employer may ask you whether you can perform the job-related functions, as long as they don't phrase the questions in terms of the disability. For example, if driving a vehicle is a function of the job, the employer may ask if you have a driver's license. However, they may not ask if you have a visual disability that would prevent you from driving.

3. Do I have to tell the truth about my disability?

NYLPI recommends that you never lie on a job application or job interview. The employer could have a legitimate justification to fire you later on if it's revealed that you lied. Some courts have ruled that lying on a job application or in an interview is a legitimate ground for firing an employee, even if there is evidence that the firing was *also* motivated by unlawful discrimination.

4. Can the interviewer ask about gaps in my employment history if those gaps were related to my disability?

Under the Americans with Disability Act (ADA), potential employers *cannot* ask certain questions at a job interview that would result in the applicant revealing information about the existence or nature of a disability.

Questions about gaps in employment history are likely to lead to information about an applicant's disability and are therefore arguably illegal. However, until the courts and the Equal Employment Opportunity Commission (EEOC) clarify the issue, the law on this question is unsettled.

5. What should I do if an interviewer asks me unlawful questions about my disability?

There is no easy answer. If you are asked a question at a job interview that is not allowed under the ADA and you answer the question, you may be revealing information that the law allows you to keep private, at least at that stage of the job application process.

There are two basic issues for you to consider: (a) do you want to get the employer to change the illegal job application or interview process or (b) do you want to get the job? Accomplishing both objectives at the same time may be difficult.

If your main goal is to pursue the job, you may choose to refuse to answer a question in a non-confrontational manner. For instance, you could state that you read about a law that prohibits questions of this type during job interviews. This lets you avoid answering the question without giving the employer the impression that you have a disability.

If your main goal is to get the employer to change the illegal interview process, then you can file a complaint with the EEOC or state or local human rights agencies, and ask them to take up the problem of the illegal question with the employer.

6. What should I do if I encounter an illegal question on a written job application?

You may leave the question blank or ask if you can take the application to fill it out at home. If you are permitted to take the application home, you can show the application to the U.S. Equal Employment Opportunity Commission (EEOC), NYLPI, other advocacy organizations, or state or local human rights agencies, and ask them to take up the problem of the illegal question with the employer.

If you do this, you can also request that the agency to whom you show the application not reveal your identity to the employer. This may enable you to get the application changed while continuing to pursue the job.

7. What should I do if I refuse to answer illegal interview questions and then don't get the position?

The employer has violated the law. You may want to consider filing an administrative complaint with the EEOC or a state or local human rights agency.

8. If I apply for a job and I am not hired, how do I know if the employer has violated the law and discriminated against me because of my disability?

There is no way to know for certain. This is especially true when an employer doesn't directly state that you weren't hired because of your disability or provides no reason at all for not hiring you.

9. Then, how can I prove that I wasn't hired because of my disability?

(a) You must show that you are a person with a disability; you were qualified for the job; you were denied the job; and the job either remained open or was given to a person without a disability.

(b) The employer must offer a neutral or non-discriminatory reason for the decision not to hire you, such as the fact that you were not qualified for the job or were not as qualified as another applicant who was hired.

(c) If the employer can meet this burden, then you have to show that the neutral reason given by the employer is not the real reason for the employer's decision not to hire you, and your disability was the true reason. Any information that you can obtain on these issues prior to filing a complaint will be helpful to your case.

10. What's my chance of success if I file a complaint based on disability discrimination by an employer?

Even if you can prove that an employer asked an illegal question on a job application or at an interview, and you can prove that you were not hired as a result of your response to the illegal question, you will not necessarily win an administrative proceeding challenging the employer's decision not to hire you.

To win an administrative complaint or lawsuit challenging a decision not to hire you, you will also have to prove that you were able to perform the essential functions of the job, with or without a reasonable accommodation.

You will need concrete evidence that the employer's decision not to hire you was based, at least in part, on your disability.

11. Does an employer who asks an illegal job interview question violate the ADA even if they extend a job offer?

The employer may have violated the ADA even if you are offered the job or even if you decide that you do not want the job and withdraw your application before a hiring decision is made. In either of these situations, you may want to ask the EEOC, NYLPI or state or local human rights agencies to investigate and ask the employer to change the application or interview process so that the question is not asked of other applicants.

12. Does the ADA require employers to give preference to hiring people with disabilities?

No. While the ADA and state and local laws protect people from employment discrimination on the basis of disability, they do not require an employer to hire or promote the person with a disability over other people.

These laws prohibit an employer from refusing to hire or promote or from taking other adverse action against a person because of the person's disability, if he or she can perform the essential functions of the job.

An employer can, under the ADA, choose a person without a disability with more experience over an individual with a disability even if the individual with the disability *is* qualified for the job.

An employer can choose a person without a disability over an individual with a disability, if the two individuals are equally qualified, as long as the choice was not made because of the individual's disability.