

Disability Inquiries in the Workforce Development System

As the workforce development system strives to meet the diverse needs of all its customers, a clear understanding of key nondiscrimination issues affecting youth and adults with disabilities is essential. One primary example is that professionals in the workforce development system need to know what they can and cannot ask about an individual's disability and what they can do with that information.

Disability nondiscrimination laws—such as the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 188 of the Workforce Investment Act (WIA)—are somewhat different than other civil rights laws. Where people with disabilities are concerned, simple access to your program is not enough. You have a legal responsibility to work with people with disabilities to make sure they have an equal opportunity to benefit from your programs, services, and activities. This means that you may need to take active steps to offer accommodations, auxiliary aids and services, or make necessary modifications to allow customers with disabilities to benefit fully from your programs, services, or activities.

The question of whether it is legal to ask disability-related questions turns on whether your agency is providing general services, providing employment-related training, or acting as an "employment agency." Employment-related training is broadly defined as "training that allows or enables an individual to obtain employment" and includes things such as occupational skills training, on the job training and job readiness training. Your agency is

This publication is for those working in One-Stop centers as well as youth and adult service providers who interact with individuals with disabilities. It is designed to help clarify what you can and cannot ask about someone's disability.

acting as an "employment agency" when it is doing things such as making job referrals and obtaining employees for employers. The most important differences between these types of activities are what disability-related questions you can ask a customer and what you do with the information you obtain in response to these inquiries.

General Service Provision

When you are providing general services (such as assessing a customer's skills, prior work experience, or employability; creating a service strategy for a customer; or providing supportive services such as child care or transportation), you will need to understand whether a customer has a disability that prevents him or her from achieving full employment success. Therefore, in the context of providing these types of services, disability-related inquiries are not only legal—they are recommended. When providing these types of services, it is appropriate to ask whether someone has a disability, and to help the person determine whether a particular disability-related accommodation, auxiliary aid or service, assistive technology, or program modification would be helpful to the person. It may also become

necessary to look for symptoms of hidden, previously undiscovered disabilities that are barriers to employment success, and to refer a customer who has such symptoms for a disability-related assessment or evaluation. Finally, the U.S. Department of Labor's regulations implementing the non-discrimination and equal opportunity provisions of WIA require that programs or activities that are part of the One-Stop system collect a variety of demographic information about the individuals who apply to and are served by the programs or activities. (29 CFR 37.37(b) (2)). This demographic information includes disability status.

Provision of Employment-Related Services and Training

Some One-Stops pre-screen job applicants as an employer service. Others fulfill a major portion of the hiring function typically performed by employer human resource departments. A One-Stop Center or youth serving organization is considered to be functioning as an "employment agency" when it regularly has as a principal function procuring employees for at least one employer. In the context of performing these types of employment service related activities, it is illegal to ask disability-related questions

before a customer is selected to receive services or to be referred for a job.

If your One-Stop is providing these types of services, clear firewalls should be instituted between the staff who



work with employers, and the staff who provide services to job seekers, to ensure that the staff who work with employers do not inappropriately receive information about a particular jobseeker customer's disability status. A One-Stop Center may disclose disability-related or other medical information about a particular job-seeker to an employer only where all of the following circumstances are satisfied: (1) the job-seeker has made an independent decision to disclose such information to the employer; (2) the job-seeker has specifically asked the One-Stop Center or its staff to make the disclosure on his or her behalf; and (3) the latter request has been initiated by the job-seeker, not by the One-Stop Center.

In the context of providing employment-related services and training, the types of disability-related inquiries which are permissible depend upon whether the questions being asked are made in the pre-offer, post-offer or post-employment hiring stages.

Pre-Offer Stage: In the pre-offer stage, if you are an employer, or a One-Stop staff member screening applicants for employers or deciding whether to refer a particular job-seeker for a particular job, you may ask about an applicant's ability to perform specific job functions. For example, you may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements. You may also ask applicants to describe or demonstrate how they would perform job tasks, if the same questions are asked of all applicants. You may also describe what the application process will involve and ask whether the job-seeker will need accommodations for the application process. If the job-seeker says yes, and the need for accommodation is not obvious, you may ask for reasonable documentation of a disability before you provide accommodations.

You may *not*, however, ask a job-seeker whether he or she will need reasonable accommodations to perform the essential functions of the job, except under the following limited circumstances:

- The job-seeker has an obvious disability, and you reasonably believe that the applicant will need reasonable accommodation because of that obvious disability;
- The job-seeker has voluntarily disclosed to you that s/he has a hidden disability, and you reasonably believe that the applicant will need reasonable accommodation because of that hidden disability; or,
- The job-seeker has voluntarily disclosed to you that s/he needs reasonable accommodation to perform the job.

In these limited circumstances, although you may ask questions about the accommodations the job-seeker will need, you may *not* ask questions about the underlying medical condition.

In the Post-Offer, Pre-Hire Stage:

Both the One-Stop and the employer may ask disability-related questions and require medical exams, even if they are unrelated to the job, as long as two conditions are met:

- All entering employees in the same job category must be subjected to the same questions/exams, regardless of disability; and,
- All information obtained through these questions/exams must be kept confidential.

After the Job-Seeker Begins Work:

The employer may ask disability-related questions and/or require medical exams if the questions/exams are job-related and consistent with business necessity. Again, the information obtained must be kept confidential.

One-Stop staff, however, should not be involved in this process unless the indi-

vidual with a disability, acting on his or her own initiative, specifically asks the One-Stop for help as described above.

Other Considerations

If part of your One-Stop's service is job referral or to act as an intermediary for an employer, you must also be very careful what you do with the knowledge you have of someone's disability. You cannot use that information to steer someone to a particular job, employer, or career path. You also cannot tell an employer or a job-training provider that a particular customer has a disability, except in the very limited circumstances detailed above. Although any medical information obtained during the hiring process (pre- and post-offer) must generally be kept confidential, it is not illegal to share such information with first aid and safety personnel if the disability is such that it may require emergency treatment.

Regardless of the situation, people with disabilities must be treated as individuals not on the basis of assumptions, myths and stereotypes about their disabilities. Disability-related inquiries, when permissible, must be approached with respect, dignity, and confidentiality. ♦

The National Collaborative on Workforce and Disability for Youth (NCWD/ Youth) is composed of partners with expertise in disability, education, employment, and workforce development issues. NCWD/Youth is housed at the Institute for Educational Leadership in Washington, DC. The Collaborative is charged with assisting state and local workforce development systems to integrate youth with disabilities into their service strategies.

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