

Employment - Mental Health and the ADA

WHAT IS TITLE I OF THE AMERICANS WITH DISABILITIES ACT (ADA)?

Title 1 of ADA is a law that makes discrimination and harassment at work because of a mental health diagnosis or other disability illegal. This means it is illegal for an employer to fire, or refuse to hire or promote someone because of their disability, as long as they are able to perform the job. The ADA also makes it illegal to retaliate against someone because they complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The ADA also requires that employers reasonably accommodate known disabilities unless doing so would impose an undue hardship on the operation of the employer's business.

Note that Ohio is an employment-at-will state, which means an employer can fire or refuse to hire someone for almost any reason. This just means that the employer may not refuse to hire or fire someone because of their disability, as long as they are qualified to perform the job.

ARE ALL EMPLOYERS REQUIRED TO COMPLY WITH THE ADA?

No. The ADA covers private employers, state and local government employers, employment agencies and labor unions that have 15 or more employees. Federal employers and contractors may be covered under a different law, the Rehabilitation Act of 1973, which has some different requirements. Ohio employers are covered under state discrimination laws if they are a state employer or any political subdivision of the state, a private employer that has four or more employees, or an agent of the state, political subdivision, or private employer.

IS MY MENTAL HEALTH DIAGNOSIS COVERED BY THE ADA?

The ADA protects the employment rights of qualified individuals with disabilities. The ADA defines “individual with a disability” in two parts, both of which must be true. (1) You must have a physical or mental impairment, which includes “mental or psychological disorders” and “mental illness,” and (2) your impairment must “substantially limit” one or more major life activities, such as your ability to think, concentrate, learn, regulate your thoughts or emotions, interact with others, communicate, care for yourself, etc. In addition, you must be “qualified,” which means that you can perform the essential functions of the job, with or without a reasonable accommodation.

As long as you meet this criteria, you are a qualified individual with a disability with employment protections under the ADA. Not everyone with a mental health diagnosis will be covered by the ADA, since some disorders are short-term in nature or result in only minor limitations in functioning. However, your condition also does not need to be permanent or severe to be “substantially limiting.” Even if your symptoms come and go, what matters is how limiting they are when symptoms are present.

CAN AN EMPLOYER ASK ABOUT A MENTAL HEALTH DIAGNOSIS WHEN I APPLY FOR A JOB?

Employers generally may not ask any questions about your disability on job applications or during job interviews. The employer should define the essential functions and conditions of the job and then ask you about your qualifications to perform and how you would perform the job. Employers can ask questions about job history, gaps in employment and other disability-neutral questions.

However, if the employer engages in affirmative action for people with disabilities, an employer is permitted to give applicants the option to self-identify as individuals with disabilities. You are not required to respond. You can choose whether or not to disclose your disability.

CAN AN EMPLOYER ASK ABOUT A MENTAL HEALTH DIAGNOSIS AFTER A JOB OFFER BUT BEFORE WORK BEGINS?

After a job is offered to you, the law allows an employer to condition a job offer on answering certain questions about your disability or successfully passing a medical exam, but only if all other new employees in the same type of job have to do the same.

CAN AN EMPLOYER ASK ABOUT A MENTAL HEALTH DIAGNOSIS ONCE I START WORK?

An employer generally can only ask questions about your disability or require a medical exam if the employer needs medical documentation to support your request for an accommodation or if the employer believes and has objective evidence that you are unable to do your job successfully or safely because of your disability.

Your employer can also ask you about your disability for reasons that are job-related and consistent with business necessity (e.g., medical examinations of employees in positions affecting public safety) and if necessary to establish eligibility for other benefits (e.g., requiring employees to submit a doctor's note to verify that sick leave has been used appropriately).

DO I HAVE TO DISCLOSE MY MENTAL HEALTH DIAGNOSIS TO AN EMPLOYER?

Generally, no. However, an employer can ask about mental health diagnoses in situations as described above.

IS AN EMPLOYER REQUIRED TO HIRE OR EMPLOY ME IF I HAVE A MENTAL HEALTH DIAGNOSIS?

No. Just as an employer may not refuse to hire you only because you have a disability, the employer is not required to hire you only because you have a disability. Employees with mental health diagnoses still must be able to perform the "essential functions" of their job, with or without "reasonable accommodations" as described below.

Employers are also not required to employ people who pose a "direct threat to health and safety" (a significant risk of substantial harm to self or others). Still, an employer cannot rely on myths or stereotypes about your mental health diagnosis when deciding whether you can perform a job or whether you pose a safety risk. And the employer must consider whether a reasonable accommodation can eliminate any performance issue or risk.

WHAT IS A REASONABLE ACCOMMODATION?

A reasonable accommodation is a modification or change to a job or work environment that enables you to apply for a job or perform the essential job functions.

Just because you have a mental health diagnosis, however, does not mean you will need an accommodation to do your job. But if you need a reasonable accommodation to do your job, your employer must give you one unless the accommodation requires significant difficulty or expense.

If more than one accommodation would work, the employer can choose which one to give you. Your employer can't legally fire you, or refuse to hire or promote you, because you asked for a reasonable accommodation or because you need one. It also cannot charge you for the cost of the accommodation.

WILL I LOSE THE RIGHT TO GET A REASONABLE ACCOMMODATION IF I DID NOT DISCLOSE MY DISABILITY DURING THE HIRING PROCESS?

No. You may disclose that you have a disability and ask for an accommodation at any time, even after many years on the job.

Of course, an employer is only required to make accommodations for known disabilities. An employer does not have to excuse poor job performance, even if it was caused by a medical condition or the side effects of medication. So, it is generally better to get a reasonable accommodation before any problems occur or become worse.

IF MY DISABILITY AFFECTS MY PERFORMANCE OR CONDUCT, MAY I HAVE SOMEONE JOIN IN MY PERFORMANCE REVIEW AS A REASONABLE ACCOMMODATION?

Possibly. Having a support person present at meetings with your employer can be a form of reasonable accommodation that an employer must consider if you need the support because of your disability (for example, if you need someone to help you take notes if concentration and/or memory are difficult).

More information about this accommodation is provided by the Job Accommodation Network and available online at <https://askjan.org/publications/consultants-corner/vol05iss01.cfm>.

You can find out more about issues regarding performance and conduct by reviewing a copy of the EEOC's publication "*Applying Performance and Conduct Standards to Employees with Disabilities*": <https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities#question>.

CAN MY EMPLOYER REQUIRE DOCUMENTATION OF MY DISABILITY AND NEED FOR ACCOMMODATION?

If you ask for an accommodation, your employer can request information to establish your disability and need for an accommodation. Your employer may ask you to describe your disability and how it affects your work. Your employer may ask you to submit a letter from your mental health care provider documenting that you have a mental health diagnosis, and that you need an accommodation because of it. If you do not want your employer to know your specific diagnosis, it may be enough to provide documentation that describes your disability more generally (by stating, for example, that you have an “anxiety disorder”).

You can help your health care provider understand what is needed by giving them a copy of the EEOC publication “The Mental Health Provider’s Role in a Client’s Request for a Reasonable Accommodation at Work”: <https://www.eeoc.gov/laws/guidance/mental-health-providers-role-clients-request-reasonable-accommodation-work>.

ARE THERE ACCOMMODATIONS THE EMPLOYER IS NOT REQUIRED TO PROVIDE?

Employers are only required to make “reasonable” accommodations for your disability. Employers are not required to make accommodations that would lower quality or quantity standards, or create a new job position if you are not qualified for the position applied for. Employers are not required to provide personal use items such as glasses or hearing aids. And employers are not required to provide accommodations that require significant difficulty or expense.

WHAT ARE POTENTIAL ACCOMMODATIONS FOR PEOPLE WITH MENTAL HEALTH DIAGNOSES?

Below are examples of accommodations that could help employees with mental health diagnoses to more effectively perform their jobs. The items on this list do not necessarily reflect “reasonable accommodations” as defined by the ADA or all possible accommodations, but are identified by the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP) as some of the most effective and frequently used workplace accommodations. More information is available at <https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities>.

Flexibility:

- Flexible Workplace: Telecommuting and/or working from home.

Flexibility (cont.):

- Scheduling: Part-time work hours, job sharing, adjustments in the start or end of work hours, compensation time and/or "make up" of missed time.
- Leave: Sick leave for reasons related to mental health, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery, leaves of absence and/or use of occasional leave (a few hours at a time) for therapy and other related appointments.
- Breaks: Breaks according to individual needs rather than a fixed schedule, more frequent breaks and/or greater flexibility in scheduling breaks, provision of backup coverage during breaks, and telephone breaks during work hours to call professionals and others needed for support.
- Other Policies: Beverages and/or food permitted at workstations, if necessary, to mitigate the side effects of medications, on-site job coaches.

Job duties:

- Modification or removal of non-essential job duties or restructuring of the job to include only the essential job functions.
- Division of large assignments into smaller tasks and goals.
- Additional assistance and/or time for orientation activities, training and learning job tasks and new responsibilities.
- Additional training or modified training materials.

Managment/Supervision:

- Implementation of flexible and supportive supervision style; positive reinforcement and feedback; adjustments in level of supervision or structure, such as more frequent meetings to help prioritize tasks; and open communication with supervisors regarding performance and work expectations.
- Additional forms of communication and/or written and visual tools, including communication of assignments and instructions in the employee's preferred learning style (written, verbal, e-mail, demonstration); creation and implementation of written tools such as daily "to-do" lists, step-by-step checklists, written (in addition to verbal) instructions and typed minutes of meetings.
- Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity, including annual discussions as part of performance appraisals to assess abilities and discuss promotional opportunities.
- Development of strategies to deal with problems before they arise.

Management/Supervision (cont.):

- Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards.
- Education of all employees about their right to accommodations.
- Relevant training for all employees, including co-workers and supervisory staff.

Equipment/Technology:

- Tape recorders or livescribe pens for recording/reviewing meetings and training sessions.
- "White noise" or environmental sound machines.
- Noise canceling head phones
- Handheld electronic organizers, software calendars and organizer programs.
- Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations.
- Software that minimizes computerized distractions such as pop-up screens.

Modifications:

- Reduction and/or removal of distractions in the work area.
- Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions.
- Private offices or private space enclosures.
- Office/work space location away from noisy machinery.
- Reduction of workplace noise that can be adjusted (such as telephone volume).
- Increased natural lighting or full spectrum lighting.
- Music (with headset) to block out distractions.

DOES THE ADA PROTECT MY CONFIDENTIALITY?

Yes. Any information about your disability must be stored on separate forms and treated as a "confidential medical record." The information must be stored separately from other personnel files where only specifically designated people can access it. However, there are five exceptions to the confidentiality requirements:

- Supervisors and managers may be informed about necessary work restrictions and other necessary accommodations.
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment, or if any special procedures are required in case of fire or other evacuations.
- Government officials should be provided access to information when investigating disability anti-discrimination compliance.
- Relevant information may be provided to workers' compensation offices.
- Relevant information may be provided to insurance companies when the company requires a medical examination to provide health or life insurance to employees.

The information should not be shared with anyone else without the explicit consent of the person with a disability.

ARE THERE CONDITIONS THAT ARE EXCLUDED FROM COVERAGE UNDER THE ADA?

Yes. People who illegally use controlled substances (including a prescribed drug without the required supervision of a licensed health care professional), do not have a disability as defined by the ADA. Psychoactive substance use disorders resulting from current use of illegal drugs is also excluded. However, the ADA protects people who participate in or have completed a supervised drug rehabilitation program and no longer use drugs illegally. Also, disability resulting from alcoholism is covered, but not drinking or alcohol impairment while working. The ADA excludes certain other conditions, including compulsive gambling, kleptomania, and pyromania.

DOES THE ADA PROTECT ME IF I DO NOT HAVE A COVERED DISABILITY BUT I AM ASSOCIATED WITH SOMEONE WHO DOES?

The ADA prohibits employment discrimination based on your relationship or association (not necessarily family relation) with a person with a disability. The law protects you from employment discrimination based on biased assumptions that your relationship to a person with a disability would affect your job performance. For example, the ADA would protect a person with a disabled spouse or child from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the disabled spouse or child. It would also protect a person who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship.

HOW CAN I ENFORCE MY RIGHTS UNDER THE ADA?

You should consider trying to resolve disputes with your employer before taking formal action. Sometimes questions about the existence of a disability or the necessity for an accommodation can be resolved by agreeing to provide documentation to the employer.

If informal measures fail, there are several options available to you for filing complaints and lawsuits, and specific timeframes that apply. Please see <https://www.disabilityrightsohio.org/assets/documents/faq-employment-discrimination-rights-and-remedies.pdf> for more information.

ADDITIONAL RESOURCES:

- EEOC Guidance - Depression, PTSD and Other Mental Health Conditions in the Workplace: Your Legal Rights: <https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights>;
- DOL Office of Disability Employment Policy Resource Page: <https://www.dol.gov/agencies/odep/program-areas/mental-health>;
- Job Accommodation Network (JAN) - Mental Health Conditions: <https://askjan.org/disabilities/Mental-Health-Conditions.cfm>.

The information provided in any Disability Rights Ohio publication is not a substitute for legal advice. You should consult with a lawyer concerning your rights in a specific case. Contact your local bar association or visit the Ohio State Bar Association Web site to find a lawyer in your area: <https://www.ohio-bar.org/LegalHelp/>.