Passed by Congress in 1990, the ADA prohibits discrimination against qualified individuals with disabilities: those who can perform the job’s essential functions with or without reasonable accommodation. (An accommodation is considered reasonable if it doesn’t place an undue hardship on the employer.)

All employers that have 15 or more employees must comply with the ADA. Note: Business partners who aren’t involved in the day-to-day operations of a firm are not counted as employees under the ADA. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S. Ct. 1673 (2003)

Covered employers must not discriminate against disabled applicants or employees who meet the definition of “qualified individual with a disability.” Further, the ADA prohibits employers from regarding a non-disabled person as disabled because this would further society’s stereotypes about people with handicaps.

The ADA has had a profound effect on hiring procedures. Employers must now maintain up-to-date, accurate job descriptions to determine each job’s essential functions. As a general rule during the hiring/interviewing process, employers should stick to questions about an applicant’s ability to perform the job’s essential functions.

Under no circumstances should an employer ask a question likely to elicit an answer that would reveal an applicant’s disability. For example, if a job requires a person to lift 50 pounds, it is permissible to ask the applicant whether or not he or she can lift that much. By contrast, it’s not permissible to ask applicants what prescription drugs they are taking.

Employers may not conduct medical exams on job applicants until after they make a conditional offer of employment. If a medical test reveals a disability after the offer was made, the employer and employee must begin an interactive process to determine what reasonable accommodations are available that would allow the applicant to perform the essential job functions. If they can agree on an accommodation, the employee is hired.

When making a hiring decision, you may not consider whether an applicant requires an accommodation. You should thoroughly document any decision regarding reasonable accommodation or hiring a disabled applicant.

Any medical information obtained from medical tests, medical certification of a disability or freely volunteered by the individual is confidential.

This information should be kept in a confidential file, separate from the applicant or employee’s general file. Access to the file should be restricted to company employees who must see it to carry out the accommodation, or to government officials in the normal and proper course of their duties.

**DEFINITION OF A DISABILITY**

The ADA Amendments Act of 2008 rejected a strict interpretation of disability, invoking the ADA’s original intent “to provide broad coverage to protect anyone who faces discrimination on the basis of disability.” The ADAAA also directed the EEOC to redefine “substantially limits,” stating that the agency’s prior definition of “significantly restricts” posed too high a standard.

The ADAAA defines disability as a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment or being regarded as having such an impairment. The law provides the following non-exhaustive list of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

It also includes as major life activities the operations of a major bodily function, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory,
endocrine and reproductive functions. In addition, it includes chronic conditions such as diabetes and conditions that are episodic or in remission. It specifically does not cover transitory impairments (conditions lasting less than six months).

The amended ADA also settled the ongoing question of whether an employee who can compensate for a disability through drugs or other aids qualifies as disabled. The law determined that for the purpose of determining whether someone is disabled, ameliorating devices beyond ordinary eyeglasses should be ignored.

In other words, just because someone can correct deafness with hearing aids or take insulin to control blood sugar does not mean the person is not disabled and protected under ADA.

The ADAAA expressly prohibits consideration of the following aids when determining whether someone is disabled: medication, medical supplies, equipment or devices, low-vision devices (beyond ordinary glasses or contact lenses), prosthetics including limbs and devices, hearing aids and implants, mobility devices, oxygen therapy equipment or supplies, assistive technology, and auxiliary aids and services.

You don’t have to accept a worker’s or an applicant’s word that he or she is disabled. You’re entitled to proof that the individual meets the definition of disabled: i.e., has an impairment that substantially limits a major life function. Before you can decide whether the impairment is limiting, though, you need proof that the person indeed has an impairment.

Sometimes an impairment is obvious, such as blindness or the need to use a wheelchair. But more subtle physical and mental conditions may require verification. Remember, you’re required to accommodate only substantially limiting impairments, not every physical or mental condition.

The EEOC’s final regulations, issued in 2011, further expand the ADAAA’s goal of broadening the definition of “disability” under the ADA. As a result, a greater number of employees will be covered under federal disability law and be eligible to file ADA-related claims. The stated goal of the final regulations—like that of the ADAAA—is to limit extensive analysis over whether an employee’s ailment does or does not qualify as an ADA-covered disability. Instead, it encourages courts to focus on whether employers have “complied with their obligations and whether discrimination has occurred.”

**DRUG AND ALCOHOL ADDICTION**

The ADA was drafted broadly to provide disabled Americans the opportunity for gainful employment. Congress recognized that some disabilities, by their nature, are special and pose safety risks. Drug and alcohol addiction are two such disabilities. The ADA requires employers to walk a fine line between enforcing reasonable workplace safety and behavioral rules and making accommodations for those who are addicted.

As a general rule, employers are allowed to enforce reasonable workplace rules against coming to work under the influence and against disruptive behavior, even if that behavior may be associated with an addiction to drugs or alcohol. That is, employers can punish inappropriate behavior and require that employees show up clean and sober.

The waters get murkier, however, when workers addicted to drugs or alcohol want to clean up their act. In some circumstances, you may be required to accommodate their attempts. In addition, they may be eligible for leave under the Family and Medical Leave Act. Under the ADA, what the employee is addicted to makes a difference in how much leeway you must provide as an employer.

The ADA does not protect current users of illegal (i.e., “street”) drugs. It does, however, protect those who’ve shaken their addiction sufficiently to no longer be classified as active illegal drug users. You should offer these workers reasonable accommodations to keep them on track: for example, time off for therapy, counseling and attending Narcotics Anonymous meetings or even inpatient care for related psychiatric problems like depression.

You can fire people who are current drug users even if their work isn’t suffering. Just be sure that the use in question is really “current.” The ADA specifies that a worker who is “currently engaged in the illegal use of drugs” isn’t covered by the law.

The EEOC has taken the position that “current” means “the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.” (29 CFR §1630.3)

The EEOC’s Technical Assistance Manual provides that “current drug use means that the illegal use of drugs occurred recently enough to justify an employer’s reasonable belief that involvement with drugs is an ongoing
problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is
determined on a case-by-case basis.”

So how long does it have to have been since the worker took drugs before the ADA protects him? What if your
drug tests take three weeks to come back from the lab? Can he argue that any action you take against him three
weeks later violates the ADA because he’s now a “former” drug user? The answer is unclear. Your best bet is to
make sure that any action you take against him is based on his violation of an established workplace rule, not
just the fact that he had a positive drug test.

The ADA covers workers who are alcoholics even if they currently drink. To be covered by the ADA, the
alcoholic’s addiction must be severe enough to substantially impair a major life function such as taking care of
himself. Many heavy drinkers may meet that test. That does not mean, however, that you have to tolerate alcoholics
coming to work drunk. Courts have consistently held that employers have the right to establish reasonable workplace
rules, including coming to work clean and sober.

How you treat a former drug user is more problematic. Some appeals courts have taken the position that you
can’t have a blanket policy by which you refuse to hire anyone who has a history of drug abuse. In a recent decision,
the U.S. Supreme Court considered whether a former addict was entitled to a second chance: an opportunity to be
rehired.

Joel Hernandez worked for Hughes Missile Systems in Arizona for about 30 years, first as a janitor and then as a
technician. In 1991 he flunked a drug test because he had done cocaine the night before. When confronted, he agreed
to resign for violating company rules rather than being fired. He then received treatment. Three years later, he was
clean and applied for a job with the company again. It refused to rehire him ostensibly because it had a policy against rehiring anyone who’d been fired or resigned for violating company rules.

Hernandez sued, alleging that under the ADA he was entitled to preferential treatment. The 9th Circuit Court of
Appeals agreed and concluded that workers who’ve recovered from addiction can’t be excluded from rehiring if the
workplace rule they violated had been directly linked to their disability—in this case, coming to work under the
influence.

The Supreme Court heard the case and sent it back to the appeals court to determine whether a reasonable jury
might believe that the employer refused to rehire Hernandez because of his past drug use, and not due to the
company’s blanket no-rehire policy. Hernandez couldn’t raise the question of whether the -blanket no-hire policy has
a disparate impact on disabled applicants because he hadn’t raised it in his original pleadings. The appeals court
ruled that the case should go to trial. Raytheon v. Hernandez, 362 F.3d 564 (2004)

Employers dodged the bullet with this case, but they may not be so lucky next time. The Supreme Court didn’t
rule on whether employees could bring disparate-impact lawsuits if employers implement policies that harm disabled
workers more than nondisabled workers.

To protect yourself from lawsuits by former addicts, follow these guidelines:

- **Set job-related rules against coming to work** under the influence of drugs or alcohol.
- **Establish behavioral rules** such as demanding punctuality and regular attendance, allowing for appropriate
FMLA absences.
- **Apply the rules consistently.** That is, if you fire someone who comes to work high, you should terminate those
who show up drunk. In both cases, you’re punishing behavior (intoxication), not a disability (alcoholism or
addiction).
- **Keep records of whom you discipline** and why. Review how you discipline workers who violate your rules
with an eye toward identifying patterns. For example, see if you’ve disciplined those who come to work late
because of an addiction more harshly than those who show up late for other reasons such as “traffic” or “car
trouble.” Remember, a neutral rule created for a valid business purpose, applied evenhandedly, will stand up in
court.
**Recreational drug use or binge drinking**

Not everyone who uses drugs (legal or illegal) or drinks alcohol is disabled. Remember, to be a disability, a condition must substantially limit a major life activity. A worker who sometimes smokes marijuana or a social drinker who sometimes is hung over on Monday is probably not disabled. Neither is covered by the ADA or needs to be accommodated.

In fact, you should enforce all workplace rules against these workers. The reason is simple: If you go easy on weekend-drinkers or drug users when you catch them and then land heavily on the true addict, you may create an ADA case. You would, in effect, be applying your neutral policy (“Don’t come to work under the influence”) to the disadvantage of the disabled addict. Define the crime, and then make sure everyone who breaks the rules does the time.

**AIDS AND HIV**

In 1998 the Supreme Court issued its first ruling on an issue related to AIDS and its first major interpretation of the Americans with Disabilities Act. The justices made it clear that all persons who are HIV-positive, even though they may show no overt symptoms of the disease, are protected under the ADA. *Bragdon v. Abbott*, 524 U.S. 624 (1998)

Lower courts had long held that people infected with full-blown AIDS are protected by the ADA. Based on the Supreme Court’s *Bragdon* ruling, employers must afford the same protection to workers or applicants who are HIV-positive but show no outward signs of the infection.

*Note:* According to the Centers for Disease Control and Prevention, one in 16 employers with 50 or fewer employees, as well as one in six large employers, has “experienced” an employee who is HIV-positive or has AIDS.

*Caution:* The ADA prevents you from asking workers about their HIV status or what medications they are taking. It is also illegal to deny a job or health insurance to applicants because they are HIV-positive.

Your best bet: Avoid even the appearance of discrimination. Follow these guidelines:

- If your insurance pool requires blood tests for classifying covered employees, have everyone take the same test. Then make sure that managers who are making hiring decisions don’t have access to test results.
- Don’t ask medical questions during interviews. If an applicant volunteers that he or she is HIV-positive, just say, “We don’t need to discuss that at this time.”
- Keep medical records private, and store them away from regular personnel files.
- Establish a company policy on HIV and AIDS. Educate employees about HIV transmission.
- Consult a lawyer before making any employment decision related to HIV or AIDS.

**MENTAL DISABILITIES: EEOC GUIDELINES**

The EEOC has clearly stated that the ADA protects employees with mental disabilities and employers must accommodate them in the same way as workers with physical disabilities.

Although it is often obvious when a worker is physically disabled, it is more difficult to determine when an employee is mentally disabled. Obvious or not, though, if an employee has a “mental impairment” that “substantially limits a major life activity,” that worker is protected, and the employer is potentially liable for discrimination under the ADA.

Under EEOC rules, employers need to be alert to the possibility that traits regarded as undesirable—chronic lateness, poor judgment, hostility to co-workers or supervisors—“may be linked to mental impairments.” Although the traits themselves are not mental impairments, they may be related to mental impairments. The following disorders are considered mental or emotional impairments:
• Major depression
• Bipolar disorder
• Anxiety disorder
• Schizophrenia
• Personality disorder
• Mental retardation
• Specific learning disabilities
• Alzheimer’s disease

What if a worker claims she’s mentally disabled because she cannot interact with her fellow employees? You should ask for medical certification of this condition. To be a valid disability, it must be diagnosed by a psychiatrist in accordance with the American Psychiatric Association’s Diagnostic Statistical Manual (DSM).

If the condition does fit a diagnosis in the DSM, you must explore ways of accommodating the disability unless it’s one of the specifically excluded conditions, such as kleptomania, pyromania and sexual disorders.

If the disability cannot be accommodated in the current position, you may transfer the person to another vacant position for which she is qualified. You are not obligated to create new jobs or remove other workers from existing jobs to accommodate a disabled employee.

If the worker’s condition is not a disability, then you may evaluate her job performance based on her behavior. She is subject to any disciplinary procedures that any other nondisabled worker would receive for the same performance.

Employees who are so disruptive that they are a “direct threat” to themselves or others are not protected under the ADA. This applies to physical conditions as well. *Chevron v. Echazabal*, 536 U.S. 73 (2002)

Employers may use the “direct threat” defense to refuse to hire an applicant or to terminate an employee. However, you must document every decision and show clearly that the person posed a direct threat to himself or others. This documentation will either support or kill your direct-threat defense in court.

**Accommodating psychiatric disabilities**

The EEOC rules give examples of the types of adjustments an employer may need to make to accommodate individuals with psychiatric disabilities. They include:

• **Modifying schedules**, including providing additional unpaid leave.
• **Making physical changes**, such as erecting room dividers to reduce workplace noise.
• **Changing policies.** For example, allowing a worker who has a dry mouth because he’s on psychiatric medication to drink beverages on duty.
• **Adjusting supervisory methods**, including providing more detailed, day-to-day guidance, feedback or structure.
• **Providing a job coach.**
• **Allowing job changes.**

Reasonable accommodations “must be determined on a case-by-case basis because workplaces and jobs vary, as do people with disabilities,” the EEOC stated. Remember: You may need to make these accommodations for individuals who are able to control the effects of their disability with medication because these workers also are protected under the guidelines.

To obtain a copy of the guidelines, *The Americans with Disabilities Act and Psychiatric Disabilities*, call the EEOC Publications Center at (800) 669-3362 or access the guidelines online at [www.eeoc.gov](http://www.eeoc.gov).

**Note:** The most common psychiatric disabilities are anxiety disorders and depression, according to the Department of Health and Human Services. Although both disorders are highly treatable, only one out of four Americans with these disorders get treatment. A treatment policy at the workplace may allow an employee to continue working effectively without disrupting your business.

An employer’s biggest concern is how co-workers will behave around an employee with a psychiatric disability. Initiating employee education programs can help eliminate certain stereotypes as well as emphasize the company’s anti-harassment policy toward people with illnesses.
As an employer, you’re responsible for the actions of your workforce. An increasingly fertile ground for lawsuits against employers is employee harassment. If you allow co-workers to create a hostile work environment for disabled workers, you may pay a high price.

Some co-workers may voice resentment when they perceive that someone with a mental disability is getting “preferential treatment” in the way of accommodations. Don’t tolerate a hostile environment.

Also, keep information about a disability confidential unless the disabled worker chooses to disclose this fact to co-workers.

**GUIDANCE FOR SPECIFIC DISABILITIES**

The EEOC is regularly adding to its guidance with suggestions for accommodating specific disabilities. Guidelines already re-leased include the following common disabilities, which may require reasonable accommodations: diabetes, cancer, epilepsy, vision impairment, hearing impairment and intellectual disabilities.

Employers can find accommodations for many disabilities at the Job Accommodation Network site: [www.askjan.org/soar](http://www.askjan.org/soar).

➤ Recommendation: When confronted with an accommodation situation, use the JAN website and document all the steps taken. Courts will have a hard time ruling against an employer that evaluated every accommodation listed on the site.

In addition, the EEOC has begun issuing guidance for specific industries. The first one, published in 2004, provided guidance for restaurants and other food service establishments. You can access other guidelines as they are released at [www.eeoc.gov](http://www.eeoc.gov).

**HIRING PRACTICES AND THE ADA**

The ADA has revolutionized the job interview. Although interviews have historically been an unreliable way to determine employee performance, employers continue to use them out of a sense of tradition. The ADA has brought some structure to the job interview, and by making employers focus on the applicant’s ability to perform the job’s essential functions may even enable employers to hire better employees.

Remember: You may not ask any question whose answer might reveal a disability. To be safe, only ask questions about the person’s ability to perform the job’s essential functions. Of course, in order to do this, employers must have accurate and up-to-date job descriptions outlining essential and nonessential job functions. Job descriptions should be updated regularly by taking input from both employees and supervisors. Courts frown upon out-of-date job descriptions.

**Make interview site accessible**

The place you conduct interviews says a great deal about your organization’s willingness to accommodate disabled workers. The interview site should be easily accessible for wheelchair-bound applicants and have disabled-accessible restrooms. Additionally, check the site for other accessibility issues: handicapped parking spaces, properly sized aisles and doors, and alarm -systems that emit both audible and visual signals in the event of an emergency.

Note: Building accessibility guidelines are available from the United States Access Board at [www.access-board.gov](http://www.access-board.gov).
ESSENTIAL FUNCTIONS

You don’t have to hire a disabled person who doesn’t have the requisite skills, experience and education for the job in question. If the deciding factor is the disability, however, you must prove that the disability interferes with what the ADA terms the “essential functions” of the job.

Those functions should be reflected in the job description. For ADA purposes, a job function is considered essential when:

- The position was established so that the function could be performed. For example, a proofreader’s ability to examine a page visually is an essential function.
- There are a limited number of employees available to perform the function. For example, in a very busy office, all employees would be required to answer the phone in addition to their regular tasks. So even if someone was hired as a typist, you could argue that speaking on the phone was still an essential job function.
- A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.
- The employee spends most of his time performing the essential function.
- There would be dire consequences if the function were not carried out. For example, a firefighter may have to carry a heavy person from a burning building only occasionally, but the ability to do so is essential to the job.
- The function is cited as essential in a collective bargaining agreement. If such an agreement lists duties to be performed in particular jobs, the terms of the agreement may provide evidence of essential job functions. However, the agreement, like a job description, would be considered along with other evidence, such as the actual duties performed in these jobs.
- Those who’ve performed the job identify it as essential.

Caution: If you intend to use a job description as evidence of essential functions, it must be prepared before advertising or interviewing for the position.

According to the EEOC, a job description prepared after an alleged discrimination action cannot be used as evidence. Also, when determining essential functions, keep in mind that you must concentrate on the result of the function, rather than the manner in which it is performed. If, for example, a job requires having access to a computer for input and retrieval, it is not essential that the person use an ordinary keyboard to enter data or visually read the information on the screen. Adaptive devices would enable the person to perform the functions differently but with the same results.

REASONABLE ACCOMMODATION

A “reasonable accommodation” is a modification or adjustment to a job, work environment or work process that enables a qualified individual with a disability to perform the job duties successfully. Employers must consider accommodations at various times including:

- Internet job portals must meet accessibility standards. Guidance is available from the international organization W3C at https://www.w3.org/standards/webdesign/accessibility.html. Federal government employers and contractors must adhere to standards listed in Section 504 of the Rehabilitation Act.
- Job interviews: The physical location for the job interview must be accessible for disabled applicants and have accessible restrooms.
- When an applicant or employee reveals a disability: Once an employer is aware of a disability, it should ask if an accommodation is needed for the person to perform the job’s essential functions. This can happen at hire or anytime the individual has a change in health or changes jobs within the organization.
• When FMLA leave is exhausted: Employers may not automatically terminate an employee who is unable to return to work following FMLA leave (see section 13). The employer must determine whether the employee is disabled as defined by the ADA and whether additional time off or another accommodation is appropriate.

An accommodation must ensure equal opportunity in the application process; assist a qualified individual with a disability to perform the essential functions of a job; and enable him to enjoy equal benefits and privileges of employment.

An accommodation is considered “unreasonable” (or, in the terminology of the ADA, “causes an undue hardship”) if it is too difficult or expensive for a company to provide. What is considered reasonable varies greatly and depends on the size and resources of the company, as well as on the nature of the accommodation being made.

To argue that an accommodation would cause your company an undue hardship, you must have supporting data in the following areas:

- **The nature and net cost of the accommodation needed.** The cost is the actual cost to your company. Specific federal tax credits and deductions are available for accommodations required by the ADA. Also, sources of funding are available to help pay for some accommodations. If you qualify for a tax credit, deduction or partial funding for an accommodation, only the net cost to you should be considered.

- **Various financial factors.** The financial resources of the facility making the accommodation, the number of employees at that facility and the financial impact of the accommodation all can be considered. If you have only one facility, the cost and impact of the accommodation will be considered in relation to the effect on expenses and resources of that facility. If your facility is part of a larger entity, you should also consider the overall financial resources, size, number of employees and the type and location of facilities of the corporation covered by the ADA.

- **The type of operation.** This includes the structure and functions of the workforce and the geographic, administrative or fiscal relationship to the larger entity of the facility involved in making the accommodation. For example, an independently owned fast-food franchise that receives no funding from the mother company may assert that it would cause undue hardship to provide an interpreter for a deaf applicant to perform as a cashier. Assuming the financial relationship between the national company and the local facility is limited to payment of an annual franchise fee, only the resources of the local franchise would have to be considered in determining whether this accommodation would cause an undue hardship. *Note:* The National Labor Relations Board and the U.S. Department of Labor have moved toward an expanded view of joint employers that may include franchises in some cases. While the EEOC has not yet taken this position, employers should consult with counsel and be proactive when evaluating the resources available to adopt a given accommodation.

- **The impact of the accommodation on the facility.** This includes how the accommodation would affect other employees’ job performance and your ability to conduct business. For example, a person with a visual impairment applied for a job as a waitress at a nightclub. The club maintains dim lighting to create an intimate setting and lowers its lights further during the floor show. If the job applicant requested bright lighting as an accommodation so that she could see to take orders, you could assert that this would be an undue hardship, one that would seriously affect the nature of your operation.

The following examples show what kinds of accommodations may be needed to make facilities accessible and usable:

- Installing a ramp at the entrance of a building.
- Removing raised thresholds.
- Making restrooms accessible, including toilet stalls, sinks, soap and towels.
- Rearranging office furniture and equipment.
- Making a drinking fountain accessible, for example, by installing a paper cup dispenser.
- Adding flashing lights, when alarm bells are normally used, to alert an employee with a hearing impairment.
Job restructuring or job modification is a form of reasonable accommodation that enables many qualified individuals with disabilities to perform jobs effectively. This often involves reallocating the secondary functions of a job. However, you are not required to reallocate the essential functions of a job as a reasonable accommodation.

For example, an essential function of a security guard’s job generally is to inspect identification cards. If a person with a visual impairment could not verify the identity of an individual from his photograph and other information on the card, you would not be required to transfer this function to another employee and you would be justified in denying an applicant the position.

Reassignment to a vacant position should be considered only when an accommodation is not possible in an employee’s present job or when it would cause an undue hardship. Reassignment may be a reasonable accommodation if both you and the employee agree that it is more appropriate than an accommodation in the present job.

➤ Observation: The reassignment accommodation is required only for current employees. You don’t have to consider a different position for a job applicant if she is not able to perform the essential functions of the position she is applying for, with or without a reasonable accommodation.

Similarly, you are not required to create a new job or bump another employee from a job in order to provide reassignment. Nor are you required to promote an individual with a disability to make such an accommodation.

**PERFORMANCE AND CONDUCT STANDARDS**

Sometimes an employee’s disability may create performance or conduct problems. When this happens, a reasonable accommodation often will eliminate the problem. But what if the employee doesn’t ask for an accommodation? Can an employer raise the issue without running afoul of the ADA?

In response to numerous performance-related questions from employers, the EEOC released a detailed guide to help employers apply performance and conduct standards to employees with disabilities. Here’s a summary of the EEOC’s recommendations.

Employers should apply the same requirements and performance standards to disabled employees that they do to all workers. Even though disabled employees may require accommodations to meet those requirements, the requirements should be the same for everyone. As with any performance standard, employers should give clear guidance regarding the quality and quantity of work and the timetables for producing it. When evaluating employees, the same principle applies: Employees with disabilities should receive an objective appraisal of their performance.

If someone’s disability leads to a performance problem, the objective appraisal (which need not raise the reasons for the performance problem) may prompt the employee to raise the issue of his or her disability and request an accommodation, but the employer should not broach the subject of disability.

If an employee requests an accommodation in response to a performance evaluation or discipline, the employer should begin the interactive process of finding a reasonable accommodation.

Just like other workers, disabled employees may be disciplined for violations of conduct rules, even if the violations result from the disability, so long as the rules result from a business necessity and are applied evenly to all workers.

The common denominator is neutrality: Set clear policies for all employees and adhere to them. For more information, visit [www.eeoc.gov/facts/performance-conduct.html](http://www.eeoc.gov/facts/performance-conduct.html).

**GENETIC INFORMATION NONDISCRIMINATION ACT**

Passage of the Genetic Information Nondiscrimination Act (GINA), which took effect in 2009, grew out of concern that employers could use genetic information to discriminate against employees. For years, business groups argued the ADA’s “regarded as” protections were sufficient to prevent genetic discrimination.

But the ADA primarily applied to employers and not insurers. Further, many disability advocates believed the ADA’s provisions did not go far enough. And the medical community weighed in, with doctors claiming people were avoiding genetic tests out of fear the results could be used against them.
The EEOC defines genetic information as “information about an individual’s genetic tests and genetic tests of an individual’s family members, as well as information about any disease, disorder or condition of an individual’s family members.” In effect, genetic information is anything that might indicate a probability that a person may develop a disease or condition in the future.

The law prohibits employers from discriminating against employees or applicants based on their genetic information in any aspect of “employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment.”

Similarly, employers may not harass employees because of their genetic information and may not retaliate against employees who bring genetic information discrimination charges.

While it is generally true that employers should not seek or possess genetic information, there are some cases where it may be necessary. Regulations allow employers to acquire genetic information under several conditions, including:

- Inadvertent acquisitions of genetic information do not violate GINA, such as in situations where a manager or supervisor overhears someone talking about a family member’s illness.
- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
- Genetic information may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws), where an employee is asking for leave to care for a family member with a serious health condition.
- Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.

Employers must remember that any legitimately obtained genetic information must be kept confidential. If you have a legitimate use for the information, it should be kept in the employee’s confidential file and accessed only by company personnel with a legitimate need to know.

Penalties for GINA violations can be large. Minimum fines for GINA violations are $2,500. However, fines for unintentional violations may go as high as $500,000 or 10% of the company’s health insurance costs, whichever is less. But should a court determine that the employer deliberately violated GINA, there is no cap.