

Disability in the Workplace: What Employers Need to Know about the Americans with Disabilities Act

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Agenda / Format

- A series of practical questions and answers about the Americans with Disabilities Act (ADA) in the workplace, covering:
 - Definition of “disability”
 - Pre-offer inquiries
 - Reasonable accommodations
 - Employee discipline
 - Leave
 - Confidentiality
 - **Your questions at the end**

Why should Texas employers
care about the ADA?

ADA coverage of Texas employers

- The ADA is a federal civil rights statute with a section that addresses employment protections.
- The ADA employment provisions apply to private employers with 15 or more employees and all state and local government employers.
- The Texas Labor Code contains mirror provisions and incorporates the ADA by reference .
- These provisions are enforced at both the federal and state level. At the federal level, they are enforced by the Equal Employment Opportunity Commission (EEOC).

Does the ADA require employers to give preference to applicants with disabilities over applicants without disabilities?

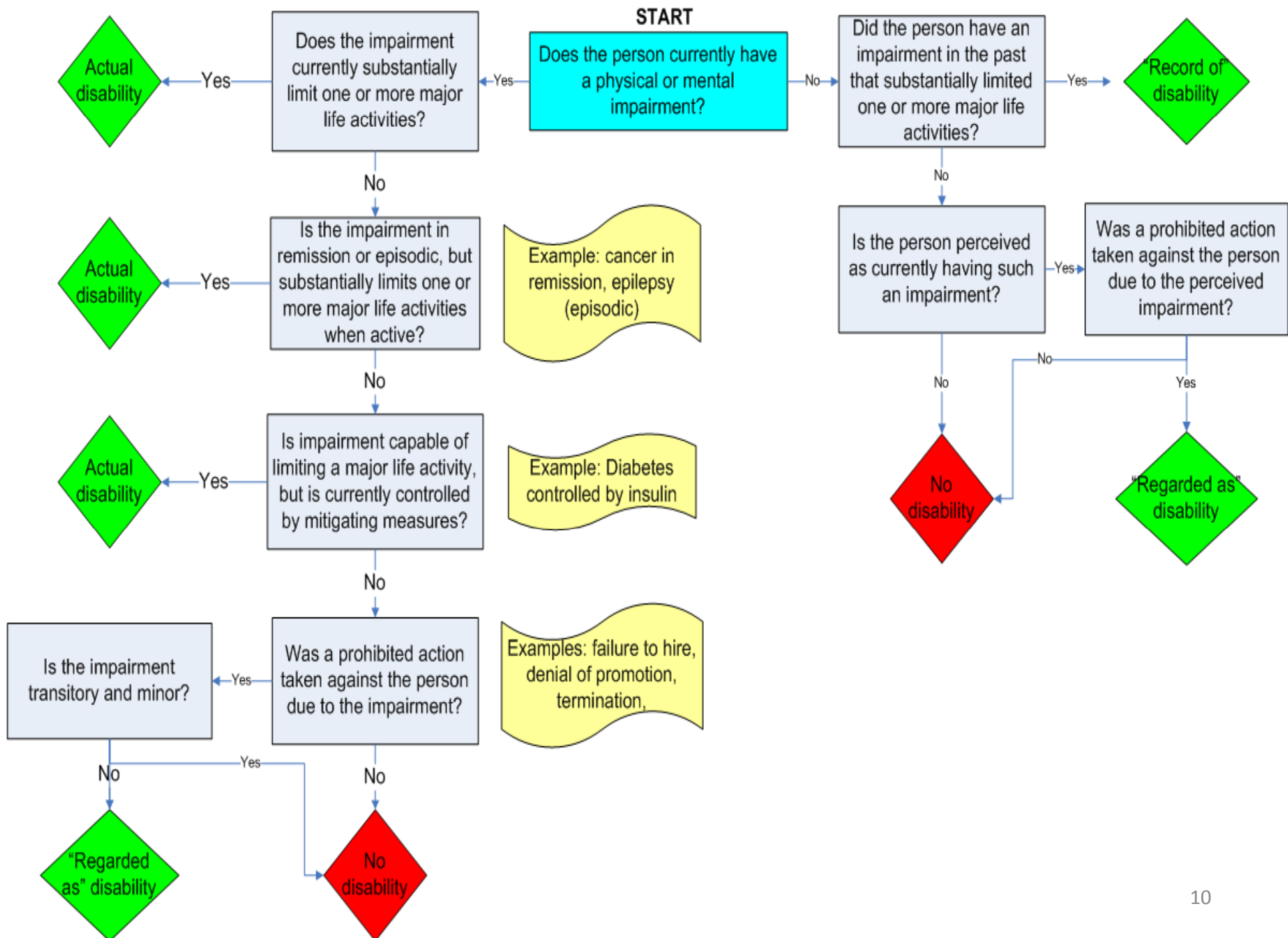
General ADA requirements

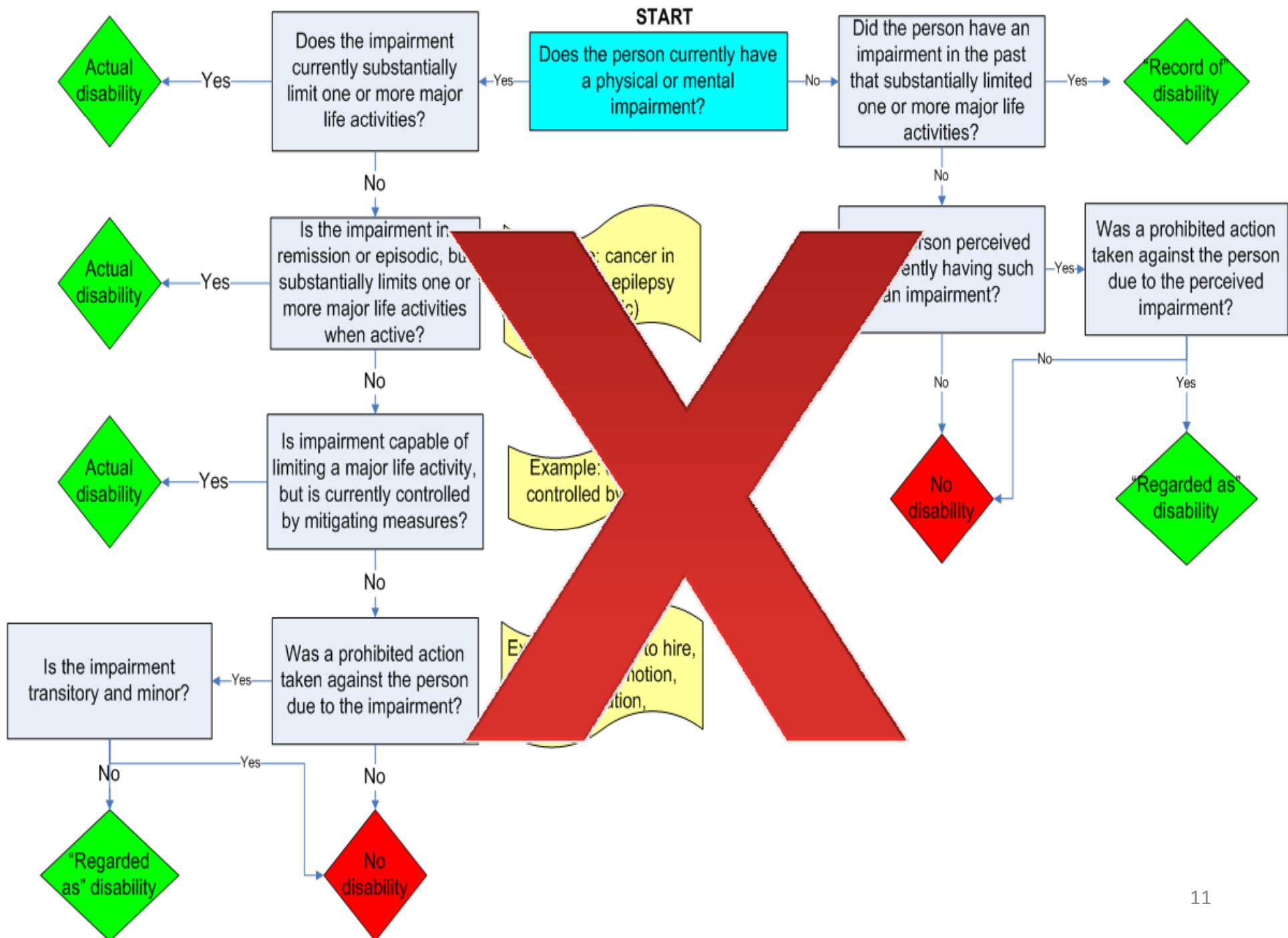
- No.
- An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability.
- Federal employment protections are anti-discrimination protections, not affirmative action programs. Most employers are not required to meet quotas related to hiring people with disabilities.

Who are considered
people with disabilities
under the ADA?

People with disabilities under the ADA

- Three groups of people are considered “people with disabilities” eligible for protections under the ADA. People with:
 - **Actual disability:** a person who has a physical or mental impairment that substantially limits one or more major life activities,
 - **Record of a disability:** a person who has a record of such impairment, or
 - **“Regarded as” a person with a disability:** a person who is regarded by others as having such impairment
- People discriminated against because they have a known association or relationship with an individual with a disability also are protected.





May an employer ask whether an applicant has a disability before making a job offer?

Pre-hire protections

- Generally no.
- An employer may not ask questions that are likely to elicit information about a disability before making an offer of employment. Questions on an application about health conditions or treatment are likely to elicit information about a disability and therefore are prohibited before an offer of employment is made.
- What can employers do at the pre-offer stage?
 - Ask about an employee's ability to perform specific job functions
 - Ask about an applicant's non-medical qualifications and skills (e.g. education, work history)
 - Ask an applicant to describe or demonstrate how he would perform job tasks

Pre-hire protections, cont'd

- Once a conditional offer is made, the employer may ask disability-related questions and require a medical examination only if this is done for all entering employees in that job category.
- If a question or examination screens out an applicant because of a disability, the employer must demonstrate that the reason for the rejection is “job-related and consistent with business necessity.”

What is a reasonable
accommodation and who
qualifies for one?

Reasonable accommodations

- A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a **qualified** applicant or employee with a disability to participate in the application process or to perform **essential job functions**.
- Examples of reasonable accommodations include:
 - making existing facilities accessible;
 - job restructuring;
 - part-time or modified work schedules;
 - acquiring or modifying equipment;
 - changing tests, training materials, or policies; and
 - providing qualified readers or interpreters.

Reasonable accommodations: the ingredients

- **Qualified.** A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position, and who can perform the essential functions of the position with or without reasonable accommodation.
- **Essential functions.** These are the basic job duties that an employee must be able to perform.
- Factors to consider in determining whether a function is essential:
 - whether the reason the position exists is to perform that function;
 - the number of other employees available to perform the function or among whom the performance of the function can be distributed; and
 - the degree of expertise or skill required to perform the function.

Reasonable accommodations: the ingredients, cont'd

- What will the EEOC consider in determining which functions are essential?
 - the employer's judgment ;
 - a written job description prepared before advertising or interviewing for the job;
 - the actual work experience of present or past employees in the job;
 - the time spent performing a function; and
 - the consequences of not requiring that an employee perform a function.

Must an employer grant every request for a reasonable accommodation?

Reasonable accommodations and undue hardship

- No. An employer does not have to provide an accommodation if doing so would be an undue hardship.
 - Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. This is a case-by-case analysis.
- An employer does not have to eliminate an essential function of a job as a reasonable accommodation or tolerate performance that does not meet its standards.
- If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective.

May an employer discipline an employee with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?

Employee discipline

- Generally yes.
- **Job-related conduct standard.** An employer may discipline an individual with a disability for violating a workplace conduct standard even if the misconduct resulted from a disability.
- **Non-job-related standard.** There may be cases where a conduct standard is not job-related for the position in question, so applying the conduct standard in a rigid way to an employee with a disability could be a violation.
- An employer must make reasonable accommodations to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future, barring undue hardship. Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.

How should an employer respond to an employee who may pose a direct threat?

Employees and direct threat

- A “direct threat” means that the person poses a significant risk of substantial harm to himself or others and that the risk cannot be reduced below the direct threat level through reasonable accommodation.
- The regulations further state that the “determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job . . . that relies on the most current medical knowledge and/or on the best available objective evidence.”
- An employer, and the EEOC when investigating a charge in which “direct threat” is an issue, must consider four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Any reasonable accommodations that would eliminate the risk of harm or reduce it to an acceptable level must also be considered.

What are the legal requirements for attendance or leave policies for employees with disabilities?

Leave and attendance policies

- An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave.
- An employer also **may** be required to make adjustments in leave policy or attendance policy as a reasonable accommodation.
 - For some positions, regular attendance is an essential function of the job. Remember that employers are not obligated to eliminate essential functions.
- The employer is not obligated to provide additional paid leave, but accommodations may include unpaid leave or a flexible work schedule.

Do confidentiality requirements apply to information about disabilities?

Confidentiality and disabilities

- Yes.
- Employers must keep all information concerning the medical condition or history of its applicants, employees, and past employees confidential.
- This includes medical information that an applicant or employee voluntarily discloses.
- Employers must maintain such information in a separate file than the person's personnel file.

Confidentiality and disabilities, cont'd

- There are limited exceptions to these confidentiality requirements:
 - Supervisors and managers may be told about necessary restrictions on work or duties of the employee and about necessary accommodations;
 - First aid and safety personnel may be told if a disability might require emergency treatment;
 - Government officials investigating legal compliance must be given relevant information on request;
 - Officials involved in processing workers' compensation or insurance claims may be told relevant information.

How should employers respond to questions about an employee with a disability from that employee's co-workers?

Responding to co-worker questions

- An employer must not disclose any medical information or the presence of a disability, except in compliance with the four narrow exceptions on the previous slide.
- An employer must not disclose to employees whether the employer is providing a reasonable accommodation. Because only employees with disabilities are entitled to reasonable accommodations, a statement that an employee is receiving a reasonable accommodation discloses that the employee has a disability.

Responding to co-worker questions, cont'd

- So what can an employer say?
 - emphasize its policy of assisting any employee who encounters difficulties in the workplace.
 - point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy.
 - reassure the employee asking the question that his privacy would similarly be respected if he found it necessary to ask the employer for some kind of workplace change for personal reasons.
- It may be helpful to supply all employees with basic training in the ADA as part of employee orientation or to include this information in the employee handbook.

Poll: What would you like to learn more about?

- Confidentiality laws
- Leave
- Substance abuse in the workplace
- Social media
- Genetic Information Nondiscrimination Act (GINA)
- Protections for caregivers
- Specific disabilities

Where to go for further information

- National Network of ADA Centers: www.adata.org 800/949 – 4232(V/TTY)
- Equal Employment Opportunity Commission: www.eeoc.gov
 - Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act: <http://www.eeoc.gov/policy/docs/accommodation.html>
- National Disability Rights Network: www.ndrn.org
- Job Accommodation Network: <http://askjan.org>
- U.S. Department of Justice, ADA Info: www.ada.gov

Questions?

- If you have further questions about general disability rights law, you may contact me at:
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