

# TWU EMPLOYMENT ADA HIRING GUIDE

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## BACKGROUND:

Title I of the ADA generally forbids discrimination in hiring on the basis of a disability. The ADA Amendments Act of 2008 broadened the definition of "individual with a disability" along with other changes that significantly expanded the coverage of the ADA, resulting in a larger number of applicants and employees protected by the law.

Although the ADA Amendments Act of 2008 did not change the requirement that applicants and employees must perform the essential functions of the job, employers are still subject to litigation if they ask unlawful questions or require prohibited examinations during the hiring process.

This TWU Employment ADA Hiring Guide is designed to assist hiring officials in the selection process as it relates to the ADA. Please contact the ADA Coordinator in the Office of Human Resources for employment related ADA questions and assistance.

## RULES FOR HIRING UNDER THE ADA:

In extremely general terms, the following rules govern hiring under the ADA.

**Texas Woman's University (TWU) cannot discriminate in hiring a "qualified individual with a disability".** A "qualified individual with a disability" is defined as an individual with a disability who meets all the skills, experience, knowledge, educational and other job requirements for the position and can perform the essential functions of the position with or without reasonable accommodation.

**TWU cannot refuse to consider requests for reasonable accommodation or reject applicants because the applicant might need a reasonable accommodation.** If an applicant requests a reasonable accommodation, and in some cases if the employing department is aware of an applicant's disability and need for an accommodation, the applicant or other representative should contact the ADA Coordinator who will engage in an interactive process to determine if an employee's disability meets the criteria for a covered disability, and if the workplace accommodation requested does not constitute an undue hardship.

**TWU cannot discriminate in any aspect of the hiring process by refusing to consider qualified individuals with disabilities.** The obligation to make reasonable accommodations extends to the hiring process itself, including applications, and interviews.

**The ability of TWU hiring officials to ask questions about an applicant's physical or mental condition before offering employment is substantially restricted.** The ADA prohibits all questions related to disabilities and medical examinations, even if job-related. Employers can make pre-offer inquiries to determine whether an applicant is "qualified" to perform essential functions (i.e. employers may ask an applicant whether they can satisfy the physical requirements of the job or whether the applicant can perform these functions with or without reasonable accommodations). Medical examinations and inquiries can be conducted only after a conditional offer has been made. See EEOC ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations (10/10/95). These rules also apply to background checks.

**Employing departments should insure that the selection criteria they utilize in their hiring processes are not discriminatory.** Discrimination on the basis of stereotypes, a speculative risk of future injury, or the possible need for other accommodations in the future, is not allowable under the Americans with Disability Act (ADA), the ADA Amendments Act of 2008, or the Texas Commission on Human Rights Act.

**Lawful reasons not to hire an individual with a disability:**

When making hiring decisions, TWU may legitimately refuse to hire any person with a disability who:

- Lacks the minimum qualifications for the job.
- Is unable to perform the essential functions of the job.
- Requires a reasonable accommodation that would be an undue hardship.
- Would pose a direct threat to the health or safety of the individual or others.
- Fails to meet any other criterion that is job-related and consistent with department necessity.

**DETERMINING "QUALIFIED" APPLICANTS WITH A DISABILITY:**

**According to the EEOC, the determination of whether an individual with a disability is "qualified":**

- is to be made at the time of the employment decision;
- cannot be made on the basis of concerns that the employee might become unable to perform essential functions in the future or might cause an increase in health insurance or workers' compensation premiums;
- cannot be made on the basis of stereotypes or speculation; and
- must be made on the basis of medical evidence and on an analysis of whether a particular applicant is qualified to perform a particular job.

**The EEOC has identified two steps in making this determination:**

**Step I - Prerequisites**

Determine if the individual satisfies the position's prerequisites, such as appropriate educational background and skills. According to the EEOC, prerequisites might include:

- education;
- work experience;
- training;
- skills;
- licenses or certificates; and
- other job related requirements, such as good judgment or ability to work well with other people.

All applicants, regardless of disability, can be required to possess all state or federal licenses or certificates required to perform the duties for which the applicant is applying. But licenses and certificates are only the most obvious prerequisites. Any prerequisites for education, experience or background can be specified as long as they do not have a disparate impact on applicants with disabilities. If prerequisites or minimum qualifications have a disparate impact on individuals with disabilities, they can still be used if they are "job-related" and "consistent with business necessity." Applicants lacking the minimum skills, qualifications or other requirements for a job are not protected by the ADA.

## **Step 2 - Ability to Perform “Essential Functions”**

Determine whether the applicant can perform the “essential functions” of the position desired “with or without reasonable accommodation.” If a disability physically prevents an applicant from performing essential functions with reasonable accommodation, he or she is not protected by the ADA. If the applicant is qualified and able to perform essential functions, and no other applicant is better qualified, the applicant is protected by the ADA. Legitimate reasons for rejecting the applicant might remain, but these reasons must be scrutinized under other standards. Such reasons include: (1) the applicant's inability to perform nonessential functions, requiring consideration of job restructuring as a reasonable accommodation/undue hardship problem and/or (2) health or safety concerns raised by the applicant's employment. These concerns must be analyzed under a direct threat standard. A job does not have to be restructured to eliminate essential functions; an applicant's inability to perform such functions is a defense against liability.

### **DETERMINING ESSENTIAL FUNCTIONS:**

Prior to posting a staff or faculty position vacancy, the employing department should review the detailed job description for the position to ensure that it adequately describes the essential functions of the job. An “essential function” is a job activity determined by Texas Woman’s University to be essential or core to performing the job; these functions cannot be modified. The employee hired **MUST** be able to perform these functions with or without reasonable accommodation. The EEOC states that whether a particular function is “essential” is a determination that must be made on a case-by-case basis.

#### **Questions to ask:**

1. Will employees in the position be required to perform the function? (Remove any functions from the job description that are no longer performed.)
2. Would removing the function fundamentally change the job?

#### **The EEOC provides guidance for reasons why a function COULD BE considered essential:**

1. The position exists to perform the function.
  - A person is hired to proof read documents. Proofreading, (and the ability to proofread accurately) is an essential function, because this is the reason that the position exists.
2. There are a limited number of other employees available to perform the function, or among whom the function can be distributed.
  - A restructuring of a job may be required and a redistribution of non-essential job duties to other employees as a reasonable accommodation. If a department has a relatively small number of employees for the volume of work to be performed, functions that might not be essential if there were a larger staff may become essential.
3. A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.
  - A program is established to provide crisis counseling services to Spanish speaking immigrants. In addition to other applicable experience, this position requires a person who can communicate fluently in the Spanish language. Fluent communication in the Spanish language is an essential function of the job.

**Types of evidence to be considered in determining whether a job function is essential, according to the EEOC:**

- The employer's judgment,
- A written job description prepared before advertising or interviewing applicants for a job.
- The amount of time spend performing the functions
- The consequences of not requiring a person in this job to perform the function
- The terms of a collective bargaining agreement
- Work experience of people who currently perform similar jobs
- Other relevant factors such as: nature of the work operation, the employer's organization structure

A written job description prepared before a job is advertised or applicants are interviewed will be more credible and given more weight than a description prepared after a disabled applicant is rejected. If a job description exists that omits particular functions, it could be viewed as evidence that those functions were not essential.

The job description containing essential functions must be shared with each applicant and the question asked, "Are you able to perform these functions, with or without a reasonable accommodation?"

**DETERMINING REASONABLE ACCOMMODATIONS:**

Reasonable Accommodations are modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position he or she desires; modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or modifications or adjustments that enable TWU employees with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

**Examples of reasonable accommodations in employment include:**

- modifying facilities, entrances, or work stations
- restructuring a job to transfer non-essential functions that the disabled person cannot perform to other employees
- providing special equipment, modifying equipment, or providing qualified readers and interpreters
- reassigning a current employee who becomes disabled and can no longer perform his or her job to a vacant position for which the individual is qualified

**Other important points about reasonable accommodation:**

- The employer's duty only extends to known physical or mental limitations of an otherwise qualified applicant or employee.
- Generally, the employer is not obligated to provide reasonable accommodation until a request is made, or until a disability is made known to the employer.
- Employers should not automatically assume that an accommodation will be needed and should not provide an accommodation without first consulting with the applicant or employee.
- Employers are not required to provide high-tech accommodations, or the accommodations requested by an applicant, if there is another simpler or less expensive accommodation.
- Employers are not required to provide reasonable accommodations if they impose "undue hardship." An undue hardship is an action that requires "significant difficulty or expense" in relation to the size of the employer, the resources available, and the nature of the operation.

- Generally, the disability is disclosed by the applicant during the interview process. If the applicant does not disclose his or her disability and the employer has no knowledge of it, the ADA does not require the employer to provide accommodation.
- Department supervisors should consult with the ADA Officer or his/her designee, in the Office of Human Resources before determining that a reasonable accommodation is not feasible or would create undue hardship, or before rejecting or approving an applicant due to a disability.

**Addressing Reasonable Accommodation during Selection:**

- The most common reasonable accommodation issue arises when an applicant asks for some type of accommodation during the selection process itself. Examples might be asking for assistance completing the application or requesting interviews be held in accessible facilities. This will rarely impose an undue hardship and hiring officials should focus on providing the accommodation.
- The other accommodation issue arises when applicants make it clear they will likely need accommodations on the job, or the applicant discloses a disability. Applicants cannot be rejected solely because they have asked for job accommodations, or because the accommodations would impose a burden. Limited inquiries may be made into the employee's ability to perform the essential with a reasonable accommodation.

**RESTRICTIONS ON HIRING DECISIONS:**

**DO NOT:**

- Refuse to hire an individual merely because the individual has asked for an accommodation.
- Refuse to hire or consider an individual for a position merely because that person has a disability or is associated with a person with a disability.
- Refuse to consider or hire a person merely because that person has, in the past, filed a workers' compensation claim.
- Refuse to hire a person because you think it might increase insurance or workers' compensation costs or because you think that they may pose a threat to the health and safety of themselves or others. This decision cannot be made based on speculation; it requires the input of the ADA Officer, or his/her designee, in the Office of Human Resources (and other campus resources) to ensure that the decision is defensible.

**YOU MUST:**

- Make or ensure that an individualized analysis is made before an applicant with a disability is rejected because of an inability to perform essential job functions or is a direct threat to the health and safety of the applicant or others. These decisions cannot be made based upon generalizations, stereotypes or assumptions.
- Contact the ADA Officer, or his/her designee, in the Office of Human Resources for advice and guidance on every individual with a disability who:
  - Requests a reasonable accommodation,
  - You are considering rejecting because of a physical or mental condition, or,
  - You are considering rejecting because of an inability to perform the essential functions of the job.

**"DIRECT THREAT" STANDARD:**

When a selection criterion that is claimed to be necessary for health or safety reasons screens out or tends to screen out disabled individuals, it must usually be

demonstrated that the individual would pose a “direct threat” to himself or others. The EEOC characterizes such a threat by specifying that the risk of harm to others must be a “significant” risk and that there must be a “high probability” of “substantial harm.”

For example, an applicant who discloses during the interview that he has AIDS cannot be rejected for a campus custodial position. The finding on transmission of AIDS from the Center for Disease Control leaves little, if any, room for an employer in an institution of higher education to reject such an applicant.

An unsubstantiated risk of an increase in workers’ compensation or insurance premiums is similarly insufficient. EEOC’s interpretation states that substantial probability of significant injury to the particular individual exists because of the job’s particular functions. If an accommodation cannot be made without lowering production standards or the time in which the task must be conducted, it is not reasonable. If, after considering all options, the risk cannot be reduced and the evidence shows the risk to be substantial, the applicant can be rejected. The EEOC and courts indicate that in assessing direct threat issues, employers should consider the risk’s duration; nature and severity of the harm posed by the risk; how likely it is that harm will occur; and whether the potential harm is imminent. The EEOC takes the position that the determination of direct threat must be made on the basis of objective factual evidence about the nature and effect of a particular disability, not on subjective perceptions, irrational fears, patronizing attitudes or stereotypes.

#### **MAKING THE HIRING DECISION:**

The ADA specifies criteria that can and cannot be used in making the hiring decisions.

##### **Criteria that cannot be used:**

- The need to make a reasonable accommodation (unless it would impose an undue hardship)
- An applicant’s inability to perform nonessential functions
- A speculative or remote risk of future injury
- Possible increase in insurance or workers’ compensation costs

##### **Criteria that can be used:**

- An applicant’s inability to perform the essential functions of the job
- A direct threat to the health and safety of the applicant or others.

#### **GUIDELINES FOR INTERVIEWS:**

The following rules apply whether you are interviewing an applicant for employment or an employee for promotion, or are conducting a reference check.

##### **Inquiries You Cannot Make:**

###### **DO NOT:**

- Ask questions about whether the individual has a current disability or a past disability.
- Ask whether the individual has any serious illness (such as AIDS), back problems, a history of mental illness or any other physical or mental condition.

- Inquire how they became disabled or the prognosis of their disability if the individual has a disability that is obvious to the interviewer (such as an applicant that is missing a limb or uses a wheelchair).
- Ask questions about the nature or severity of the applicant's disability.
- Comment in any way on the individual's physical condition except as earlier described.
- Ask whether the individual wears a hearing aid or needs to wear glasses while on the job.
- Ask questions about the applicant's past on-the-job injuries.
- Ask about the applicant's medical problems by requesting the applicant to identify if he or she has ever suffered from a list of ailments.
- Ask whether the applicant has ever been treated for any mental condition.
- Ask applicants to list any conditions or diseases for which they have been treated in the past.
- Ask whether the individual has ever been hospitalized, and if so, for what condition.
- Ask whether the individual has ever been treated by a psychiatrist or psychologist and, if so, for what condition.
- Ask whether applicants have had a major illness in prior years, or whether they have any current illnesses.
- Ask whether the applicant has ever been treated for drug addiction or alcoholism.
- Ask how many days the applicant was absent from work last year because of illness.
- Ask whether applicants are taking or have been taking any prescribed drugs.
- Ask whether the applicant has a sexually transmitted disease, such as the HIV virus.
- Ask whether an applicant has ever requested and/or received assistance or assistive devices in performing past jobs.
- Inquire about an applicant's past or current need for or receipt of medical or disability benefits.
- Ask about an applicant's past drug use or alcohol use.
- Ask any questions regarding whether an applicant is or ever has been a drug addict or an alcoholic.
- Ask whether the individual has ever filed a workers' compensation claim.
- Ask whether the individual has ever received an award of workers' compensation benefits.
- Ask whether an individual has ever been found to be disabled.
- Ask whether the individual has a spouse, children, or friends with disabilities.
- Ask about problems the individual has had because of a disability.
- Ask questions of applicants with disabilities that you do not ask of other applicants, except as described under "Inquiries you must make."
- Ask whether the individual has any disabilities or impairments that may affect performance in the position.
- Ask whether the applicant has any physical defects that preclude the applicant from performing certain kinds of work, or ask the applicant to describe such defects or specific work limitations.

**Inquiries You Are Permitted to Make:**

*These are questions you may ask in interviews or during reference checks if they are asked of all persons applying for a particular category of job, regardless of a disability.*

**YOU MAY:**

- Ask whether the individual needs any reasonable accommodations or assistance during the hiring or interviewing process.
- Describe the job and ask whether the individual can perform those functions.

- State TWU's standards and expectations and ask if the individual can meet those standards.
- State TWU's policy regarding illegal drugs and alcohol.
- State TWU's smoking policies.
- State TWU's and departmental standards for attendance, including the availability of leave for newly-hired employees.
- State the performance standards and expectations for a particular position.
- Ask questions about any of the qualifications that TWU requires for the position, including: Education, Experience, Licenses, Training, Basic reading and writing skills, Mathematical skills, and other minimum qualifications set by TWU that do not expressly relate to physical or mental conditions.
- Ask about the individual's attendance at prior jobs, if the question is limited to days off or number of days late for any reason, and is not limited to days missed due to illness.
- Ask whether the individual has ever been involved in an accident on-the-job that injured co-workers or members of the public or damaged property.
- Ask about an individual's accident record, especially accidents involving injury to property (such as traffic accident history for persons who will do driving) if you avoid questions about the individual's own injuries.
- Ask an individual how he or she could perform tasks, and with what accommodations, if the applicant indicates that he or she can perform the tasks with an accommodation.

*Questions you may ask if the individual has an obvious disability or another disability known to you that you believe may interfere with or prevent the individual from being able to perform the essential functions of the job:*

**YOU MAY:**

- Ask the individual to explain or demonstrate how he or she can perform the essential functions of the job, with or without a reasonable accommodation.

*If an applicant has a known or obvious disability that would not interfere with or prevent performance of the job, you CANNOT ask or require the applicant to demonstrate performance of a job function, unless all applicants for those positions are required to do so.*

**Inquiries You MUST Make:**

*If the individual indicates that he or she has a disability and may require a reasonable accommodation:*

**YOU MUST:**

- Inquire about the types of accommodations the individual believes may be necessary.
- Make inquiries with the individual, and if necessary, with others, as to the nature and costs of the accommodations that may be necessary.

*If the individual has an obvious disability or a disability known to you that you believe will interfere with the applicant's ability to complete the pre-employment procedures, including pre-employment testing:*

**YOU MUST:**

- Raise that concern with the individual and inquire whether the individual will require any reasonable accommodation during the hiring process.

*During the interview process:*

**YOU MUST:**



- Give a copy of the job description to the individual that identifies all essential functions and ask whether the individual is able to perform all of those essential functions with or without a reasonable accommodation.

**SAMPLE QUESTIONS FOR INTERVIEWERS:**

- **Q:** Here is a job description for this position. Are you capable of performing each of the job duties on that description?
- **Q:** Our regular work hours are 8:00 to 5:00, but you may be required to work overtime during evenings and weekends, sometimes without much advance notice. Are you able to meet those requirements?
- **Q:** New employees are not allowed to use vacation until completion of six months continuous service with the State. New employees get 8 hours sick leave accrual per month, which may be used as needed once earned. Sick leave is only for instances when the employee is actually ill, for doctor's appointments, or if a close family member living with the employee or dependent on the employee for care is ill and requires care. Otherwise, our expectations are that your attendance will regularly be 40 hours per week as scheduled. Can you meet these requirements?
- **Q:** Did your prior employer ever criticize your attendance?
- **Q:** This position requires receiving phone calls from outside individuals, students, or other employees that call into this office. There may be times when you are the only person available to take messages. Describe how you would perform this function.
- **Q:** This position frequently involves receiving incoming correspondence and the review of that correspondence to determine its importance and destination. Describe how you would perform this function.
- **Q:** This position involves loading and unloading and delivering supplies for eight hours per day with one hour off for lunch and two fifteen minute breaks. Would you be able to do that?
- **Q:** The position requires that you be working out of doors in various weathers: in the heat of summer to mow, edge, and plant; and in winter weather to sand or sweep walkways in case of ice or snow. Would you be able to do this?
- **Q:** This position requires the ability to lift and maneuver goods using forklifts, hand trucks, and stack bed trucks. Individual items may weigh over 50 pounds. Are you capable of performing this function? Describe any related experience.
- **Q:** This position will frequently involve climbing up ladders and walking on catwalks to install or service lighting equipment. Are you capable of doing that?
- **Q:** One of the key responsibilities of this position will be to provide students with detailed information in response to their questions about course sequences and graduation requirements. Describe how you would perform this function.
- **Q:** This position must be able to monitor the entrance doors and screen visitors, some of whom are allowed limited access to unsecured areas, and others who are not allowed access beyond the reception area. Describe how you would perform this function.

- **Q:** This position must calculate and post time and attendance records for our entire department. Do you have prior experience performing this function?
- **Q:** This position involves composing memos and letters, and writing informational and instructional materials. Can you tell me about your previous writing experience and provide me with some samples of your writing?

**CONCLUSION:**

TWU is free to structure positions in a way that makes sense, defining what are considered essential functions of the position. Performance standards may be set at whatever level we choose, as long as the standards are applied equally and require that all applicants perform the essential functions of the job. In addition, the ADA does not suggest that a qualified individual with a disability must be preferred to a better qualified candidate or even an equally qualified nondisabled applicant. Hiring procedures and criteria designed to indicate the best person for the job regardless of disability will be the most defensible against ADA claims.