

cans With Disabilities Act (ADA). To help employers, the EEOC has developed specific enforcement guidance on these matters.

The general thrust of the guidance is that the organization may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional job offer to a person. Once that offer is made, however, the organization may ask disability-related questions and conduct medical examinations so long as this is done for all entering employees in the job category. When such questions or exams screen out a person with a disability, the reason for rejection must be job related and consistent with business necessity. A person who provides a direct threat of substantial harm to himself, herself, or others may be rejected for safety reasons. We will have more to say about the legality of medical examinations in the next chapter.

More specific guidance is provided for the pre-offer stage as follows. Disability-related questions cannot be asked, meaning questions that (1) inquire whether a person has a disability, (2) are likely to elicit information about a disability, or (3) are closely related to asking about a disability. Along with these general prohibitions, it is impermissible to ask applicants whether they will need reasonable accommodation to perform the functions of the job or can perform major life activities (e.g., lifting, walking), to ask about lawful use of drugs, to ask about workers' compensation history, or to ask third parties (e.g., former employers, references) questions that cannot be asked of the applicant.

Alternatively, before the offer is made, it is permissible to ask:

- Whether the applicant can perform the job, with or without reasonable accommodation
- Whether the applicant can meet the organization's attendance requirement
- Whether the applicant will need reasonable accommodation for the hiring process (unless there is an obvious disability or the applicant discloses a disability)
- The applicant to provide documentation of a disability if requesting reasonable accommodation for the hiring process
- The applicant to describe or demonstrate how he or she would perform the job (including any needed reasonable accommodation)
- The applicant for certifications and licenses
- About the applicant's current illegal use of drugs (but not past addiction)
- About the applicant's drinking habits (but not alcoholism)

State Laws and Regulations

There is a vast cache of state laws and regulations pertaining to PIs.⁶⁴ These requirements vary substantially among the states and are often more stringent and inclusive than federal laws and regulations. The organization thus must become familiar with and adhere to the laws for each state in which it is located.

An example of Ohio state law regarding PIs is shown in Exhibit 8.9. Notice how the example points out both lawful and unlawful ways of gathering PI information.