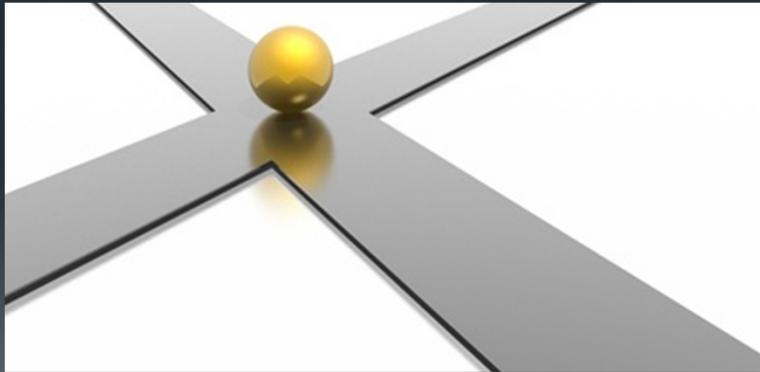


# Transition, ADA, and Employment Law

Lenore Knudtson  
Knudtson Law, LLC  
Utah Institute of Special Education Law  
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## The Intersection: 3 Areas of the Law





## Talking Points:

- IDEA Transition and community work experiences.
- The protections of ADA, Section 504, etc.
  - Accommodations
  - Accessibility
  - Prohibited acts
- Employment Law Considerations
  - Paid employee v. volunteer
  - Compensation generally
  - Job applications

Office of Disability Employment Policy

May 2012 — Youth Employment Rate (%)		
Age 16 to 19	Disability	No Disability
	10.5	25.9
Age 20 to 24	Disability	No Disability
	33.9	62.4
April 2012 — Youth Employment Rate (%)		
Age 16 to 19	Disability	No Disability
	14.2	24.8
Age 20 to 24	Disability	No Disability
	30.2	61.9
March 2012 — Youth Employment Rate (%)		
Age 16 to 19	Disability	No Disability
	9.4	24.5
Age 20 to 24	Disability	No Disability
	26.4	62.1
February 2012 — Youth Employment Rate (%)		
Age 16 to 19	Disability	No Disability
	14.0	24.1
Age 20 to 24	Disability	No Disability
	22.6	61.8
January 2012 — Youth Employment Rate (%)		
Age 16 to 19	Disability	No Disability
	15.0	23.6
Age 20 to 24	Disability	No Disability
	26.7	61.0

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## IDEA Transition and Employment



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## IDEA Transition

- Transition plans must include:
  - Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to –
    - Training,
    - Education,
    - Employment, and
    - Independent living, where appropriate.
  
- 34 C.F.R. §300.320(b).

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## Are Employment Goals Required?

- **YES.** According to recent OSEP guidance, each transition age student's IEP must include a separate postsecondary goal in the area of employment. See *Letter to Cox*, 112 LRP 6511 (OSEP 2011).

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## Are Work Placements Required?

- **MAYBE.** If an IEP team determines that a work placement is an appropriate transition service for a child, it must be included in the IEP. See *Letter to Spitzer-Resnick, Sweden, and Pugh*, 112 LRP 32664 (OSEP 2012).

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## Does LRE Apply to Work Placements?

- **YES.** Segregated employment programs may be appropriate work placements under the IDEA for a particular student if determined appropriate by the IEP team based on the LRE requirements and the specific needs of a student.
- The IDEA does not prohibit segregated employment, but the LRE provisions would apply equally to the employment portion of the student's program and placement.
- Segregated employment must be justified as the LRE for a student.

*See Letter to Spitzer-Resnick, Sweden, and Pugh, 112 LRP 32664 (OSEP 2012).*

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## Must Supplementary Aids & Services Be Provided?

- **YES.** When an IEP includes a work placement as part of the student's transition services, the IEP team must consider, and include in the IEP, as appropriate, any supplementary aids and services needed to enable the student to participate with other students with disabilities and nondisabled students in the work placement.
- The LEA must provide any supplementary aids and services that are identified in the IEP.

*See Letter to Spitzer-Resnick, Sweden, and Pugh, 112 LRP 32664 (OSEP 2012).*

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## Basic Facts About the ADAA



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## Basic Facts

### Title I – Employment

- Employers may not discriminate against an individual with a disability in hiring or promotion if the person is otherwise qualified for the job.
- Employers can ask about one's ability to perform a job, but prior to offering a job they cannot inquire if someone has a disability or require medical examinations.
- Employers cannot use tests that tend to screen out people with disabilities unless the tests measure job-related skills.

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## Basic Facts

- Employers need to provide “reasonable accommodation” to individuals with disabilities. This includes steps such as job restructuring and modification of equipment.
- Employers do not need to provide accommodations that impose an “undue hardship” on business operations.
- Who needs to comply:
  - Private employers with 15 or more employees.
  - State and local government employers, regardless of how many employees they have.

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## Accommodations Are Not . . .

- Accommodations are NOT intended to justify or compensate for a lack of knowledge, skills, or abilities necessary to succeed. Whenever possible, accommodations should be based on the use and further development of existing skills and capabilities.
  - *The 411 on Disability Disclosure, ODEP & NCWD*

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## Employers & the ADA: Myths & Facts

Office of Disability Employment Policy

### MYTHS

The ADA forces employers to hire unqualified individuals with disabilities.

### FACTS

Applicants who are unqualified for a job cannot claim discrimination under the ADA. Under the ADA, to be protected from discrimination in hiring, an individual with a disability must be qualified, which means he or she must meet all requirements for a job and be able to perform its essential functions with or without reasonable accommodations.

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## Employers & the ADA: Myths & Facts

Office of Disability Employment Policy

### MYTHS

The ADA gives job applicants with disabilities advantages over job applicants without disabilities.

### FACTS

The ADA does not give hiring preference to persons with disabilities.

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## Employers & the ADA: Myths & Facts

Office of Disability Employment Policy

### MYTHS

The ADA places a financial burden on small businesses that cannot afford to make accommodations for individuals with disabilities.

### FACTS

Businesses with fewer than 15 employees are not covered by the employment provisions of the ADA. Moreover, a covered employer does not have to provide a reasonable accommodation that would cause an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an organization's size, financial resources and the nature and structure of its operation.

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## Employers & the ADA: Myths & Facts

Office of Disability Employment Policy

### MYTHS

Under the ADA, an employer cannot fire an employee who has a disability.

### FACTS

Employers can fire workers with disabilities under three conditions:

- The termination is unrelated to the disability or
- The employee does not meet legitimate requirements for the job, such as performance or production standards, with or without a reasonable accommodation or
- Because of the employee's disability, he or she poses a direct threat to health or safety in the workplace.

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## Prohibited Employment Practices from the EEOC

- It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

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## Prohibited Employment Practices from the EEOC

- It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race.
- An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

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## Prohibited Employment Practices from the EEOC

- If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.
- If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

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## Prohibited Employment Practices from the EEOC

- It is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the bases of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Employee benefits include sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs. For example, an employer may not pay Hispanic workers less than African-American workers because of their national origin, and men and women in the same workplace must be given equal pay for equal work.

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## Prohibited Employment Practices from the EEOC

- The law requires that an employer provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.
- A reasonable accommodation is any change in the workplace (or in the ways things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.
- Reasonable accommodation might include, for example, providing a ramp for a wheelchair user or providing a reader or interpreter for a blind or deaf employee or applicant.

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## Prohibited Employment Practices from the EEOC

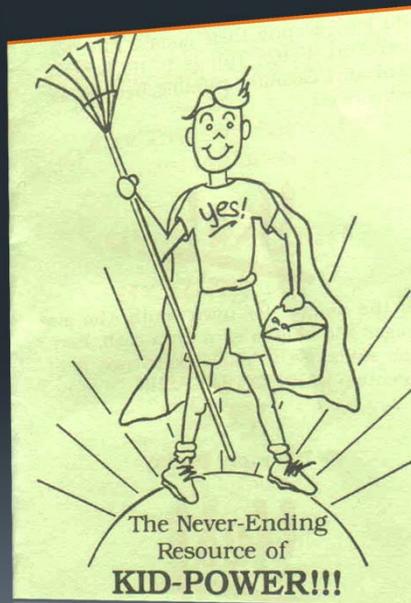
- As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.
- Employers are explicitly prohibited from making pre-employment inquiries about disability.

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## Prohibited Employment Practices from the EEOC

- Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.
- Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.
- Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

## Employment Law Considerations



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## To Disclose, or Not

Excerpts from *The 411 on Disability Disclosure*, ODEP & NCWD

- Every job seeker with a disability is faced with the same decision: “Should I or shouldn’t I disclose information about my disability?” Ultimately, the decision of whether or not to disclose is entirely personal. It is a decision to be made only after a person with a disability weighs the personal advantages and disadvantages of disclosure.
- People with disabilities must consider the supports and services that they may need to be successful in the job of their choice. Remember that accommodations in the workplace are only provided when a worker discloses his or her disability and requests job accommodations. **Employers and co-workers are not required to provide accommodations to workers who have chosen not to disclose their disabilities.**

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## To Disclose, or Not

Excerpts from *The 411 on Disability Disclosure*, ODEP & NCWD

- Some job seekers choose not to disclose their disabilities because they believe that they can manage their careers in the same way as any other job seeker or because they have become skilled at developing compensatory strategies and have the ability to self-accommodate without assistance. Others decide not to disclose at work because they fear being treated differently or being denied the same opportunities as job seekers without disabilities.

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## To Disclose, or Not

Excerpts from *The 411 on Disability Disclosure, ODEP & NCWD*

- On the other hand, many job seekers choose to disclose disability-specific information for a variety of important reasons and to a variety of different people (employer, work mentor, co-workers). The following list includes some (but definitely not all) of the reasons a person with a disability might choose to disclose:
  - To obtain information to assist him or her in developing a career plan that addresses possible barriers and accommodations;
  - To identify disability-specific employment services and support networks;
  - To discuss employment requirements with recruiters or other professionals;
  - To discuss disability issues with prospective employers to determine whether the requirements of the position can be met, with or without reasonable accommodation;
  - To investigate the supports available at the workplace; and
  - To develop mentoring and peer support structures with employees and employers with disabilities.

Excerpts from *The 411 on Disability Disclosure, ODEP & NCWD*

People with disabilities have the <b>right</b> to:	People with disabilities have the <b>responsibility</b> to:
<ul style="list-style-type: none"> <li>▪ Have information about their disability treated confidentially and respectfully.</li> <li>▪ Seek information about hiring practices from any organization.</li> <li>▪ Choose to disclose their disability at any time during the employment process.</li> <li>▪ Receive appropriate accommodations in an interview so they may demonstrate their skills and abilities.</li> <li>▪ Be considered for a position based on their skills and merit.</li> <li>▪ Be questioned in a respectful manner about their disability for the purpose of reasonable accommodation.</li> <li>▪ Be self-determined and proactive.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Disclose their need for accommodation if they desire any work-related adjustments.</li> <li>▪ Search for jobs that address their skills and abilities.</li> <li>▪ Inform the manager or interview panel about their need for appropriate interview accommodations in a timely manner.</li> <li>▪ Identify appropriate and reasonable accommodations for an interview.</li> <li>▪ Negotiate reasonable accommodation(s) with an employer at the point of job offer and beyond.</li> <li>▪ Bring their skills and merit to the table.</li> <li>▪ Be truthful, self-determined, and proactive.</li> </ul>

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## What Questions Can be Asked?

- In the context of providing employment related services and training, the types of disability-related inquiries which are permissible depend upon whether the questions being asked are made in the following hiring stages:
  - Pre-offer,
  - Post-offer, or
  - Post-hire.

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## What Questions Can be Asked?

- You may not, however, ask a job-seeker whether he or she will need reasonable accommodations to perform the essential functions of the job, except under the following limited circumstances:
  - The job-seeker has an obvious disability, and you reasonably believe that the applicant will need reasonable accommodation because of that obvious disability;
  - The job-seeker has voluntarily disclosed to you that s/he has a hidden disability, and you reasonably believe that the applicant will need reasonable accommodation because of that hidden disability; or,
  - The job-seeker has voluntarily disclosed to you that s/he needs reasonable accommodation to perform the job.

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## What Questions Can be Asked?

- In these limited circumstances, although you may ask questions about the accommodations the job-seeker will need, you may not ask questions about the underlying medical condition.

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## What Questions Can be Asked?

- **In the Post-Offer, Pre-Hire Stage:** Both the One-Stop and the employer may ask disability-related questions and require medical exams, even if they are unrelated to the job, as long as two conditions are met:
  - All entering employees in the same job category must be subjected to the same questions/exams, regardless of disability; and,
  - All information obtained through these questions/exams must be kept confidential.

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## What Questions Can be Asked?

- **After the Job-Seeker Begins Work:** The employer may ask disability-related questions and/or require medical exams if the questions/exams are job-related and consistent with business necessity. Again, the information obtained must be kept confidential.

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## Special Minimum Wages

### The Fair Labor Standards Act

- A worker who has disabilities for the job being performed is one whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury.
- Disabilities which may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism and drug addiction.
- The following, taken by themselves, **are not** considered to be disabilities for purposes of paying special minimum wages: education disabilities, chronic unemployment, receipt of welfare benefits, nonattendance at school, juvenile delinquency, and correctional parole or probation.

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## Special Minimum Wages

### The Fair Labor Standards Act

- Special minimum wages must be commensurate wage rates - based on the worker's individual productivity, no matter how limited, in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the geographic area from which the labor force of the community is drawn. The key elements in determining commensurate rates are:
  - Determining the standard for workers who do not have disabilities, the objective gauge against which the productivity of the worker with a disability is measured.
  - Determining the prevailing wage, the wage paid to experienced workers who do not have disabilities for the same or similar work and who are performing such work in the area. Most SCA contracts include a wage determination specifying the prevailing wage rates to be paid for work on the SCA contract.
  - Evaluating the quantity and quality of the productivity of the worker with the disability.

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## Subminimum Wages

### The Fair Labor Standards Act

- The **youth** minimum wage is authorized by Section 6(g) of the FLSA, as amended by the 1996 FLSA Amendments.
- The law allows employers to pay employees under 20 years of age a lower wage for a limited period -- 90 calendar days, **not** work days -- after they are first employed.
- Any wage rate above \$4.25 an hour may be paid to eligible workers during this 90-day period.

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## What Questions Can be Asked?

- **Pre-Offer Stage:** In the pre-offer stage, if you are an employer, or a One-Stop staff member screening applicants for employers or deciding whether to refer a particular job-seeker for a particular job, you may ask about an applicant's ability to perform specific job functions.
- For example, you may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.
- You may also ask applicants to describe or demonstrate how they would perform job tasks, if the same questions are asked of all applicants.
- You may also describe what the application process will involve and ask whether the job-seeker will need accommodations for the application process. If the job-seeker says yes, and the need for accommodation is not obvious, you may ask for reasonable documentation of a disability before you provide accommodations.

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## Fringe Benefits

- The Fair Labor Standards Act does not require the payment of fringe benefits.

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## Safety and Risk

- The ADA requires that employers consider reasonably accommodating any employee with a disability so that he or she can perform the essential functions of the job, in accordance with OSH Act requirements. For example, if an audiometric test required by OSHA identifies that an employee has a hearing loss because of exposure to loud equipment, the employer might be tempted to terminate the employee or transfer him or her to another job to prevent continued exposure. The ADA requires, however, that the employer first consider an accommodation (such as sound abatement equipment) that would enable the employee to remain in his or her current position. If no such accommodation would work, the employer may then consider reassigning the employee.
- OSHA regulations may prohibit certain accommodations. For instance, OSHA's respirator requirements are clear and specific. Where OSHA regulations require employees to wear respirators on a particular job, an employer would not have to keep an employee who is unable to wear a respirator in a position that requires one as part of a reasonable accommodation. The ADA would require, however, that the employer consider transferring this employee to an equivalent, vacant position as an alternate accommodation.

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## Safety and Risk

- Generally speaking, Occupational Safety and Health Act (OSHA) coverage extends only to employees of an organization.
- If a student receives no pay for "job-shadowing" or other unpaid experiences, ten OSHA regulations would not apply.

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## Safety and Risk

- Generally speaking, volunteers may be covered by the employer's Workers' Compensation program.
- However, continuation pay is not available since volunteers are not salaried.

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## Volunteers v. Employees

- Generally speaking, volunteers cannot be used to displace wage earning employees. *See 45 C.F.R. Part 1216.*
- Limited exceptions exist, but an employer cannot replace a paid workforce with volunteers.

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**Thank you!**

Lenore Knudtson  
Knudtson Law, LLC  
knudtsonlaw@me.com

