

THE INSIDE PERSPECTIVE

LABOR AND EMPLOYMENT LAW SOLUTIONS FOR EXECUTIVES AND HR PROFESSIONALS



SMITH MOORE LLP
ATTORNEYS AT LAW

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ADA Pre-Offer Inquiries: Be Careful What You Ask

Under the Americans With Disabilities Act (“ADA”), before an applicant receives a conditional offer of employment (during the “pre-offer period”), covered employers are prohibited from asking any question that is likely to reveal the existence of a disability. This prohibition applies equally to written questions asked on an application and those asked verbally during an interview. Examples of **prohibited** pre-offer inquiries include:

- Do you have a disability that will interfere with your ability to perform the job?
- Do you need a reasonable accommodation to perform the job?
- How many sick days or FMLA days did you take during the last year?
- Have you ever filed a claim for workers’ compensation benefits?
- Have you ever been treated for mental health issues?
- What prescription drugs are you currently taking?

However, if an applicant *volunteers* information regarding a disability, the employer may listen. Moreover, if an applicant has an obvious disability and it is reasonable to ask whether this disability will make it difficult for the applicant to perform a specific job task, the employer may ask if an accommodation is needed to perform the specific task.

- Example: Mary uses a wheelchair. She applies for a job that requires her to retrieve and store files on shelves that would appear to be beyond her reach. The employer may ask Mary whether she would need a reasonable accommodation to perform the job. Mary replies that she can stand for short periods of time and believes she can perform the job. The employer may show Mary the files and ask her to describe how she would perform the task with or without reasonable accommodation.

An employer can always list the functions of the job and ask the employee if he or she is qualified to perform them. Just be careful if the conversation turns to health-related issues. The time to follow up on those types of issues is after the conditional offer of employment, not before.

TIP

Timing is everything. Pre-offer, the employer should only ask if the applicant is able to perform the essential functions of the job as described by the employer. An employer has more latitude to ask job-related questions that might elicit health information or to require a medical examination after it has extended the applicant a conditional job offer, as long as the employer treats all applicants who are offered the same type of job equally.



TIP Author - Patti Ramseur
Smith Moore LLP
Labor and Employment Team
Greensboro Office

Labor and Employment Team Members

Allen Buckley	(404) 962.1042	Alex Maultsby	(336) 378.5331
Laura Deddish Burton	(336) 378.5566	Jerry Oliver	(919) 755.8710
Will Burton	(336) 378.5421	Patti Ramseur	(336) 378.5304
Denise Smith Cline	(919) 755.8734	Barbara Ruby	(336) 378.5294
Martin Erwin	(336) 378.5327	Beth Brooks Scherer	(919) 755.8790
Mike Kelly	(336) 378.5336	Ed Sharp	(336) 378.5259
Caroline Lock	(336) 378.5341	Julie Theall	(336) 378.5256
Travis Martin	(336) 378.5277	Jeri Whitfield	(336) 378.5270

To send individual email: firstname.lastname@smithmoorelaw.com

For additional information on this or any other labor and employment topic, please contact any member of the Labor and Employment Team.

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www.smithmoorelaw.com

ATLANTA

One Atlantic Center
Suite 3700
1201 West Peachtree Street
Atlanta GA 30309
404.962.1000
404.962.1200 {FAX}

GREENSBORO

300 N. Greene Street
Suite 1400
Greensboro NC 27401
336.378.5200
336.378.5400 {FAX}

RALEIGH

2800 Two Hannover
Square
Raleigh NC 27601
919.755.8700
919.755.8800 {FAX}

WILMINGTON

300 N. 3rd Street
Suite 301
Wilmington NC 28401
910.251.7001
910.251.7007 {FAX}

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