

**REMEMBER THE TITANIC – DON'T SINK YOUR COMPANY'S BOAT WITH POOR
RECRUITING AND HIRING PRACTICES**

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I. Important Laws That Impact Recruiting and Hiring Practices

- A. Americans with Disabilities Act (ADA) and the American with Disabilities Act Amendment Act ("ADAAA"); The Rehabilitation Act of 1973
- B. Title VII Civil Rights Act 1964 ("Title VII") and Executive Order 11264
- C. The Age Discrimination in Employment Act ("ADEA").
- D. The Family and Medical Leave Act ("ADEA")
- E. Oklahoma's Anti-Discrimination Act ("OADA")
- F. Oklahoma's Workers' Compensation Act
- G. Oklahoma Workplace Drug and Alcohol Testing Act
- H. The Fair Credit Reporting Act ("FRCA")
- I. The Uniform Services Employment and Reemployment Rights Act ("USERRA")
- J. The Civil Rights Act of 1866 ("1981")
- K. The Fair Labor Standards Act ("FLSA")
- L. The Immigration and Nationality Act ("INA"), and related federal legislation
- M. The Occupational Safety and Health Act "(OSHA)"; Oklahoma's Safety and Health Act
- N. The Bankruptcy Act
- O. Sarbanes-Oxley Act
- P. The Oklahoma Smokers Protection Act
- Q. Negligent Hiring

II. General Overview of Law

A. The ADA

1. The ADA prohibits employment discrimination against people with disabilities, who are able to perform the essential functions of the job with or without accommodations.
2. The ADA also requires the employer to make reasonable accommodations to qualified employees to perform the essential functions of the job.
3. It further limits medical inquiries and inquires about an individual's disability at the pre-offer stage.
4. It prohibits retaliation against individuals exercising rights under the statute.
5. The ADA applies to employers who have 15 or more employees.
6. The OADA also prohibits discrimination in employment on the basis of a disability and retaliation. 25 O.S. § 1901. Oklahoma's law applies to employers who have 20 or more employees.
7. The Rehabilitation Act of 1973 is similar to the ADA. It applies to all federal agencies and employers doing business under certain federal contracts.

B. Title VII, the ADEA and § 1981

1. Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin. Congress amended Title VII through the Pregnancy Discrimination Act of 1978 to prohibit discrimination in the treatment of pregnant women for all employment related purposes.
2. Section 1981 also prohibits race, ethnic and national origin discrimination.
3. The ADEA prohibits discrimination against persons 40 years of age or older in all employment related purposes.
4. Under Title VII religious practices must be accommodated.
5. Title VII, the ADEA and § 1981 prohibit retaliation against individuals exercising rights under the statute.
6. Title VII applies to all employers and labor organizations engaged in an industry effecting commerce, who employ fifteen or more employees.
7. Unlike the ADA, there is no statutory prohibition on pre-employment inquiries under Title VII or the ADEA. However, under developing case

law and Equal Employment Opportunity Commission ("EEOC") guidelines, certain pre-employment inquiries have been held to be discriminatory and/or are closely examined by the EEOC when the employment decision is adverse to a protected individual. For example, the EEOC regulations on interpretations of the ADEA provide that "a request on the part of an employer for information such a 'date of birth' or 'state age' on an employment application form is not, in itself, a violation of the Act. But because the request may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which reveal such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act." 29 CFR § 1625.5

C. The FMLA

1. The FMLA provides leaves of absence and job and benefit protection to employees who qualify under certain circumstances.
2. Leave is available for the serious health condition of the employee or the employee's protected family member or qualified servicemember; the birth, adoption or foster care placement of a child, and exigent circumstances when a family member is on active duty or call to active duty status in the National Guard or Reserves.
3. The FMLA prohibits retaliation against individuals exercising rights under the statute.

D. Oklahoma's Workers' Compensation Act

1. Provides benefits for employees injured on the job.
2. It prohibits retaliation against individuals exercising rights under the statute.

E. The Workplace Drug and Alcohol Testing Act

1. Set out specific requirements that must be met before an employer can test for applicants or employees drug or alcohol use. Employers required to test under federal law are exempt.

F. The FCRA

1. Sets out specific requirements that must be met before an employer can use a third party to gather credit history or background information on an employee, including such information as criminal history, employment history, etc.

G. Sarbanes-Oxley Act

1. Among other prohibitions the Act creates a new civil cause of action in favor of employees of publicly traded companies who are subject to any retaliation for disclosures relating to fraud against shareholders, accountancy violations, violation of SEC rules and related matters.

H. Oklahoma Smokers' Protection Act

1. Prohibits discrimination against employee because employee is a nonsmoker or smokes or uses tobacco products during non-working hours; or
2. Requiring employee or applicant for employment to abstain from smoking or using tobacco products during non-working hours

I. Immigration Laws

1. Prohibits the hiring of workers unless they are citizens of the United States or aliens authorized to work in the United States. Imposes documentation requirements. Also imposes non-discrimination requirements.

J. The Bankruptcy Act

1. Prohibits employers from discharging (and public employers from refusing to hire) employees on basis of past bankruptcy or dischargeable debt

K. The National Labor Relations Act

1. Protects the rights of private employees to organize collectively for purposes of mutual protection and collective bargaining

L. Section 1981

1. Prohibits race discrimination in *all* forms of contracting, including public and private employment (except fed. govt.)

M. OSHA and Oklahoma's OSHA

1. Establishes minimum standards of occupational health and safety, and prohibits retaliation for complaining about safety issues
2. Prohibits employers from retaliating against whistleblowers

N. FLSA

1. Requires payment of minimum wage;

2. Requires payment of overtime for hours greater than 40 hours/week
3. Prohibits retaliation against employee for complaining about practices related to the FLSA

O. USERRA

1. Prohibits discrimination because of an individual's service in the uniformed and armed forces of the United States. It provides certain leave of absence benefits. Usually, an employee returning from active military must be restored to his/her former position with the appropriate seniority, status, and benefits.

P. Negligent Hiring

1. Creates a theory to hold an employer legally responsible for harm an employee cause to third parties if the employer knew or had reason to know that the employee would engage in the harmful behavior.

III. Lawful Recruitment and Hiring Practices

A. The Hiring Decision

1. Prohibition against discrimination

- a. Recruitment and hiring decisions cannot be based on an individual's race, religion, color, national origin, sex, disability, age (40 or over); smokers, users of tobacco, persons with impairments, etc.
- b. An employer cannot discriminate against a qualified individual who can perform the essential job functions, with or without accommodation, on the basis of that individual's disability.

2. Bona Fide Occupational Qualifications ("BFOQ")

- a. A bona fide occupation qualification is a very narrow exception to the prohibition against discrimination. Employers may base hiring decisions on religion, sex or national origin, only when such classifications are reasonably necessary to the normal operations of the business or enterprise.

3. Prohibition against retaliation

- a. Recruiting and hiring decisions cannot be based on an individual's prior exercise of rights under the Title VII, Civil Rights Act, FMLA, ADA, ADEA, OADA, FLSA, USERRA, OSHA, NLRA, and Sarbanes-Oxley, etc.

4. Prohibition against denying employment opportunities because of the requirement to make a reasonable accommodation

a. An employer is prohibited from denying employment opportunities to an applicant or employee who is an otherwise qualified individual with a disability because of the requirement to make a reasonable accommodation.

5. Prohibition against discrimination on the basis of association with a person with a disability.

a. An employer cannot refuse to hire someone because he/she associates with disabled.

6. Prohibition against discrimination on the basis of bankruptcy or credit history.

a. Public employers cannot refuse to hire an individual because he/she has been discharged in bankruptcy, been insolvent, had a dischargeable debt, or has associated with someone who has.

b. Private employers cannot terminate or discriminate against employees for the reasons stated above. It is unclear whether the prohibition goes to the hiring decision, but the best practice would be not to refuse to hire because of bankruptcy.

c. Additionally, the EEOC will find that discrimination has occurred if the refusal to hire because of a bankruptcy or bad credit history has an adverse impact on minorities.

7. Accommodation of Disabled

a. An employer must make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless the accommodation would impose an undue hardship on the operation of the business of the employer. The reasonable accommodations are made to enable the individual to perform the essential functions of the job.

b. An employer can refuse to hire someone who refuses necessary reasonable accommodation.

c. A reasonable accommodation does not have to be the accommodation of choice of the disabled individual. As long as the employer gives primary consideration to the requested accommodation and ultimately offers an effective reasonable accommodation, he/she can refuse to hire/fire someone who rejects the reasonable accommodation.

8. Requirement of interactive process

a. Employers are required to engage in an interactive process with a disabled individual to determine whether or not a reasonable accommodation exists. The process includes:

- i Consultation with applicant;
- ii Consultation with human resources;
- iii Consultation with technical assistance class.

B. Advertising

Generally, advertising must be non-discriminatory. The ADA and the ADEA impose some additional conditions.

1. Age

a. Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature violate the ADEA unless one of the statutory exceptions applies.

b. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60, retirees, or supplement your pension*. (Emphasis added.)

c. Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the ADEA. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the request were made for a lawful purpose.

d. A request on the part of an employer for information such as Date of Birth or age on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the ADEA. That the purpose is not one proscribed by the statute should be made known to the applicant by a reference on the application form to the statutory prohibition in language to the following effect:

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age, or by other means. The term “employment application,” refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant’s background. It relates not only to written preemployment inquires, but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the Act. The term “employment application,” refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant’s background. It relates not only to written pre-employment inquires, but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the Act.

2. Disability Accommodation

- a. Information about job openings should be accessible to disabled. For example, an available location to those with mobility disabilities.
- b. Recruitment activity must be accessible at college campus, job fairs, etc., to people with visual hearing and other disabilities.

C. Pre-Employment Inquiry

a. Limitations on pre-employment inquiries apply to

- 1. Application forms
- 2. Job interviews
- 3. Background or reference checks.

b. List Of Fair And Unfair Pre-Employment Inquiries.

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
|--------------------------------|--|---|
| Accommodations Required | Obvious disability or need — can inquire about reasonable accommodation when you reasonably believe that an applicant will need reasonable | What reasonable accommodations are needed to perform the job? |

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
|-----------------------------------|--|--|
| | <p>accommodation to perform the job functions, based on; 1) obvious disability; 2) voluntarily disclosed hidden disability; or 3) voluntarily disclosed need for accommodation.</p> <p>You may ask certain limited questions, such as what type of accommodation is needed.</p> <p>May ask applicant if s/he needs accommodation in hiring process — interviews, written tests, et cetera.</p> <p>May ask if the applicant can perform the essential functions of the job.</p> | |
| Addictions (Alcohol/Drugs) | None. | Have you ever been treated for drug addition or alcoholism? How much alcohol do you use? |
| Affirmative Action | <p>May ask applicants to voluntarily and confidentially identify for affirmative action program under federal, state or local law. The applicant must be told that the information is used solely in connection with an affirmative action program, is voluntary, confidential, and refusal will not subject applicants to adverse treatment and information will be used according to law. Information must be kept confidential on a form separate from the application.</p> | |
| Age | <p>Inquiries and proof if over age 18. After hire birth date and proof of age for benefits purposes, etc.</p> <p>Preference for older individuals, such as over the age of 60, retirees or supplement your pension.</p> | <p>Age/date of birth/date of graduation. Any inquiry implies a preference for persons under 40 years of age.</p> |
| Alcohol | Whether applicant drinks alcohol or has been arrested for driving under the influence for alcohol. | |

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
|---------------------------------------|---|--|
| Arrests (See also Convictions) | None. | All inquiries relating to arrests. |
| Attendance | Inquiries about ability to meet attendance requirements and provide information on regular work hours (e.g., 7:00 - 3:00). May disclose job related leave policies and special attendance needs for the job and ask if applicant can meet these requirements. | How many days absent from work at prior employers because of illness, FMLA, etc.? |
| Citizenship | Whether applicant is lawfully eligible to work in this country. | Whether applicant is a citizen. Requirement before hiring that applicant presents birth certificate, naturalization or baptismal record. Any inquiry into citizenship which would tend to divulge applicant's lineage, ancestry, national origin, descent or birthplace. |
| Convictions (See also Arrests) | Inquiries concerning specified convictions which reasonably relate to fitness to perform the particular job(s) being applied for. | Any inquiry which does not meet the requirements for fair pre-employment inquiries is prohibited. |
| Disability | None. | Any inquiry regarding disability — e.g., one that is likely to elicit information about the cause, nature, severity, treatment, length, prognosis. |
| Documentation | May ask for documentation of disability or need for accommodation when appropriate to otherwise inquire about accommodation. See Accommodation Required. | Birth certificate, naturalization or baptismal record. |
| Education | Inquiries about level of education received should be job related and consistent with business necessity to avoid disparate impact claim. | Inquires which are not job related and inconsistent with business needs because of potential for disparate impact. |
| Experience | Inquiries about experience applicant has in performing the job. | |

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
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| Family | Whether all applicants (male/female) can meet specified work schedules or have activities, commitments or responsibilities that may prevent applicants from meeting work attendance requirements. | Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements, or dependents. |
| Financial | None, unless job related and consistent with business necessity. | Whether applicant has ever declared bankruptcy. Inquiries about credit history, garnishment, if not job related and consistent with business necessity. |
| Health - Physical | None. | Any medical related inquiry. For example, "Have you ever been treated for any diseases? E.g., epilepsy, muscular dystrophy, multiple sclerosis, AIDS, cancer, heart disease, diabetes." "Whether applicant has had major illness during prior period?" "Is there any health related reason you might not be able to perform the job for which you are applying?" |
| Health-Mental | None. | Have you ever suffered any mental impairment or been treated for any mental condition? |
| Height and Weight | Inquires as to ability to perform actual job requirements. Being of a height or weight will not be considered to be a job requirement unless employer can show that no employee with the ineligible height or weight could do the work. | Any inquiry which is not based on actual job requirements. |
| Hospitalization | None. | Have you ever been hospitalized? If so, for what condition? |
| Job Function | Inquiries into ability of applicant to perform any job-related functions. Can ask all applicants to demonstrate how he/she can perform job related functions with or without accommodation. If applicant requires accommodations to enable them to demonstrate, may discuss and provide. Can ask | Can you perform these functions with ___ without ___ reasonable accommodation? (Check One) |

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
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| | a particular applicant to describe or demonstrate how s/he would perform the job, if reasonably believe the applicant will not be able to perform the job because of an obvious disability or because applicant voluntarily disclosed a hidden disability. If applicant requires reasonable accommodations to enable them to demonstrate, may discuss and provide. | |
| Languages Spoken | May inquire when certain language skills are job related and consistent with business needs. | May not inquire when language skills are not a legitimate requirement of the work. |
| Major Life Activities | None. | What major life activities, such as standing, lifting, walking, et cetera, are able/unable to perform? |
| Marital Status | None. After hire may get married/single status for tax and social security purposes and name and ages for benefits purposes. | All inquiries. |
| Medications (Drugs) | Inquiries about current illegal use of drugs. May inquire about lawful drug use, if the applicant tests positive for illegal drug use. | Are you on any constant medication? Are you taking any prescribed drugs? |
| Military | Inquiries concerning educations, training, or work experience in the armed forces of the United States. | Type or condition of military discharge. Applicant's experience in other than U.S. Armed Forces. Request for discharge papers. |
| Name | Whether applicant has worked for this company or a competitor under a different name and, if so, what name. Name under which applicant is known to job references if different from present name. | Inquiry to original name whether it has been changed by court order or marriage. Inquiries about a name which would divulge lineage, ancestry, national origin or descent. |
| National Origin | Inquiries into an applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements. | Inquiries into an applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of an applicant's parents or spouse. |

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
|--|---|--|
| Organizations | Inquiry into organizations, professional, occupations or business related memberships which have bearing on job requirements. | Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs. |
| Photographs | None. | Request that an applicant submit a photograph, mandatory or optionally, at any time before hiring. |
| Pregnancy (See also Disability) | Can applicant perform job function, comply with legitimate business needs such as attendance policies, hours of work, et cetera. Inquiries as to a duration of stay on the job or anticipated absences which are made to males and females alike. | All questions as to pregnancy, and medical history concerning pregnancy and related matters. |
| Prior Employers | May ask for consent to inquire from prior employer about job performance and attendance record. | The same prohibitions on pre-employment inquiries apply to third parties, such as prior employers. |
| Qualifications | May ask about qualifications, licenses, etc., necessary for position. | |
| Race or Color | None. | Any inquiry concerning race or color of skin, hair, eyes, et cetera. |
| Relatives | Name of applicant's relatives already employed by this company or by any competitor. | Names and address of any relative other than those listed as proper in fair pre-employment inquiries. |
| Religion or Creed | None. | Inquiries concerning applicant's religious denomination, religious affiliations, church, parish, pastor, or religious holidays observed. |
| Residence | Inquiries about address to the extent needed to facilitate contacting the applicant, places and length of current and previous addresses. | Names and relationship of persons with whom applicant resides. Whether applicant owns or rents his/her home. |
| Sex | None. | Any inquiry. |
| Smoking | None. Applicants may be told the workplace is smoke free. | Do you smoke or use tobacco products? |

| <u>SUBJECT</u> | <u>PRE-EMPLOYMENT INQUIRIES ALLOWED</u> | <u>PRE-EMPLOYMENT INQUIRIES NOT ALLOWED</u> |
|------------------------------|--|--|
| Vision | None — may ask if applicant can perform essential job function, such as, work on computers, et cetera. | Do you wear contact lenses? Are you night blind? |
| Workers' Compensation | None. | Have you ever filed for workers' compensation insurance? |

D. General Approach To Inquiries

1. In general, you can determine if a question may be discriminatory by asking yourself, "Will the answer to my question have a direct bearing on the candidate's ability to do his job?" If the answer is no, then the question may be viewed as discriminatory if it tends to disclose protected category information.
2. A question may also be discriminatory if you do not ask all applicants the same question, regardless of sex, race, et cetera.
3. Avoid any questions that you think might be discriminatory or nonessential. Focus your inquiry on legitimate company policies, legitimate job functions and the ability of the applicant to perform those functions and comply with policies.

E. The Post-Offer Stage.

1. Medical/disability related inquires

- a. An employer make medical inquiries, ask disability related questions and perform medical examinations in the post-offer stage.
- b. The inquiries should be job related and consistent with business necessity.
- c. The job offer may be conditioned on the results of the post-offer questions or inquiries, that are job related and consistent with business necessity.
- d. Before the post-offer health/disability inquires can be made.
 - i. All entering employees in the same job category must be subjected to the examinations/inquiry regardless of disability, race, etc.;
 - ii. Medical information obtained must be kept confidential;

e. An employer can revoke job offer if the medical exam is failed. But if exam reveals disability, the employer must be able to show no reasonable accommodation is possible and reasons for exclusion are job related and necessary for business.

2. Workers Compensation Inquiry

a. At the post-offer stage, an employer may ask about the individual's workers' compensation history, sick leave usage/illness/diseases/impairments, general physical and mental health.

3. Use of the health/disability information.

a. Medical information may be given to and used by the appropriate decisions makers involved in the hiring process so that they can make decisions consistent with the ADA. It also may be used to determine reasonable accommodations for the individual.

b. If a disability is disclosed in the post-offer stage, the employer cannot revoke the job offer based upon the knowledge of disability unless the disability interferes with the performance of the essential job functions and cannot be reasonably accommodated without undue burden and risk.

4. Other post-offer inquires.

a. Inquires about an individual's birth date and proof of age and other family information is appropriate for social security, tax and benefits purposes. Information necessary to comply with I-9 requirements is appropriate. Other inquiries which are job related and consistent with the business necessity can be made.

5. Drug/alcohol testing.

a. During the pre-employment stage, drug and alcohol testing is allowed as a post-offer employment test provided that the employer has a policy that complies with Oklahoma Workplace Drug and Alcohol Testing. All applicants entering into the same positions must be subject to the test; the applicants subject to the test must be given a copy of the employer's policy; and the ADA must be complied with.

F. Complying with ADA Obligations During the Hiring Process

1. Application process accommodation

a. Written information should be available in an accessible form on request. For example,

i. Telecommunication devices for deaf (TDD).

- ii. Large print materials.
- iii. Reader for printed materials.
- iv. Cassette recordings of printed materials.
- v. Sign interpreter for deaf.

2. Accommodation in testing

- a. Tests cannot screen out a disabled person on the basis of disability unless is job related and consistent with business necessity.
- b. Test must reflect skills and aptitudes rather than impaired manual, sensory or speaking skills, unless those are job-related skills that the test is designed to measure.
- c. Tests given to people with impaired sensory, speaking or manual skills must be given in a format and manner that does not require use of the impaired skill, unless test is designed to measure that skill. For example:
 - i. allowing additional time to take test.
 - ii. allowing written test to be taken orally.
 - iii. allowing answers by dictation or recording device.
 - iv. test breaks; non-distracting environment.
- d. Inform applicants of tests in advance, if possible, so they may request accommodation.
- e. Employers may require documentation of the need for accommodation.
- f. Employers should make tests available at accessible location.
- g. Employers are not required to offer the specific accommodation requested, but it should be given primary consideration in making tests accessible.
- h. Reasonable accommodation may require foregoing test if accessible alternative is available, i.e. Evaluate skill or ability by interview, education, work experience, licenses, certification, job demonstration for a trial period.

G. Types of reasonable accommodation

1. Making facilities readily accessible and usable by disabled.
2. Job restructuring.
3. Leaves of absence, part-time or modified work schedule.
 - a. Working at home may be a reasonable accommodation. *Mason v. Avaya Comm.*, 357 F.3d 1114 (10th Cir. 2004) (case by case analysis).
4. Reassignment to vacant positions.
5. Acquisition or modification of equipment or devices.
6. Appropriate adjustments or modification of examinations, training materials or policies.
7. Providing qualified readers/interpreters.
8. Other similar accommodations.

Example:

- a. Failing to accommodate request for supplemental oxygen devise was unlawful when it would have enabled plaintiff to work after hospitalization for pulmonary embolism even though she was only "regarded as disabled." *Kelly v. Metallics West Inc.*, 16 AD Cases 1538 (10th Cir. 2005).
9. Not required to provide accommodation that is primarily for personnel use.

H. Documentation of need for accommodation

1. If need for accommodation is not obvious, or not believed, documentation may be requested.
2. Documentation may be obtained from:
 - a. doctor;
 - b. psychologist;
 - c. rehabilitation counselor;
 - d. occupational or physical therapist;
 - e. independent living specialist;

- f. others with knowledge of person's functional limitation.

I. Importance of Job Descriptions

1. Job descriptions have always been an important tool in addressing the issue of whether or not an individual can perform the essential function of a job.
2. Not only do they assist the decision maker in selecting the right person for the job, but, the EEOC will examine job descriptions to see if they support the employers contentions concerning an applicant's job qualifications or ability to do the job.
3. With the new amendments to the ADA, job descriptions have become even more critical. The EEOC broadened the definition of "major life activities to the following". The new activities are included in bold letters.

". . . caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping,** walking, **standing, lifting, bending,** speaking, breathing, learning, **reading, concentrating, thinking; communicating,** and working" and **major bodily functions.**
4. The term "major bodily functions" is defined to include, but not be limited to

". . . functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."
5. The amendments add a definition of "regarded as having such an impairment" to include an individual that:

"...has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."
6. Impairments that are transitory or minor are not included in the definition if the transitory impairment is expected to have an actual or expected duration of 6 months or less.
7. With the new definition for "regarded as having an impairment", individuals with impairments, even if not disabled are protected from discrimination. For this reason, a job description will be critical in defending against decisions not to hire an individual because his/her impairment interferes with the ability to perform the job duties.

J. Requirements when using third parties (consumer reporting agencies) to collect background information such as credit reports, criminal background checks, etc.

a. Who is required to comply with the FRCA?

1. The FRCA regulates the use of credit and background checks by employers. The Act protects consumers, which includes employees and applicants, from abuses of credit information and provides required procedures for obtaining or using credit or background checks.
2. The FRCA applies to all employers that use a third party to obtain a consumer report or investigative consumer report for employment purposes. This act does not apply if you (or your company's employees) get the information directly from the primary source such as the Oklahoma Bureau of Investigation, prior employer, etc.

b. Who are the third parties?

1. A third party (Consumer Reporting Agency) is any person which, for monetary fees, dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing the reports. This definition would encompass both private investigators, as well as, traditional reporting agencies. It will also include online services such as Equifax, West Law, Lexis, etc.

c. What are the types of reports covered?

1. A consumer report is a written, oral or other communication of any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used for employment purposes. This include criminal records and or driving records.
2. An investigative consumer report is a consumer report which includes information on a consumer's character, general reputation, personal characteristics, or mode of living, which is obtained through personal interviews of neighbors, friends, associates, acquaintances, et cetera.

d. What disclosures are required?

1. Prior to requesting a report, an employer must make a clear and conspicuous disclosure in writing to the consumer that a report may be obtained for employment purposes.

2. The disclosure must be in a document that consists solely of the disclosure. In other words, a statement in the application is insufficient written authorization.
3. Written authorization from the consumer must be obtained.
4. If the report is an investigative report, an additional disclosure must be made within 3 days after the report is requested. The disclosure to consumers must include a clear and accurate disclosure that an investigative consumer report, including information on the individual's character, general reputation, personal characteristics and mode of living may be made. It must inform the consumer of his/her rights to request additional disclosures on the scope and nature of the requested report and a written summary of the rights, the form and content of which is prescribed by the Federal Trade Commission. (The FTC form can be obtained at 62 FR 35586).
5. A certification to the reporting agency must be made which advises that the required disclosures to the consumer are made and that the requirements on subsequent disclosures will be complied with.
6. If the consumer, within a reasonable period of time after the disclosure, requests additional disclosures, the employer shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in writing and mailed or otherwise delivered not later than 5 days after the date the request for such disclosure was received or after first requesting the report, whichever is later.
7. A copy of the report obtained must be provided to the consumers before the employer can take adverse action against the consumer based upon information obtained in the report.
8. The consumer must be provided with a written description of the consumer's rights under the act as prescribed by the Federal Trade Commission.
9. Oral, written or electronic notice of the adverse action must be given to the consumer after adverse action is taken which contains the name, address, and telephone number of the consumer reporting agency, including any toll free number, that furnished the report, a statement to the consumer that the consumer reporting agency did not make the decision to take the adverse action and is unable to explain the specific reason for the adverse action and notice to the consumer of his/her right to obtain a free copy of the consumer report within 60 days from the reporting agency and the right to dispute the accuracy and completeness of the information on the report.