

EPILEPSY IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA)

General Information about Epilepsy

About 2.3 million people in the United States or one percent of the population have some form of epilepsy, with more than 180,000 new cases diagnosed each year in Americans of all races and ages.⁽²⁾ Epilepsy is a general term that includes various types of seizures. A seizure happens when abnormal electrical activity in the brain causes an involuntary change in body movement or function, sensation, awareness, or behavior. People diagnosed with epilepsy have had more than one seizure, and they may have had more than one kind of seizure. A seizure can last from a few seconds to a few minutes. Some individuals recover immediately from a seizure, while others may be dazed and sleepy for a period of time following a seizure. The severity of epilepsy and the type of seizure vary from person to person.⁽³⁾ For most people with epilepsy, no single cause has been determined. Seizures may result from illness (including high fever), head trauma, stroke, brain tumor, poisoning, infection, inherited conditions, brain disorders, or problems during fetal development.

Individuals with epilepsy successfully perform all types of jobs, including heading corporations, teaching and caring for children, and working in retail and customer service positions. Individuals with epilepsy also can perform jobs that might be considered "high-risk," such as police officer, firefighter, welder, butcher, and construction worker. Yet, many employers wrongly assume that people with epilepsy automatically should be excluded from certain jobs.⁽⁴⁾ For example, many employers believe that anyone with epilepsy cannot safely operate certain types of machinery, drive, or use computers.⁽⁵⁾ The reality is that because antiseizure medications and other treatment methods totally control seizures for more than half of the people with epilepsy, many employers do not know when someone in the workplace has this condition. Some people whose epilepsy is not completely controlled experience a sensation or warning called an "aura" that lets them know that they are about to have a seizure. Many other people with epilepsy only have seizures while asleep (nocturnal seizures) or seizures that do not cause loss of consciousness or motor control.

Some employers also fear hiring individuals with epilepsy because they are concerned about higher workplace insurance rates or believe that employees with epilepsy will use a lot of sick leave. Workplace insurance rates, however, are determined by how hazardous the type of work is and by an employer's overall claims record in the past, not by the physical condition of individual employees. There is no evidence that people with epilepsy are more prone to accidents on the job than anyone else. Finally, because medications usually can control seizures for most people, they do not need to take time off from work because of their epilepsy.

1. When is epilepsy a disability under the ADA?

Epilepsy is a disability when it substantially limits one or more of a person's major life activities. Major life activities are basic activities that an average person can perform with little or no difficulty, such as walking, seeing, hearing, speaking, breathing, performing manual tasks, caring for oneself, learning, and working. Major life activities also include thinking, concentrating, interacting with others, reproduction, and sleeping.

Epilepsy may be a disability because of limitations that occur as the result of seizures or because of side effects or complications that can result from medications used to "control" the condition.

Example: A court concluded that an individual who had brain surgery to control seizures, but still continued to experience two or three seizures per month, was an individual with a disability because she was substantially limited in several major life activities, such as walking, seeing, hearing, speaking, and working, while having a seizure and often was limited in caring for herself (sometimes for more than a day) following particularly severe seizures.

Example: Some individuals take drugs that control their seizures but make them drowsy, unable to concentrate, or unable to sleep. An individual who is substantially limited in major life activities such as sleeping, thinking, concentrating, or caring for himself as a result of these side effects would have a disability under the ADA.

Epilepsy also may be a disability because it was substantially limiting some time in the past (i.e., before seizures were controlled).

Example: A job applicant has had epilepsy for five years. For the past three years she has been seizure-free, but prior to that she experienced severe and unpredictable seizures. As a result, she had to move back home with her parents because she could not live alone, she was unable to drive, and rarely socialized with friends because she feared having a seizure in public. Even if the individual's epilepsy is not now substantially limiting, it substantially limited major life activities such as caring for herself and interacting with others in the past. This individual has a record of a disability.

Finally, epilepsy is a disability when it does not significantly affect a person's everyday activities, but the employer treats the individual as if it does.

Example: An employer who refuses to hire someone with epilepsy because it assumes the individual is incapable of working without hurting himself or others regards the individual as having a disability.

Under the ADA, the determination of whether an individual has a disability is made on a case-by-case basis.

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

Applicants

The ADA limits the medical information that an employer can seek from a job applicant. An employer may not ask questions about an applicant's medical condition or require an applicant to take a medical examination before it makes a conditional job offer. This means that an employer *cannot* ask an applicant questions such as:

- whether she has epilepsy or seizures;
- whether she uses any prescription drugs; or
- whether she ever has filed for workers' compensation or was injured on a job.

After making a job offer, an employer may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants the same.

2. Does the ADA require an applicant to disclose that she has epilepsy or some other disability before accepting a job offer?

No, the ADA does not require applicants to disclose that they have epilepsy or another disability unless they will need a reasonable accommodation for the application process. Some individuals with epilepsy, however, choose to disclose their condition to eliminate any surprise should a seizure occur in the workplace. Often the decision to disclose depends on the type of seizure a person has, the need for assistance during or after a seizure, the frequency of seizures, and the type of work for which the person is applying.

Sometimes the decision to disclose depends on whether an individual will need a reasonable accommodation to perform the job. A person with epilepsy, however, may request an accommodation after becoming an employee even if she did not ask for one when applying for the job or after receiving the job offer.

3. May an employer ask any follow-up questions if an applicant voluntarily reveals that she has epilepsy?

If an applicant voluntarily discloses that she has epilepsy, an employer only may ask two questions: whether she needs a reasonable accommodation, and if so, what type. The employer also must keep any information an applicant discloses about her medical condition confidential. (See "Keeping Medical Information Confidential" on p. 8.)

Example: An individual applies for a data clerk position. She tells the interviewer that she does not have a driver's license due to epilepsy and will need a flexible schedule because public transportation is not always reliable.⁽⁶⁾ She also mentions that she has not had a seizure in more than six months. The interviewer may ask the applicant additional questions about her requested accommodation, such as how early she can start to work and how many hours she can work each day, but cannot ask for details about her epilepsy, such as how long she has had epilepsy or whether she has had to miss work in the past because of her condition.

4. What should an employer do when it learns that an applicant has epilepsy after he has been offered a job?

The fact that an applicant has epilepsy may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety. ("Reasonable accommodation" is discussed in Questions 10 -15. "Direct threat" is discussed in Questions 5, 6, 16, and 17.) The employer, therefore, should evaluate the applicant's present ability to perform the job effectively and safely. After an offer has been made, an employer also may ask the applicant additional questions about his epilepsy, such as whether he takes any medication; whether he still has seizures and, if so, what type; how long it takes him to recover after a seizure; and/or, whether he will need assistance if he has a seizure at work.

The employer also could send the applicant for a follow-up medical examination or ask him to submit documentation from his doctor answering questions specifically designed to assess the applicant's ability to perform the job's functions and to do so safely.

Example: An experienced chef gets an offer from a hotel resort. During the post-offer medical examination, he discloses that he has had epilepsy for ten years. When the doctor expresses concern about the applicant's ability to work around stoves and use sharp utensils, the applicant explains that his seizures are controlled by medication and offers to bring information from his neurologist to answer the doctor's concerns. He also points out that he has worked as a chef for seven years without incident. Because there is no evidence that the applicant will pose a significant risk of substantial harm while performing the duties of a chef, the employer may not withdraw the job offer.

Employees

5. When may an employer ask an employee if epilepsy, or some other medical condition, may be affecting her ability to do her job?

An employer may ask questions or require an employee to have a medical examination only when it has a legitimate reason to believe that epilepsy, or some other medical condition, may be affecting the employee's ability to do her job, or to do it safely.

Example: Several times during the past three months, a supervisor has observed a newly hired secretary staring blankly, making chewing movements with her mouth, and engaging in random activity. On these occasions, the secretary has appeared to be unaware of people around her and has not responded when the supervisor has asked if she was okay. The secretary has no memory of these incidents. She also has seemed confused when the supervisor asked her to make corrections on documents she (the secretary) recently typed. The supervisor may ask the secretary whether a medical condition, such as epilepsy, is affecting her ability to perform the essential functions of her job.

On the other hand, when an employer does not have a reason to believe that a medical condition is causing an employee's poor job performance, it may not ask for medical information but should handle the matter as a performance problem.

Example: Lately, a normally reliable receptionist with epilepsy has been missing work on Mondays and leaving work early on Fridays. The supervisor noticed these changes soon after the receptionist's fiancé moved to another state. The supervisor can ask the receptionist about her attendance problems but may not ask her about her epilepsy.

An employer also may ask an employee about epilepsy when it has a reason to believe that the employee may pose a "direct threat" (i.e., a significant risk of substantial harm) to himself or others. An employer should make sure that its safety concerns are based on objective evidence and not general assumptions. (See also section below on "Concerns About Safety.")

Example: A line cook with epilepsy had three seizures in his first six weeks on the job. Although the cook did not injure himself or anyone else during his seizures, the employer may send him for a medical examination or ask him to submit documentation from his doctor indicating that he can safely perform his job, which requires him to work around flat top grills, hot ovens, and fryers with boiling oil.

6. May an employer require an employee on leave because of epilepsy to have a medical exam or provide documentation before allowing her to return to work?

Yes, if the employer has a reasonable belief that the employee may be unable to perform her job or may pose a direct threat to herself or others. However, the employer may obtain only the information needed to make an assessment of the employee's present ability to perform her job and to do so safely.

Example: A pool cleaner called his supervisor on Monday morning and told him he was taking sick leave because he had a seizure over the weekend -- his second in six months. Given the safety risks associated with the pool cleaner's job, the employer may ask him to have a medical exam or provide medical documentation indicating that he can safely perform his job without posing a direct threat before allowing him to return to work.

Example: A cashier, who has occasional nocturnal seizures, took two weeks off to adjust to a new medication. She works the day shift and never has been late for work, never has had difficulty performing her duties, and never has had a seizure on the job. The employer may not require the cashier to have a medical examination or ask her for medical documentation before allowing her to return to work because there is no indication that her epilepsy will prevent her from doing her job.

Example: A budget analyst with epilepsy has a seizure at work. She explains to her manager that following a seizure she is typically very tired and needs to rest for several hours. She says that she will be fine the next morning and will be back at work, but asks if she could call someone to drive her home and take off for the rest of the day. Because there is no reason to believe that the analyst will be unable to do her job or will pose a safety risk, the employer may not require her to submit a doctor's note clearing her to return to work the next day.

7. Are there any other instances when an employer may ask an employee about epilepsy?

An employer also may ask an employee about epilepsy when the employee has requested a reasonable accommodation because of his epilepsy or as part of a voluntary wellness program.⁽⁷⁾ In addition, an employer may ask an employee with epilepsy to justify the use of sick leave by providing a doctor's note or other explanation, as long as it requires all employees to do so.

Keeping Medical Information Confidential

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. An employer, however, under certain circumstances may disclose to particular individuals that an employee has epilepsy:

- to supervisors and managers, if necessary to provide a reasonable accommodation or meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance if she had a seizure at work;⁽⁸⁾
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- as needed for workers' compensation or insurance purposes (for example, to process a claim).

8. May an employer explain to other employees that their co-worker is allowed to do something that generally is not permitted (such as have more breaks) because he has epilepsy?

No. An employer may not disclose that an employee has epilepsy or is receiving a reasonable accommodation. However, an employer certainly may respond to a question about why a co-worker is receiving what is perceived as "different" or "special" treatment by emphasizing that it tries to assist any employee who experiences difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal and it is the employer's policy to respect employee privacy.

9. If an employee has a seizure at work, may an employer explain to other employees or managers that the employee has epilepsy?

No. Although the employee's co-workers and others in the workplace who witness the seizure naturally may be concerned, an employer may not reveal that the employee has epilepsy. Rather, the employer should assure everyone present that the situation is under control. The employer also should follow the employee's plan of action if one has been created. (See footnote 8.)

Example: During a staff meeting, an attorney's arm and leg suddenly start jerking. Although she appears awake, she does not say anything. When another employee asks whether he should call an ambulance, a manager calmly explains that no first aid is necessary and that the attorney will be okay in a few minutes. He adjourns the meeting and stays with the attorney until she recovers from her seizure.

An employer also may allow an employee voluntarily to tell her co-workers that she has epilepsy and provide them with helpful information, such as how to recognize when she is having a seizure, how long her seizures generally last, what, if anything, should be done if she has a seizure, and how long it generally takes her to recover. However, even if an employee voluntarily discloses that she has epilepsy, an employer is limited in sharing this information with others. (See section on "Keeping Medical Information Confidential" above for the only circumstances in which an employer may disclose that an employee has epilepsy.)

ACCOMMODATING EMPLOYEES WITH EPILEPSY

The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (i.e., a significant difficulty or expense). Accommodations vary depending on the needs of an individual with a disability. Not all employees with epilepsy will need an accommodation or require the same accommodation, and most of the accommodations a person with epilepsy might need will involve little or no cost.

10. What types of reasonable accommodations may employees with epilepsy need?

Some employees may need one or more of the following accommodations:

- breaks to take medication
- leave to seek treatment or adjust to medication ⁽⁹⁾
- a private area to rest after having a seizure
- a rubber mat or carpet to cushion a fall
- adjustments to work schedules

Example: A library schedules employees to work eight-hour shifts starting as early as 8:00 a.m. and as late as 1:00 p.m. A librarian who has epilepsy and experiences nocturnal seizures, which leave her tired in the early morning, requests that her shifts start in the late morning or early afternoon. The employer determines that because there are a sufficient number of staff available between 8:00 a.m. and 10:00 a.m. to respond to requests from the public for assistance, the accommodation can be granted without undue hardship.

a consistent start time or a schedule change (e.g., from the night shift to the day shift)

Example: A home nurse rotated from working the 7:00 a.m. to 3:00 p.m. shift to the midnight to 8:00 a.m. shift. His doctor wrote a note to the employment agency indicating that interferences in the nurse's sleep were making it difficult for him to get enough rest and, as a result, he was beginning to have more frequent seizures. If eliminating the nurse's midnight rotation would not cause an undue hardship, this would be a reasonable accommodation.

a checklist to assist in remembering tasks

Example: A box packer would have absence seizures while packing boxes and forget what he was doing. The supervisor created a checklist for each step of the job. Now, when the box packer has a seizure, he simply looks at the checklist to see what steps he has completed.

Other employees with epilepsy may need:

to bring a service animal to work ⁽¹⁰⁾
someone to drive to meetings and other work-related events
to work at home

Example: When a medical transcriber started having frequent, unpredictable seizures at work, she asked her supervisor if she could work at home until her seizures were controlled. Because the transcriber can do the essential functions of her job at home without day-to-day supervision, the employer granted her request.

Although these are some examples of the types of accommodations employees with epilepsy commonly need, other employees may need different changes or adjustments. An employer should ask the employee requesting an accommodation because of his epilepsy what is needed to do the job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the web site for the Job Accommodation Network (JAN) (www.jan.wvu.edu/media/epilepsy.html) provides information about many types of accommodations for employees with epilepsy.

11. Does an employer ever have to reassign an employee with epilepsy to another position?

Yes, reassignment may be necessary where an employee with epilepsy no longer can perform his job, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship. The new position should be equal in pay and status to the employee's original position, or as close as possible if no equivalent position is available. The new position does not have to be a promotion, although the employee should have the right to compete for promotions just like other employees.

Example: A telephone repairman submits a note from his doctor stating that he recently has been diagnosed with epilepsy and must avoid climbing and working at heights above ground level. Although the employer would not have to "bump" another employee from a position to create a vacancy, the employer should determine whether there is another position for which the repairman is qualified that will meet his restrictions.

12. How does an employee with epilepsy request a reasonable accommodation?

There are no "magic words" that a person has to use when requesting a reasonable accommodation. A person simply has to tell the employer that she needs an adjustment or change at work because of her epilepsy.

Example: A teacher tells her principal that she recently has been diagnosed with epilepsy and needs three weeks off to find out whether medication will control her seizures. This is a request for reasonable accommodation.

A request for reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with epilepsy. If the employer does not already know that an employee has epilepsy, the employer can ask the employee for verification from a health care professional.

13. Does an employer have to grant every request for a reasonable accommodation?

No. An employer does not have to provide an accommodation if doing so will be an undue hardship. Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense. If a requested accommodation is too difficult or expensive, an employer still would need to determine whether there is another easier or less costly accommodation that would meet the employee's needs.

14. Is it a reasonable accommodation for an employer to make sure that an employee takes anti-seizure medicine as prescribed?

No. Employers have no obligation to monitor an employee to make sure that she does not have a seizure. However, an employer may have to provide a flexible work schedule or allow the employee breaks to rest or to take medication to keep her epilepsy under control.

15. If an employee does not have a license because of epilepsy, does an employer have to eliminate driving from his job duties?

If driving is an essential function of a job, an employer does not have to eliminate it. However, an employer should carefully consider whether driving actually is a job function or simply a way of accomplishing an essential function. If an accommodation is available that would enable an employee with epilepsy to perform a function that most employees would perform by driving, then the employer must provide the accommodation, absent undue hardship.

Example: A qualified sales clerk applies for promotion to assistant manager of a store. The employer promotes someone else because it claims that an essential function of the assistant manager's job is driving store receipts to the bank. Because *depositing* the receipts in a safe and timely manner, not driving, is the actual function of the job, the employer should have determined whether the sales clerk could have done the job with a

reasonable accommodation (e.g., having another employee drive her or paying for her to take a taxi).

Similarly, if driving is a marginal (or non-essential) function, the fact that an individual with epilepsy does not have a driver's license cannot be used to deny the individual an employment opportunity.

Example: College orientation guides are hired to hand out information packets and give tours of the campus. Occasionally, a guide also may be asked to drive prospective students to and from the airport. Not every guide is asked to perform this function, and there are always other guides available to perform the function if a particular individual is unavailable. Because driving is not an essential function of the job, the college cannot refuse to hire a person to be a guide who does not have a driver's license because of epilepsy but, rather, would have to assign someone else to perform that task.

CONCERNS ABOUT SAFETY

When it comes to safety, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes about epilepsy. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and how having epilepsy affects him. In other words, an employer should determine whether a *specific* applicant or employee would pose a "direct threat" or significant risk of substantial harm to himself or others that cannot be eliminated or reduced through reasonable accommodation. This assessment must be based on objective, factual evidence, including the best recent medical evidence and advances to treat and control epilepsy.

16. When may an employer prohibit a person who has epilepsy from performing a job because of safety concerns?

An employer may prohibit a person who has epilepsy from performing a job when it can show that the individual may pose a direct threat. In making a "direct threat" assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also should consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and, (4) the imminence of the potential harm. The harm also must be serious and likely to occur, not remote and speculative. Finally, the employer must determine whether any reasonable accommodation would reduce or eliminate the risk.⁽¹¹⁾

Example: A tool inspector with epilepsy applies to be a welder for the same company. During the past two years, the employee has on several occasions failed to take prescribed medication and has experienced sudden and unpredictable seizures at work. Because of the likelihood that the employee would experience sudden and unpredictable seizures and the serious consequences that would result if the employee had a seizure while working as a welder, the employer may deny the employee the job.

17. What should an employer do when another federal law prohibits it from hiring anyone who has epilepsy?

The employer has a defense to a charge of discrimination under the ADA if a federal law prohibits it from hiring a person with epilepsy. The employer should be certain, however, that compliance with the law actually is *required*, not voluntary and that the law does not contain any exceptions or waivers.

HARASSMENT

Employers are prohibited from harassing or allowing employees with disabilities to be harassed in the workplace. When harassment is brought to the attention of a supervisor, the supervisor must take steps to stop it.

18. What should employers do to prevent and correct harassment?

Employers should make clear that they will not tolerate harassment based on disability or on any other basis (i.e., race, sex, religion, national origin, or age). This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager. Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action. For more information on the standards governing harassment under all of the EEO laws, see www.eeoc.gov/policy/docs/harassment.html.

Footnotes

1. This document is the second in a series of fact sheets issued by the EEOC that addresses a particular medical condition. The first fact sheet, Questions and Answers About Diabetes in the Workplace and the ADA, can be found at www.eeoc.gov/facts/diabetes.html.
2. Centers for Disease Control (CDC), www.cdc.gov/nccdphp/epilepsy/index.html
3. For example, some seizures result only in small involuntary movements or brief lapses of attention. In other instances, consciousness (the ability to react to external stimuli in a meaningful and appropriate way) may be unaffected, lost completely, or altered but not lost completely. In addition, motor control may be partially affected (e.g., a person's hand may shake or she may be alert but cannot speak) or completely lost.
4. Many occupations have their own health regulations. Some federal laws may prohibit an employer from hiring an individual who still has seizures or takes medication for epilepsy. See Question 17.
5. There is a rare condition called photosensitive epilepsy in which seizures are triggered by flashing or flickering lights or by certain geometric patterns. People who are photosensitive are most likely to react to lights that flicker between five and 30 times per second. Modern computers usually operate at a higher frequency and do not tend to provoke seizures.
6. Every state licenses people with epilepsy to drive, though eligibility requirements vary. The most common requirement is that individuals be seizure free for a specified period of time and submit a physician's evaluation of their eligibility to drive safely. Some states require individuals with epilepsy to submit periodic medical reports for as long as they remain licensed.

7. The ADA allows employers to conduct voluntary medical examinations and activities, including obtaining voluntary medical histories, which are part of an employee health program as long as any medical records acquired as part of the program are kept confidential.

8. Although many individuals who have seizures do not require any first aid or assistance, an employee who might need assistance may want to work with his employer to create a plan of action that includes such information as: who to contact in an emergency; warning signs of a possible seizure; how and when to provide assistance; when to call an ambulance, etc. The employee and employer also should discuss who in the workplace should know this information. Some individuals also might want to ask their employers for an opportunity to educate their co-workers about epilepsy to dispel any misperceptions or unsubstantiated fears they may have about the condition.

9. An employee with epilepsy also may be entitled to leave under the Family and Medical Leave Act (FMLA), which provides up to 12 weeks of unpaid leave for a serious health condition. The U.S. Department of Labor enforces the FMLA. For more information, go to www.dol.gov/esa/whd/fmla.

10. Service animals are animals that are trained to perform tasks for individuals with disabilities such as guiding people who are blind, alerting people who are deaf, pulling wheelchairs, alerting and protecting a person who is having a seizure, or performing other special tasks.

11. If the individual is a current employee, reasonable accommodation must include consideration of reassignment to a vacant position for which the employee is qualified.