

WHAT YOU DON'T KNOW ABOUT THE ADAAA MAY HURT YOU: ADAAA Requires Confidentiality of Health Information and Maintenance of Health Information Separate from Personnel Records

Most employers covered by the Americans with Disabilities Amendment Act (“ADAAA” or “the Act”) are familiar with the ADAAA’s disability and reasonable accommodation requirements. Not all covered employers, however, are aware of the ADAAA’s rules regarding confidentiality of health information and requiring maintenance of health-related records in a file separate from personnel records. These restrictions apply to the health information of all employees of a covered employer, not just those who are “disabled” for purposes of the Act or employees who are requesting a reasonable accommodation.

Confidentiality of Health Information

The ADAAA, which covers employers with 15 or more employees, requires employers to maintain the confidentiality of employee medical information except under narrow circumstances. The purpose of this confidentiality requirement is to focus employment considerations on job performance, not unrelated medical information which may negatively impact the employee.

The limited circumstances under which an employer may release confidential health information include: informing supervisors and managers who need to know about work restrictions or accommodations; first aid and safety personnel who may need to be aware of any special needs while responding to a call; government officials with proper authority to access the health information; worker’s compensation officials to process a request; health care professionals while seeking advice regarding a reasonable accommodation; and insurance carriers to process and monitor coverage.

Employee medical information may include: medical documentation regarding the employee’s disability, medical release forms, workers’ compensation, insurance related documentation, medical leave requests, and/or prescription drugs the employee may be taking.

An employer must maintain the confidentiality of medical information regardless of whether an applicant is eventually hired or the employment relationship ends. The obligation also applies even if the employee voluntarily discloses the health information.

In addition to the ADAAA confidentiality requirements, the Genetic Information Non-Disclosure Act (“GINA”) imposes confidentiality provisions. GINA requires that any genetic information obtained through a legitimate business-purpose inquiry must be maintained separate from the personnel file. Moreover, some

employers are subject to further regulation under HIPAA. HIPAA privacy regulations apply to employers that self-administer medical insurance plans with 50 or more participants. An employer is required to keep confidential any medical information created or received for the purposes of the provision of health care to the participant and that identifies or may identify the participant.

Maintenance of Employee Health Records in a Separate File

The ADAAA also requires an employer to maintain an employee's medical information in a separate file from the employee's personnel file. The purpose of this requirement, like the confidentiality provision, is to ensure an employer does not impermissibly consider an employee's medical information. This means that any medical documentation, including doctors' notes, the results of physicals or drug tests, workers' compensation, and medical records relating to leave should not be maintained in personnel files.

Best Practices

To reduce the risk of violating the ADAAA, an employer should treat any medical documentation obtained about an employee (including information voluntarily disclosed) as **a confidential medical record** separate from any personnel file.

Employers should share employee medical information only in very limited circumstances with supervisors, managers, first aid and safety personnel, and/or government officials investigating compliance with the ADAAA and only when necessary.

Employers should keep employee medical documentation secure with additional privacy measures. Paper files should be kept separate from the personnel file in a locked cabinet or room. Electronic medical files should have limited system user access or password protection.