

NTI  
C Group  
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## APPRENTICE SELECTION AND ADA ISSUES

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### Overview

- JATC's and AJATC's are
  - Trusts governed by ERISA
  - Apprenticeship Programs governed by US DOL regulations and state laws
  - Joint Labor-Management Committees
  - Often non-profits under federal and state laws
  - Sometimes post-secondary "schools" or programs under state law or through joint ventures
  - Involved in employment issues

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### Application of "Employment Laws"

- JATC's and AJATC's are not and should not be considered "joint employers" of apprentices doing on the job ("OTJ") training; for most wage/hour and other laws the contractor or utility is the employer
- *However*—many federal and state "employment" laws directly or indirectly reach apprentice issues, both in class and on the job
- These laws also apply to contractors and to the JATC and AJATC as an employer of its staff

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### Potential Liability of the JATC/AJATC

- Can be held directly liable for decisions made by the Committee, or for harassment or discrimination by Training Directors or other Committee members or staff
- Can be held liable for harassment or discrimination by fellow apprentices, if the Program knew about it and failed to correct it
- Has potential liability for discrimination by a contractor or the union if the Program learns of it and fails to take appropriate action

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### Who is on the Hook?

- *Carrie is called before the Committee after being terminated for insubordination. She explains that she told off her foreman after being subjected to repeated sexual remarks and some physical touching. One trustee remarks that she needs to get tougher if she wants to work in the industry; another says she should stop flirting on the job. Carrie goes to the bottom of the list and is out of work for several weeks. A few months later, Carrie is let go from another job for substandard performance. She again complains of gender discrimination. The Committee terminates her from the program.*

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### Who is on the Hook?

- **Questions**
  - Is the Committee potentially liable for its actions at the first meeting? For the termination?
  - Are any of the individual Trustees potentially liable?
  - If this were an AJATC Sub-Committee, would the AJATC be liable?
  - When would Trust funds pay?

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## LAWS AFFECTING APPRENTICE SELECTION

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### Federal and State Apprenticeship Laws

- Apprentice Selection Procedures are part of Registered Standards
- Must have uniform procedures, including questions to applicants
- Some states push/require weighting factors
- Require affirmative outreach in recruitment and non-discrimination in procedures

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### Federal, State and Local Equal Employment Opportunity Laws

- Prohibit discrimination in recruitment and selection based on protected classifications (e.g. race, color, religion, sex, national origin, age) or related factors (e.g. pregnancy)
- "Guidelines" on interviewing allow rejected applicants to use questions during the pre-indenture process as evidence of discrimination

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## ADEA

- *Snowwhite v. IBEW Local 117 JATC (N.D. Ill.)*
- 40 year rejected applicant, qualifies for interview, not selected after initial interview or, a year later, re-interview. Sues for age discrimination
- Court denied JATC pre-trial motion that ADEA does not apply. Court denied; Court held there was a issue whether the JATC was an "employer or employment agency. Case settled

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## EEO Laws and Questions

- Except for the ADA, no federal law makes the wrong question an automatic violation-just evidence
- EEO agencies, courts and juries assume that all questions are asked for a reason
- Applies to applications, interviews and any other pre-employment inquiries
- Do's & Don'ts for Interviewers help avoid mistakes

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## Disparate Impact Claims

- A claim that selection procedures have an adverse impact on a protected group because there is a statistical difference in selection rates from the pool
- Can be used to challenge
  - Specific selection tools (e.g., the test); or
  - The procedure as a whole has a disparate impact
- Can be defended by showing the process is "job-related for the position in question" and "consistent with business necessity"

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## Disparate Impact

- The EEOC's position has shifted back and forth over the years on disparate impact of various requirements such as H.S. diploma, criminal history/arrest record, type of military discharge
- Bright line rules are more subject to challenge than case by case.
- Need to be able to defend any practices with an adverse impact

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## Fair Credit Reporting Act

- Applies to third party background checks and investigations
- Various requirements on advance notification of such checks

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## Standards and Selection Procedures

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## Standards and Selection Procedures

- Qualifications are set forth in the registered Standards
- Selection procedures are part of the registered standards
- Cannot change either without approvals, and cannot do through policies

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## Time for a Change?

- *Some new Committee members are asking whether the Committee can*
  - *Add citizenship to the Application*
  - *Verify Social Security Numbers of applicants'*
  - *Require that all applicants pass drug tests*
  - *Amend policies to require community service*
  - *Institute new interview questions*

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## Time for a Change?

- **Questions for each:**
  - Would it potentially violate any law?
  - Can it be implemented unilaterally?
  - What approvals, if any, are necessary?

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## UNDERSTANDING THE SELECTION PROCEDURES

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### Integrated and Validated

- All of the components are designed to work together
  - The selection process
  - Required documentation
  - Test batteries
  - The interview rating form
- All aspects have been validated

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### Selection Components

#### Application

- identifies prior relevant experience
- identifies certain minimum qualifications (e.g. driver's license)
- identifies *possible* disqualifying factors

#### The Aptitude Test

- tests *minimum* language and math skills
- higher scores are *not* an indication of better future apprentices

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## Selection Components

- **The Oral Interview**
  - helps measure abilities that cannot be tested
- **Physical Exams** (when used by a program)
  - measures physical requirements
  - identify possible disqualifying candidates

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## Apprenticeship-Relevant Abilities Evaluated During the Interview

- Ability....
  - Develop alternative solutions and choose the best alternative to a problem
  - Plan and organize tasks to meet deadlines
  - Maintain good relations with others in a work setting
  - Work smoothly with others as a team to complete a task

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## Apprenticeship-Relevant Abilities Evaluated During the Interview

- Be self-motivated, responsible, and dependable without close supervision
- Remain calm in an emergency situation
- Understand verbal instructions
- Communicate orally with others

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### Preparing for the Interview

- Prepare the Applicant Education and Training Summary Sheet
- Prepare the Committee
  - Review Do's and Don'ts
  - Select lead interviewer
  - Review process and questions
- If must have subcommittees, 6 members ideal, 4 minimum, balanced between labor and management

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### Asking Questions

- Avoid irrelevant questions
- Ask open-ended questions, not leading questions
- Don't talk too much; LISTEN
- Maintain eye contact
- Probe for the *situation, action, and result*

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### Evaluating the Applicant

- Focus on the applicant's behavior
- Rate the applicant's behavior on the appropriate abilities on the rating form
- Remember that everyone has strengths and weaknesses
- Maintain confidentiality of applicant information

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### Using the Rating Forms

- The ratings for *particular* questions do *not* translate to the overall rating

#### OVERALL EVALUATION

- Education
- Experience
- Aptitude
- Interest
- Drive
- Who will make the best apprentice?

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### Advantages of Sticking to the Script

- Federal and state standards *require* a standardized list of questions
- Helps select better qualified apprentices
- Avoids legal challenges from asking the wrong question at the wrong time
- If criteria or selection is challenged, the experts can show why these questions are defensible and job related

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### When You Add to the Script

- Use the structured interview questions first
- Train committee members on Do's and Don'ts for interviews
- Prepare a list *in advance* of questions that will be asked, and tie them to the KSA's
- If a question may tend to elicit information regarding a protected category, *the question should not be asked*

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### Do Not Ask About . . .

- Questions which may tend to reveal religious beliefs (e.g., about church activities), political beliefs, affiliations with other groups
- **Do not try to do indirectly what you cannot or should not do directly**

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### FAQs

- Driver's License
- Reliable transportation
- Military background
- HS Diplomas showing date of graduation
- Work permit status

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### Google Mania

- A JATC routinely has the Office Manager run internet searches on applicants, give anything interesting is given to the Chair, who decides whether to tell the interview committee. Examples include reports of arrests and convictions, pictures from Facebook and Instagram about partying, and drugs. An applicant who was not selected after being asked about some prior misdemeanors and drug use has filed a complaint with the state apprenticeship bureau.
- **Questions:**
  - What legal issues are raised by this conduct?
  - What should the Committee with this applicant?

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### The Outlier Committee

- A JATC uses more than one group of interview committees. Over the years one sub-committee has developed a reputation for being easier than others on conduct issues in selection
- **Questions**
  - Does inconsistency between committees pose a legal problem?
  - If so, what can you do about it?

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### Donald's Demands

- Donald's ranking was not high enough to be indentured. He re-interviewed a year later, and scored even lower. He has now filed both an EEOC Charge and a formal appeal claiming race and age discrimination. Donald does not want anyone involved in the interviews to hear his appeal. When he was told no, Donald started ranting and threatening lawsuits and unspecified threats to Committee members.

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### Donald's Demands

- **Questions**
  - What are the Committee's obligations during the appeal? Can/should the Committee exclude those involved in the interviews?
  - Can Donald be removed from the list based upon his allegations?
  - What about his threats?

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### Jumping the List

- A JATC keeps a ranked list of apprentices, but rarely uses it; most manpower needs are done with CE/CW. A particular Davis Bacon job requires an apprentice, and the program wants to register several more qualified applicants who are not yet on the ranked list
- **Question**
  - What issues does this raise under the Standards and Selection Procedures?

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### AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION

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### The Pressure

- Goals and timetables for women and minorities; DOL pressure
- Government Contracts requiring or giving preferences based upon percentage of women or minority journeymen and apprentices

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### The Risk

- Title VII makes it illegal to base decisions on race or gender. More qualified individuals can sue for reverse discrimination.
- There are very narrow exception for court-ordered plans and voluntary affirmative action plans to correct an employer's own past discrimination.

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### What is Legal

- Expanding the pool
- Mentoring, pre-apprenticeship or other targeted programs to improve skills and increase retention
- Programs not based on protected characteristics alone
- Ensuring that selection criteria are fair and do not have an adverse impact

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### ADA and Apprentice Selection

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### Americans with Disabilities Act

- Prohibits discrimination against individuals with disabilities
- Expressly restricts pre-indenture medical inquiries—questions that can be asked on applications or in interviews
- Expressly restricts when and how medical exams can be required
- Requires reasonable accommodation of applicants in the selection process

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### ADA Issues in Pre-Offer Inquiries

- An employer/JATC cannot inquire at the pre-offer stage as to whether a individual has a disability.
- Employers/JATC can ask questions that relate to the applicant's ability to perform job-related functions.

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### ADA-Related “Don’ts”

Do *Not* Ask About . . .

- Current or past disabilities or medical history
- Physical or mental conditions
- The prognosis or diagnosis of a condition
- Past medical problems

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### Post-Offer Medical Examinations and Inquiries

- An employer or apprenticeship program may administer a medical examination or inquiry *only* after an “offer of employment” has been made to the applicant and before the applicants starts work
- That means pre-indenture

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### Post-Offer Medical Examinations and Inquiries (cont'd)

- An apprenticeship program may condition admission to the program on the results of a medical examination if:
  - the examination is given or the inquiry is made to *all* entering apprentices;
  - medical information is segregated and kept confidential; and
  - the results of the examination “are used only in accordance with” the ADA.

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### Exclusion of Individuals with Significant Impairments or Disabilities

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### The New Medical Exam

- Your Committee has decided that too many new apprentices are leaving for physical reasons, and it is time to adopt a post-offer, pre-indenture physical exam. The doctor polls five to discuss with you based upon their medical history:
- Apprentice A --color blindness;
- Apprentice B--past history of alcoholism;
- Apprentice C--epilepsy, but has been seizure-free for two years;
- Apprentice D--highly allergic to bee stings; and
- Apprentice E--three months pregnant.

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### The New Medical Exam

- **Questions for each:**
  - Which of these applicants could potentially be denied admission? Why?
  - What additional information do you need, if any, to make that decision?
  - If you admit some or all of these applicants to the program, what obligation do you have to inform contractors that the apprentices have these conditions?

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### Legal Reasons to Refuse Indenture (or Terminate) Based on Medical Conditions

- The applicant or apprentice cannot perform the *essential functions of the job* or the program even with reasonable accommodations
- The requirement is *job-related* and *consistent with business necessity*
- The individual poses a *direct threat* to the health or safety of him/herself, or others that cannot be reduced through reasonable accommodations

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### Direct Threat Issues

The term "direct threat" means:

- a *significant* risk of *substantial harm* to health or safety of the individual or others
- *that cannot be eliminated or reduced* by reasonable accommodation

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### Direct Threat Issues

This determination:

- *must be based on an individualized assessment* of the individual's present ability to safely perform the essential functions of the job
- *must be based on a reasonable medical judgment* that relies on the most current medical knowledge and/or the *best available objective evidence*

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### Direct Threat Issues

The factors to be considered include:

- the *duration* of the risk;
- the *nature and severity* of the potential harm;
- the *likelihood* that the potential harm will occur; and
- the *imminence* of the potential harm

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### The Deaf Apprentice

- A recently-organized contractor has an employee, Kevin, who has been working for two years. Kevin has sufficient hearing loss that he is considered legally deaf, but has some residual hearing. He lost his hearing at an early age, so his speech is sometimes slow and difficult to understand. Kevin's father has been with this contractor for 10 years and is a friend of the owner. The Business Agent who tells you about Kevin says he has already spoken to the IBEW Committee members, and they agree Kevin should not work for any other contractors because of the concern over potential safety issues and the extra work involved in having to supervise a deaf apprentice.

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### The Deaf Apprentice

- **Questions:**
  - What issues will this pose for the Committee?
  - How do you respond to the Business Agent?
  - What accommodations would be needed for the Aptitude test or interview?
  - What accommodations on the job?
  - How would you handle small contractors refuse him as unqualified?

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### Difficult Cases

- Reading
  - inability to see warnings
  - color blindness
- Vision
- Hearing
- Missing Limbs
- Blood Bourne Illnesses
- Epilepsy

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### Bad Back Jack

- Jack, a third year apprentice, has developed chronic back pain that flares up periodically and leaves him incapacitated for 1-3 days. His doctor recommends that Jack not do repetitive lifting over 35 lbs. Jack ignored this advice at his last job, and his back went out again. He's been released to return to work, and calls to request that he only be referred to positions that can accommodate his restrictions. When you contact the first contractor on the list, he responds that they do not have any light duty jobs, and to send another apprentice.
- **Questions:**
  - What are the Committee's rights and responsibilities here?
  - How would you respond to Jack's request?

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### Requests for Accommodations

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### Mom's Call

- You receive a telephone call from Mrs. Jones about her son AJ, who is graduating high school and has just filled out an application. Mrs. Jones asks about the test and interview process. Mrs. Jones tells you AJ has some learning disabilities, and he'll need extra time on the test, a quiet environment for all testing, and a reader for all instructions. She also says that AJ might need extra time for any on-line testing.
- **Questions:**
  - What ADA issues are raised by this request?
  - How should the Committee respond?

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### Basic Principles

- The reasonable accommodation obligation *applies only to accommodations* that reduce barriers to employment *related to a person's disability*
- A reasonable accommodation *need not be the best* accommodation available or the one requested, as long as it is an *effective* accommodation

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### Apprentice's Duty to Ask for an Accommodation

- It is an individual's obligation to inform the employer/program of the need for an accommodation
- No "magic words" are required

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### Documentation

- Programs *can*
  - require medical documentation
  - require apprentices to sign releases of information
  - require second opinions or independent medical exams, where appropriate
- Most common concerns
  - what happens pending this process
  - who pays

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## Defenses

- *Undue Hardship*—a particular accommodation would impose an undue financial or administrative hardship, considering the cost, financial resources of employer, and the impact on the operation or co-workers
- *Direct Threat*—to the health or safety of the individual or others
- *Fundamental Alteration of the Program or Services*. There is specific new language in the ADA Amendments, reiterating this defense

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## Evaluation of Documentation for Learning Disabilities

- New guidance and best practices have reduced the amount of documentation that is appropriate
- Does the documentation show that the applicant has a specific learning disability?
- Does the documentation show that the individual has received the particular accommodation in the past, e.g., on school tests?

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## Testing or Classroom Accommodations that May Be Appropriate with Documentation

- Longer test time or untimed tests
- Split testing
- Use of a calculator
- Sign language interpreters

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### Testing or Classroom Accommodations that Would Rarely or Never be Appropriate

- Use of a reader
- Waiver of test section (e.g., reading or math)

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### Examples of Common Requests on the Job

- Adjustment in referral procedures when individual contractors refuse to make accommodations
- Adjustment in procedures where apprentices cannot work particular sites
- Request to only be sent to certain types of job sites
- Specialized Equipment
- Changes in job duties
- Schedules and breaks

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### Who Pays For Accommodations?

- Contractor, if covered by the ADA
  - 15 or more employees; and
  - is not an undue hardship
- JATC
  - has joint responsibility with the employer

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### Medical Leaves

- Time off for medical conditions
- Deadlines to get through the program
- Absences as affecting classroom training

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### The Deaf Apprentice Pt. 2

- *Kevin, who was admitted through organizing, requires a sign language interpreter. For a 3 hour class this means two interpreters, with special skills. On the job he may need accommodations for certain meetings and training.*
- **Question**
  - When does this become an undue hardship?

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### Sam and Harry

- *You get two calls from apprentices about accommodation requests.*
  - *Sam has a bad knee and wants permission to park close to the building—where the supervisors park*
  - *Harry is a second year apprentice who suffered from heat stroke, and wants to either be exempt from outside jobs during the summer, or from working on the hottest days of the year*
- **Question:** are these reasonable accommodations?

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### The New Journeyman

- Jason recently completed his apprenticeship. He received some accommodations for a learning disability in class (extended time on tests) and on some jobs (verbal instructions supplemented with written lists)
- Questions
  - Does the JATC have any further responsibility for job accommodations? Or if he comes to the JATC for classes offered to Journeymen?

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### Confidentiality of Medical Information

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### Confidentiality

- ADA has strict requirements for maintaining confidentiality of all medical information
- Medical information should be shared only with those with a need to know

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### Committee Members

- Would have a need to know when they need to approve accommodation request
- Should only have access to the medical information related to that request, not an entire medical file

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### Contractors

- Have a right to know if they would otherwise be entitled to the information if they asked themselves
- Try to limit to those individuals who have ADA compliance responsibilities
- Foremen or supervisors may need to know of the fact of an accommodation, but only rarely need to know the medical details

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### Unions

- Are a participant in the accommodation process
- Have a right to information to comply with their own ADA responsibilities towards their members

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### Co-Workers

- Never *need* to know
- The program should always speak to the apprentice regarding how he/she would like to address co-worker concerns

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### OTHER APPRENTICE SELECTION ISSUES

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### The Felony Question on the Application

- The question: whether the applicant has ever been convicted of a felony
  - Why not ask about arrests?
  - Why not ask about misdemeanors?
- Key issues that arise
  - When/how to ask follow-up questions
  - What to do with results
  - What if the applicant lied—and you find out later?

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### When to Ask?

- Two options—and both are legal
  - Training Director can ask prior to the interview for details of the crime. Gives an opportunity to get supporting materials to present to the Committee
  - Can ask during the interview, but this runs the risk of taking a lot of time, and requiring follow-up

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### When to Ask?

- The ideal is both—Training Director does research, then the Committee asks the tough questions to determine if the applicant has been rehabilitated and deserves another chance

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### Yellow or Red Flags

- Applicants who do not answer the question
- Applicants who admit they have a felony conviction-but do not tell you about all of them, or all the details
- Committees that fail to follow-up on truthful answers
- Serious conduct that was only prosecuted as a misdemeanor-and is not captured by the current application

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### Reviewing the Background Check Results

- Because of the number of military and government jobs in your area, your Committee has decided to do post-offer background checks on apprentices prior to indenture and ask for all felony and misdemeanor records within the past 10 years. The report shows that four highly ranked applicants have felony records:
  - Applicant A: Convicted of Robbery
  - Applicant B: Convicted of Possession with Intent to Distribute
  - Applicant C: Registered Sex Offender
  - Applicant D: Aggravated Assault

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### Reviewing the Background Check Results

- **Questions for each:**
  - Is this conviction job-related or a risk to the health safety and security of others?
  - Should this conviction automatically result in rejecting the applicant?
  - What additional information do you need to make a decision?

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### Reviewing the Background Check Results

- What difference, if any, would it make if you learned from the applicant that:
  - Applicant A was convicted of robbery 10 years ago, when he was 17 years old and a drug addict. He's been clean since
  - Applicant B's conviction was for 8 ounces of marijuana, 5 years ago
  - Applicant C's conviction was for public urination after a party
  - Applicant D's conviction was for a fight in a bar last year, when he was drunk

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## Questions?



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## Contact Information

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