

One Lincoln

City of Lincoln Commission on Human Rights News

ADA-Compliant Employer Preparedness for the H1N1 Flu

The U.S. Equal Employment Opportunity Commission

This document answers basic questions about workplace preparation strategies for the 2009 H1N1 flu virus (swine flu) that are compliant with the Americans with Disabilities Act (ADA). Because this situation is rapidly evolving, employers should consult their local public health authorities and the Centers for Disease Control and Prevention (CDC). Accurate and timely public health information is critical to an effective and ADA-compliant pandemic plan. Employers should establish lines of communication with local public health authorities and community medical experts in advance of a pandemic. See www.pandemicflu.gov.

Disability-Related Inquiries and Medical Examinations

Title I of the Americans with Disabilities Act (ADA) protects applicants and employees from disability discrimination. Among other things, the ADA regulates when and how employers may require a medical examination or request disability-related information from applicants and employees, regardless of whether the individual has a disability. **This requirement affects when and how employers may request health information from applicants and employees regarding H1N1 flu virus.** Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre offer, post-offer, and employment.

- At the first stage (**prior to an offer of employment**), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- At the second stage (after an applicant is given a conditional job offer, but before she/he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

See *Disability-Related Inquiries & Medical Examinations of Employees Under the ADA* (2000) at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>. See also *Enforcement Guidance: Pre-employment Disability-Related Questions & Medical Examinations* (1995) at <http://www.eeoc.gov/policy/docs/preemp.html>.

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Frequently Asked Questions:

Planning for Absenteeism

- Q. In light of the ADA's requirements, how may employers ask employees about factors, including chronic medical conditions that may cause them to miss work in the event of a pandemic?**
- A.** An employer may survey its workforce to gather personal information needed for pandemic preparation *if the employer asks broad questions that are **not** limited to disability-related inquiries.* An inquiry would **not** be disability-related if it identified non-medical reasons for absence during a pandemic (e.g., mandatory school closures or curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that weaken immunity). Below is a sample ADA-compliant survey that could be given to all employees before a pandemic.

ADA-Compliant Pre-Pandemic Employee Survey

Directions: Answer "yes" to the whole question **without** specifying the reason or reasons that apply to you. Simply check "yes" or "no" **at the bottom.**

In the event of a pandemic, would you be unable to come to work because of any of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work, and/or; if you or a member of your household fall into one of the categories identified by CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ NO _____

- Q. May an employer require entering employees to have a medical test post-offer to determine their exposure to the influenza virus?**
- A.** Yes, in limited circumstances. The ADA permits an employer to require entering employees to undergo a medical examination after making a conditional offer of employment but before the individual starts work, if all entering employees in the same job category must undergo such an examination.

Example A: An employer in the international shipping industry implements its pandemic influenza preparedness plan when the WHO and the CDC confirm that a new influenza virus, to which people are not immune, is infecting large numbers of people in multiple countries. Because the employer gives these medical tests post-offer to all entering employees in the same job categories, the examinations are ADA-compliant.

Infection Control in the Workplace

- Q. During a pandemic, may an employer require its employees to adopt infection control practices?**
- A.** Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and tissue usage and disposal, does not implicate the ADA.
- Q. May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of a pandemic virus?**

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- A. Yes. An employer may require employees to wear personal protective equipment. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these absent undue hardship.
- Q. May an employer encourage or require employees to tele-work (i.e., work from an alternative location such as home) as an infection control strategy?**
- A. Yes. An employer may encourage or require employees to tele-work as an infection-control strategy, based on timely information from public health authorities about pandemic conditions. Tele-work also may be a reasonable accommodation. Of course, employers must not single out employees either to tele-work or to continue reporting to the workplace on a basis prohibited by any of the EEO laws. See generally *EEOC Fact Sheet on Work at Home/Tele-work as a Reasonable Accommodation* at www.eeoc.gov/facts/telework.html

The Americans with Disabilities Act Amendments Act of 2008

Effective January 1, 2009, Congress amended the Americans with Disabilities Act pursuant to the Americans with Disabilities Act Amendments Act of 2008 (ADA AA or Amendments). The EEOC will be revising its ADA regulations to comply with these Amendments. With the ADA AA, Congress changed the way that the ADA's statutory definition of the term "disability" should be interpreted. The Amendments emphasize that the definition of disability should be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA, and generally shall not require extensive analysis. For the full text of Titles I and V of the ADA, as amended, see [Americans with Disabilities Act of 1990](#).

The ADA AA does not change the ADA's restrictions on disability-related inquiries and medical examinations, discussed herein.

Resources:

- **Discrimination complaints outside of Lincoln City limits:** Nebraska Equal Opportunity Commission—402-471-2024 or the regional Equal Opportunity Commission office in St. Louis, MO (800) 669-4000
- **City agency complaints**—City Ombudsman/Mayor's Office (402) 441-7511
- **University of Nebraska-Lincoln employment complaints**—UNL Affirmative Action (402) 472-3417
- **Lincoln Police Department complaints**—Internal Affairs Division (402) 441-7204, Citizen Advisory Board (402) 441-6351, or Mayor's office (402) 441-7511
- **Jail/ State Penitentiary Complaints**—State Ombudsman (402) 471-2035
- **State Penitentiary**—Ombudsman at the State office for Corrections (402) 471-2035
- **Landlord-Tenant disputes**—Lincoln Action Program Specialist (402) 471-4515
- **Complaints about legal matters**—County Attorney (402) 441-7321, Southeast Nebraska Legal Services (402) 435-2161, Nebraska Attorney General (402) 471-2682, or Nebraska State Bar Association (402) 475-7091
- **Advocacy Services for people with disabilities**—League of Human Dignity (402) 441-7891 or Nebraska Advocacy Services (402) 474-3183.

What is Your Intent? Craigslist Phrases and the Law

By Margie Nichols, LCHR Civil Rights Investigator

“Best for one person.” “Seeking responsible and quiet tenant.” “Ideal for one person or couple.” “Prefer single party renter.” “Prefer mature, professional, couple or single person.” “We are looking for quiet people.” “Men’s only facility.”

These phrases come directly from Craigslist apartment and house rental advertisements for Lincoln, Nebraska. With the exception of one, most possibly violate Federal, State and Lincoln fair housing laws. Do you know which phrase listed above is probably okay and, do you know why there could be a problem with the others? A little hint: You don’t really have enough information to answer that question.

Fair Housing laws state that owners or landlords cannot discriminate on the basis of race, color, religion, sex, handicap, national origin, and familial status. The Federal Fair Housing Act also states, specifically, that it is unlawful “to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

So based on that, what appears to be the common denominator in all of those phrases? Familial status. According to the Act, familial status is defined as:

- One or more individuals (who have not attained the age of 18 years) being domiciled with
- A parent or another person having legal custody of such individual or individuals; or
- The designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years. So, if you have a family with two adults over 18 and two children, and you read this statement in a rental advertisement: “Prefer mature, professional, couple or single person,” what would your reaction be? Most likely, to skip over the ad, only to find the next one saying: “Seeking responsible and quiet Tenant.” You keep going, because your children are ages six and two hardly meeting the requirement of a quiet tenant.

The wording of these phrases could be viewed as discouragement, which is illegal when the intent is to keep families with children out of the property advertised. The phrases listed above could be read as possibly discouraging a family (with children or a pregnant female) from even inquiring about the listing in order to obtain more information about the property being advertised.



If you reread the law cited in the Act’s second paragraph, it includes the words: “that indicates **any preference, limitation, or an intention.**” Those Craigslist phrases indicate a preference for a certain type of renter and an attempt, or intent, to purposely exclude families with children, which is illegal.

Regarding familial status, according to Advertising Guidance issued by the U.S. Department of Housing and Urban Development (HUD) in 1995: “Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not

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What is Your Intent? Craigslist Phrases and the Law

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contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Advertisements describing the properties (**two bedroom, cozy, family room**), services and facilities (**no bicycles allowed**) or neighborhoods (**quiet streets**) are not facially discriminatory and do not violate the Act.”

There are, however, exceptions, which include the answer to the original question: Do you know which phrase listed above is probably okay? According to the HUD Advertising Guidance, a complaint should not be taken “against a newspaper for running an advertisement which includes the phrase **female roommate wanted** because the advertisement does not indicate whether the requirements for the shared living exception have been met. Publishers can rely on the representations of the individual placing the ad that shared living arrangements apply to the property in question. Persons placing such advertisements, however, are responsible for satisfying the conditions for the exemption. Thus, an ad for a female roommate could result in liability for the person placing the ad if the housing being advertised is actually a separate dwelling unit without shared living spaces.” While the Guidance mainly addresses the publisher not being held liable, it also clarifies that if the person placing the ad does not qualify for the exemption of a dwelling with shared living spaces, then the ad could be discriminatory.

According to the Guidance, this phrasing appears to only apply to this specific exemption. And what that exemption means is that if you want a roommate with whom you will be sharing a bathroom and other common areas such as the kitchen and living room, and you are female, you can advertise for a female roommate. An argument does exist, though, as to whether or not this violates that part of the Fair Housing Law regarding “an intention to make any such preference, limitation, or discrimination”. According to the HUD Advertising Guidance, it does not, as long as the person placing the advertisement meets the exemption’s definition of a dwelling with shared living spaces.



The difference between the phrase “female roommate wanted” and “ideal for one person or couple” is that the first phrase *could* indicate a dwelling with shared living spaces, while the second appears only to address the familial status of possible renters. The author seeking the roommate could meet the legitimate exemption of a dwelling with shared living spaces. The same is true for a “men’s only facility” where there are shared common areas. The ad on Craigslist advertising a “men’s only facility” is a house with sleeping quarters, shared common areas, and meets the exemption. In older days, they were commonly referred to as boarding houses.

The second phrase, “ideal for one person or couple”, appears to be discouraging, according to the Act, because it appears that the advertiser doesn’t want families or couples with children living in the unit being advertised. The ad then appears, on its face, to be discriminatory. The only way to know for sure is through investigation. This is even true for the advertiser stating “female roommate wanted”. There are other exemptions in the Act for individuals owning less than three properties, owner-occupied homes with rental apartments in the home, and housing for older persons.

But, according to the Act, if the advertiser qualifies for one of exemptions other than the shared living spaces and uses discriminatory language in the advertisement, such as “ideal for one person or couple”, or “no children”, the exemption is lost. The bottom line: Try to keep your advertisement limited to a description about the apartment or house, and stay away from trying to describe the type of people you want to see living there.

For more information or for questions on placing housing ads, contact our office at 441-7624. The HUD Advertising Guidelines can be found on the internet at www.hud.gov/offices/fheo/FHlaws.

Gender Stereotyping: A Growing Trend

By Ernest Hadley, Attorney at Law, FELTG President

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The U.S. Court of Appeals for the Third Circuit has joined the Equal Employment Opportunity Commission and other circuit courts of appeals in finding that an individual harassed because of sexual orientation, a claim that is not cognizable under Title VII, may present a viable Title VII claim based on "gender stereotyping." The Third Circuit's opinion in **Prowel v. Wise Business Forms, Inc.**, No. 07-3997 (August 28, 2009), highlights the difficult distinction between claims based on sexual orientation or preference and claims based on the gender of the plaintiff.

In Prowel, the plaintiff worked for 13 years in a small company that produces and distributes business forms. He was, by his own admission, "an effeminate man" who did not "fit in" with the stereotypical man at the plant, whom he described as: Blue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn't drink gin and tonic. Just you know, all into football, sports, and all that kind of stuff, everything I wasn't."

Prowel further testified that he had a high voice, did not curse, was well-groomed, filed his nails instead of ripping them off with a utility knife, crossed his legs, carried himself in an effeminate manner, had a rainbow decal on his car, and liked art, music, interior design, and décor.

Over a period of years, Prowel's coworkers commented negatively on his appearance and demeanor referring to him as "Princess" and "Rosebud" and making comments on what he wore, how he walked, and his grooming habits. Later, Prowel was also "outed" with regard to his sexual orientation when a coworker placed an ad for a "man-seeking-man" at his work station along with a note that read: "Why don't you give him a call, big boy?" Prowel was also called a "faggot" and a "pink, light-up, feather tiara with a package of lubricant jelly" was left at his work station. Graffiti was placed on the restroom walls accusing Prowel of having AIDS and claiming he had sexual relations with male coworkers.



Reversing a grant of summary judgment for the employer by the district court, a unanimous panel of the Third Circuit held that Prowel had presented a viable claim of sex discrimination sufficient to be submitted to a jury. The Court found that even though Title VII did not prohibit discrimination based on sexual orientation that did not preclude a homosexual individual from bringing a gender discrimination claim under Title VII. Relying on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Court found In Price Waterhouse, Ann Hopkins had been denied partnership in an accounting firm because she used profanity; was not charming; and did not walk, talk, or dress in a feminine manner. A plurality of the Supreme Court concluded that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250. The plurality also noted: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes". Id. at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S.702, 707 n.13 (1978)) (some internal quotations omitted). Thus, the Supreme Court held that Title VII prohibits discrimination against women for failing to conform to a traditionally feminine demeanor and appearance.

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Gender Stereotyping: A Growing Trend

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The Supreme Court's decision in *Price Waterhouse* provides the applicable legal framework, but does not resolve this case. Unlike in *Price Waterhouse* where Hopkins's sexual orientation was not at issue here there is no dispute that Prowel is homosexual. The difficult question, therefore, is whether the harassment he suffered at Wise was because of his homosexuality, his effeminacy, or both.

As this appeal demonstrates, the line between sexual orientation discrimination and discrimination "because of sex" can be difficult to draw. In granting summary judgment for Wise, the District Court found that Prowel's claim fell clearly on one side of the line, holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis viewing the facts and inferences in favor of Prowel leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel's gender stereotyping claim must be submitted to a jury. The Court specifically found that Title VII requires that sex be a motivating factor in an employment action, but not the sole factor and Prowel could bring a claim of sex discrimination even if the comments were also partially motivated by Prowel's sexual orientation.

The Commission has employed a similar analysis to find prohibited sex discrimination where the conduct at issue also reflected an animus based on sexual orientation. See *Hitchcock v. Secretary of Homeland Security*, EEOC Appeal No. 0120051461 (2007).

El Centro de las Américas 2009 Festival

El Centro de Las Américas, Lincoln's only community agency dedicated to enhancing the lives of Latino families, partnered with the State Fair Board to bring its *Festival de Las Américas* to the 2009 Nebraska State Fair. Sunday August 30th offered a day of Latino entertainment, music, food, and educational and cultural exhibits.



"We were excited about partnering with the Nebraska State Fair this year, especially because it supports our mission of empowering and educating the Hispanic/Latino families and the community at large. The event allowed us to showcase the Latino Culture and its traditions and we were able to share them with the community," said Marién Ruiz, Executive Director for El Centro de las Américas.



Festival de Las Américas began its fun filled day at the Open Air Auditorium with the Mexican folklore dance group, Sangre Azteca. The day continued with performances from the following; Ana Delia, Joropo Dance, Kumbe, Sabor Peruano, Cosalneb, Marimba Mayateca, Lincoln Tango Club, Estrellitas de Colombia, Kusi Taki, Luna y Sol, and Son del Llano. Along with the entertainment a parade of Latin American flags danced the streets during the Festival. Foods starting from a variety of Latin American countries were provided by the following restaurants: Taqueria El Rey, Café Salvadoreño, Adelitas Mexican Restaurant, El Rancho Mexican Restaurant, Antojitos Peruanos, Antojitos Colombianos, Antojitos Guatemaltecos.

Sponsors and contributors include Southeast Community College, Saint Elizabeth Regional Medical Center, Lisa Sterling Agency State Farm, and Radio Lobo 97.7FM.

Larry Williams participating at the festival.

Lincoln Commission on Human Rights Welcomes the New AmeriCorps Outreach Coordinator Lisa Bickert

Lisa Bickert is the new AmeriCorps Education Outreach Coordinator for the LCHR. Lisa's responsibilities include facilitating the Equity Education outreach sessions with the LPS. She is also working to promote the Equity sessions with local businesses, state and city agencies and community organizations. Lisa also coordinates equity and diversity sessions for city employees as a part of the LCHR's cultural competency educational workshops.

This is Lisa's second stint as an AmeriCorps member. She served her first year at Lincoln Action Program in the late 1990's in the Education Outreach program. Lisa has many years of business experience ranging from employee career planning, human resource consultation and non-profit management development.

She has served on Diversity Inclusion committees in the public and private sector and volunteered for many community committees/events like Cinco de Mayo, Junteenth, Martin Luther King Day, Cesar Chavez Day and local pow wow's. She also originated a non-profit organization focused on providing athletic opportunities for under-represented girls in elementary, middle and high school. Lisa has one daughter, Nia. She is studying to be a physical therapist and is

entering her third year at UNL.

Lisa is a long time Lincoln resident. She graduated from Lincoln Northeast High School and received her Bachelor of Arts degree from the College of Saint Mary. Currently she is a graduate student in Leadership Development at the University of Nebraska-Lincoln.

Lisa is a very welcomed addition at the Lincoln Commission on Human Rights, and we all look forward to working with her. We know her efforts here will better educate our youth through the outreach programs provided by the LCHR.



Lincoln Commission on Human Rights

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402-441-7624



EQUAL HOUSING OPPORTUNITY

Fair Housing. It's Not an Option. It's the Law!

If you feel that you have been denied the right of purchase, rental or are otherwise discriminated against when dealing with a person regarding housing and believe this was on the basis of your race, color, gender, religion, marital or familial status, disability, or national origin; please call the Lincoln Commission on Human Rights and set up an intake interview. Our phone number is (402) 441-7624, and all of our cases are completely confidential.

SAVE THE DATE

The **2010 CIVIL RIGHTS CONFERENCE** will be a day and a half state-wide training conference which will cover issues and topics related to fair housing, fair employment, diversity, and public accommodations. Realtors, public housing authorities, state and local agencies, government officials private and non-profit organizations are invited to attend.

The first half day will consist of continuing education sessions for lawyers and realtors. The second full day will consist of a variety of sessions on topics/issues related to fair housing, fair employment, public accommodation and diversity.

WHAT: 2010 Civil Rights Conference hosted and organized by the Lincoln Commission on Human Rights

WHO: Anyone with an interest in issues relating to fair housing, fair employment and diversity

WHEN: April 20th & 21st 2010

WHERE: Cornhusker Marriott Hotel
333 South 13th Street
Lincoln, NE 68508

