

# Hearing Loss in the Workplace – Rights and Obligations

will begin at 2:00 PM ET



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## About Your Hosts...

- **TransCen, Inc.**
  - Improving lives of people with disabilities through meaningful work and community inclusion
- **Mid-Atlantic ADA Center**, a project of **TransCen, Inc.**
  - Part of the ADA National Network which consists of ten regional centers located throughout the United States that provide personalized assistance to educate the public about the ADA.
  - Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services



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## Listening to the Webinar

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### Captioning

Real-time captioning is provided; open the window by selecting the "CC" icon in the AUDIO & VIDEO panel

- You can re-size the captioning window, change the font size, and save the transcript




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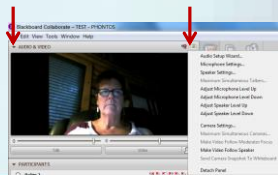
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### Sign Language Interpreter

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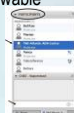
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- In the webinar platform:
  - You may type and submit questions in the CHAT area text box or press Control-M and enter text in the CHAT area; you will not be able to see the question after you submit it but it will be viewable by the presenters
  - If you are connected via a mobile device you may submit questions in the CHAT area within the app
- Questions may also be emailed to: ADAtesting@transcen.org




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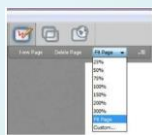
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### Archive

- This webinar is being recorded and can be accessed within a few weeks
- You will receive an email with information on accessing the archive

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### Certificate of Participation

- Please consult the reminder email you received about this session for instructions on obtaining a certificate of participation for this webinar.
- **You will need to listen for the continuing education code which will be announced at the conclusion of this session.**
- Requests for continuing education credits must be received no later than **12PM ET on Friday, August 11<sup>th</sup>, 2017.**

12



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# Hearing Loss in the Workplace – Rights and Obligations

August 9, 2017

Lise Hamlin,  
Director of Public Policy  
David Gayle, Esq.



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The Mission of HLAA is to open the world of communication to people with hearing loss by providing information, education, support and advocacy.

Founded in 1979, HLAA has a nation-wide network that includes local chapters, state organizations and a home office in Bethesda, MD.

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## People with Hearing Loss



About 48 million American adults report a hearing loss that affects their ability to communicate.

- At age 65, one out of three people has a hearing loss.
- 60 % of the people with hearing loss are either in the work force or in educational settings.

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### Hearing Loss and the ADA

- Hearing loss does qualify as a “disability” within the meaning of the ADA.
- Individuals with hearing loss must show that they are substantially limited in the major life activity of “hearing.” 42 USC §12102(1) and (2). See 29 CFR §1620.2(j)(3)(iii).

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### Hearing Loss and the ADA

People with hearing loss typically communicate using the help of personal technology and/or visual supports such as:

- Hearing aids, cochlear implants
- CART, sign language

**A determination of disability cannot take into consideration mitigating measures such as hearing aids or cochlear implants. See 29 CFR §1630.2(j)(5)(i).**

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### Some Accommodations for People with Hearing Loss

- Assistive listening devices or systems, e.g., FM, IR, or hearing induction loop systems
- Appropriate telephones, e.g., amplified phones, HAC wireless phones, video phones
- Access to Telecommunication Relay Services (TRS) using captioned phones and apps, video relay
- Communication Access Real-time Translation (CART), sign language interpreters

Job Accommodation Network (JAN) (<http://askjan.org>) includes information about accommodations for people with hearing loss.

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## Employment Complaints

- Most complaints arise when the economic stakes are highest: getting hired for a job or getting terminated from a job
- Some complaints involve conditions of employment
- A few situations include harassment of the employee

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## Employment Complaints

A common theme is twofold:

- Employers
  - Do not understand their legal obligations to accommodate employees
- Employees
  - Are unaware of their legal rights and/or
  - Do not know the kinds of accommodations that would be effective for their hearing loss

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## Hearing Aids & Job Qualification Testing

- Hiring and/or employment retention procedures: prohibiting applicants from using hearing aids during medical qualification testing is the primary complaint raised.
- For certain jobs: a specified level of hearing acuity is a valid physical requirement for performance of essential job functions: public safety, e.g., police, FBI, firefighters, etc.

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### Hearing Aids & Job Qualification Testing

Reasons given for refusal to allow hearing aids:

- Hearing aids being dislodged
  - Possible battery failure
  - Diminished hearing caused by ear wax
  - Incompatibility with some mobile phones
  - Inability to detect environmental sounds
- These fears insufficient to support a total ban on testing while using of hearing aids.

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### Case Example 1: Mr. P Medical Qualification Testing



- Mr. P: 35 year old man, moderate to severe hearing loss in his left ear, normal hearing in his right ear.
- Applied for a position as an special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), a component of the Department of Justice.
- These positions have a valid standard of hearing acuity, specifying a minimum hearing loss at various frequencies. The written standard is silent on the use of hearing aids during testing.

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### Case Example 1: Mr. P Medical Qualification Testing



- Mr. P notified ATF of his hearing loss, was permitted to be tested with and without his hearing aid.
- He was disqualified after he failed the hearing test *without* his hearing aid. No mention made of the test he passed *with* his hearing aid.
- He later learned that ATF policy prohibited the use of hearing aids by its agents.

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### Case Example 1: Mr. P Medical Qualification Testing



- Mr. P requested reconsideration of his rejection accordance with OPM regulations (5 CFR §339.306).
- He never received a response to this request.
- Instead he was invited to retake a sound field test unaided which he passed.

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### Case Example 1: Mr. P Medical Qualification Testing



- He received a second notice that his application was rejected because he failed two other components of the hearing test *unaided*.
- Because he is not a veteran, he was required to file a discrimination complaint with ATF pursuant to EEOC regulations.

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### Case Example 1: Mr. P Medical Qualification Testing



- After investigation of his complaint by ATF, he requested a hearing before the EEOC before getting a final decision by the head of ATF.
- EEOC has a backlog of 12 to 15 months, and he is waiting for his hearing to be scheduled.
- It has been 2 ½ years since the filing of his discrimination complaint with the agency.

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### Medical Testing and ADA Enforcement



- ATF's approach is inconsistent with the requirements of the ADA as articulated by the Civil Rights Division of DOJ, of which the ATF is a component.
- The Division indicated that it lacks authority to get involved with discrimination complaints filed against federal agencies.

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### Medical Testing and ADA Enforcement



- Charges of discrimination have been filed with EEOC involving *state* or *local* police officers.
- EEOC: denying applicants the use of hearing aids during testing violates the ADA.
- EEOC rejected the business necessity defense asserted by police departments, found the claim that officers using hearing aids would pose a "direct threat" to be speculative.

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### Medical Testing and ADA Enforcement



- Civil Rights Division of the Department of Justice: settlement agreements were reached in which the EEOC findings were confirmed.
- Civil Rights Division settlements: required applicants to be assessed on a case-by-case basis, with and without their hearing aids to determine their qualifications, including whether applicants pose a direct threat to the health and safety of themselves and others.

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### Medical Testing and ADA Enforcement



- Office of Personnel (OPM) regulations are old and obsolete. Title 5 CFR, Part 339, Medical Qualification Determinations, was issued in **1989** and is *not* in conformance with current law.

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### Case Example 2: Ms. A Veterans and Employment

- Ms. A, 29 years old, mild to moderate hearing loss in her left ear, normal hearing in her right ear.
- Applied for positions as agents with the ATF, DEA, and FBI.
- These law enforcement agencies have valid requirements for hearing acuity.

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### Case Example 2: Ms. A Veterans and Employment

- Ms. A is a military veteran and thus has veterans' preference eligible status for federal employment.
- She served 8 years in the Army as a Military Police (MP) officer. She experienced multiple combat deployments including direct action night raids in Afghanistan.
- She had no problems carrying out her mission despite hearing loss.
- She was given a Baha by the Army at some point.

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### Case Example 2: Ms. A Veterans and Employment

- Ms. A's applications were rejected by the DEA and the FBI because of her hearing loss. ATF had not yet issued a decision.
- Despite OPM regulatory requirements, neither agency considered granting a waiver (5 CFR 339.204).

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### Case Example 2: Ms. A Veterans and Employment

- Under federal statutes (5 USC 3312 and 3318), disqualifications of a veterans' preference eligible for medical reasons must be adjudicated by OPM *before* the position can be filled.
- With information provided by HLAA, OPM determined it could not sustain FBI's position to disqualify Ms. A.
- OPM did not spell out its rationale in writing, but OPM indicated it spoke to the FBI about the case.

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### Case Example 2: Ms. A Veterans and Employment

- The FBI offered Ms. A a position as an agent, which she accepted.
- Her hiring constitutes a breakthrough overcoming policy to exclude all applicants using hearing aids.

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### Case Example 3: Mr. D Termination of Employment



- Mr. D, a NYC police officer starting in 1989. In 1996, his partner fired a gun 5 times about 18 inches from his right ear causing hearing loss in that ear.
- Without accommodation, Mr. D advanced to the rank of Deputy Inspector in 2008.
- Mr. D requested and was authorized to obtain a hearing aid for his right ear.

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### Case Example 3: Mr. D Termination of Employment



- Subsequently, an NYPD medical doctor recommended Mr. D be "involuntarily retired" on the basis of disability. No testing or other assessment was made of Mr. D's ability to perform the essential functions of his job.
- Mr. D vigorously protested the recommendation and continued to perform his duties successfully using his hearing aid.

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### Case Example 3: Mr. D Termination of Employment



- NYPD issued a new written policy stating that police officers on duty may not wear hearing aids. No factual basis was given.
- Accordingly, Mr. D's formal request for a reasonable accommodation (i.e., use of a hearing aid) was rejected, without regard to Mr. D's ability to perform his essential job functions.

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### Case Example 3: Mr. D Termination of Employment



- Mr. D's employment was terminated.
- He filed suit in U.S. District Court alleging discrimination in violation of the ADA.
- HLAA submitted an amicus brief (friend of the court), providing data on modern hearing aid technology and showing that other police departments allow the use of hearing aids.
- The court accepted the brief.

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### Case Example 3: Mr. D Termination of Employment



- On the first day of trial, the NYPD settled the case, agreeing to give Mr. D back pay, to return lost benefits, to reinstate his employment, and to rescind the policy prohibiting the use of hearing aids by officers.
- This victory conformed to DOJ requirements to test the hearing of applicants and employees, with and without hearing aids, and make individual assessments (no blanket exclusions) of whether applicants or employees can perform the essential functions of the jobs in question.

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### Hearing Loss in the Workplace: Rights and Obligations

*HLAA has found:*

- Many employers lack knowledge of reasonable accommodations to enable employees with hearing loss to effectively perform their duties and responsibilities.
  - **HLAA has worked with and will continue to work with employers seeking a better understanding of the accommodations that enable their staff to do their job well.**

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### Hearing Loss in the Workplace: Rights and Obligations

HLAA has found:

- Employees often do not know what accommodations will work for them (e.g., accessible phones, CART services, listening systems, work space adjustments, elimination of non-essential functions, and reassignment to a vacant position).

- **HLAA will continue to empower consumers to become knowledgeable self-advocates.**

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### Questions?



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## Contact Us

- ADA questions
  - ADA National Network
    - 1-800-949-4232 V/TTY
    - [www.adata.org](http://www.adata.org)
  - Questions about this presentation
    - Mid-Atlantic ADA Center
      - 1-800-949-4232 V/TTY (DC, DE, MD, PA, VA, WV)
      - 301-217-0124 local
      - [www.adainfo.org](http://www.adainfo.org)
      - [ADAtraining@transcen.org](mailto:ADAtraining@transcen.org)

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