2022 HR & Employment Law Conference

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"Heard on the MEA Hotline" Q&A

Jane Disher, HR Advisor — MEA

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Question 1

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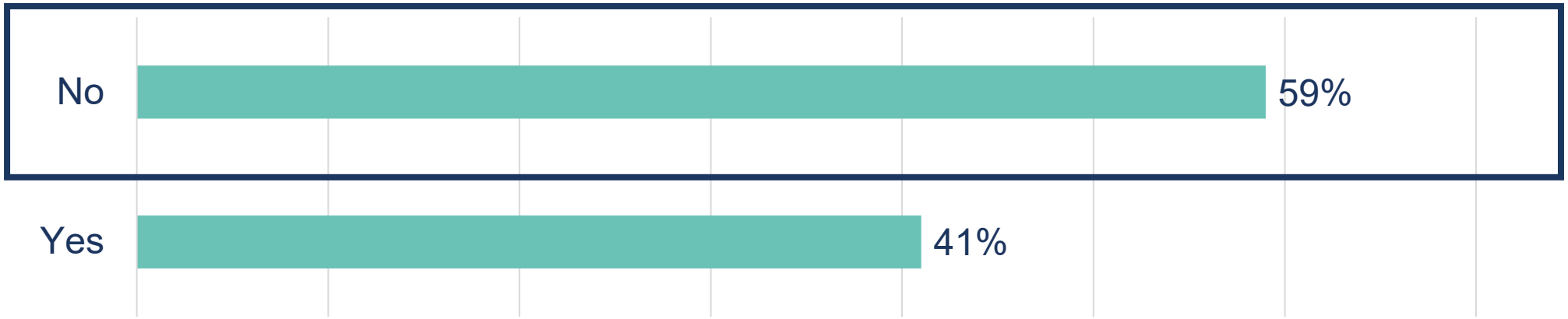
Employee – truck driver – was cited for a moving violation. The violation was caught by a red light camera – there are photos so there is no question that it is him. The notice was sent to the member because the truck is registered to them. Can they withhold the amount of the fine from the employee's pay?



Question 1

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No. They can discipline the employee but cannot legally deduct the fine from his paycheck.

Question 2

May 10, 2022

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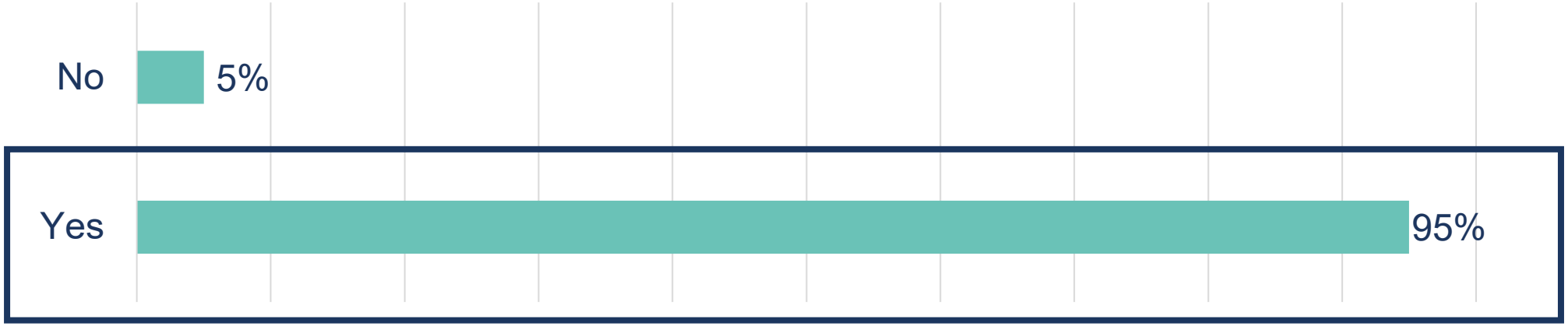
Employee had a seizure at work; he disclosed that he has had them in the past. He is a service technician which requires him to drive and be on ladders. The employer would like to request a fitness for duty before returning him to work – can they?



Question 2

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Yes. Under the Americans with Disabilities Act, an employer can require a medical examination or make disability-related medical inquiries of an employee only when the "examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. §12112(d)(4)(A). Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." More information. It appears in this case that a medical inquiry like a fitness for duty would be permissible under ADA because employer has a reasonable belief, based on objective evidence, that the employee constitutes a direct threat.

Question 3

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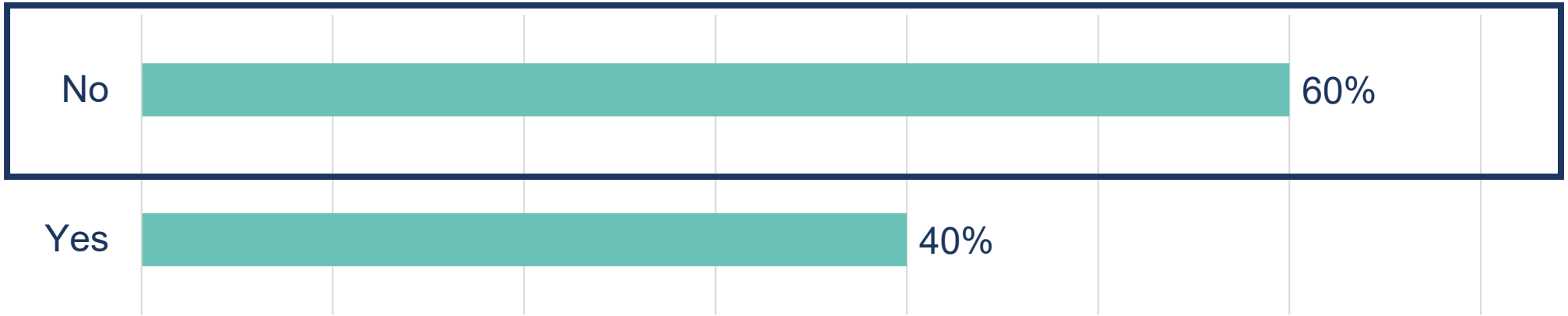
Can we ask about preferred pronouns in a job application or during the interview process?



Question 3

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No. This is a developing area of the law, but pronouns probably go in that category of information that employers would prefer not to know before making a hiring decision, because the employer may be accused of discrimination for failing to hire an applicant using unexpected pronouns. Certainly, it is a great DEI initiative for the employer to include pronouns in signature blocks and/or on an interview email (example: You will be meeting with Jane Doe (she/her/hers) and John Smith (he/him/his) and asking employees about preferred names and pronouns as part of the onboarding process after an offer has been made and accepted.

Question 4

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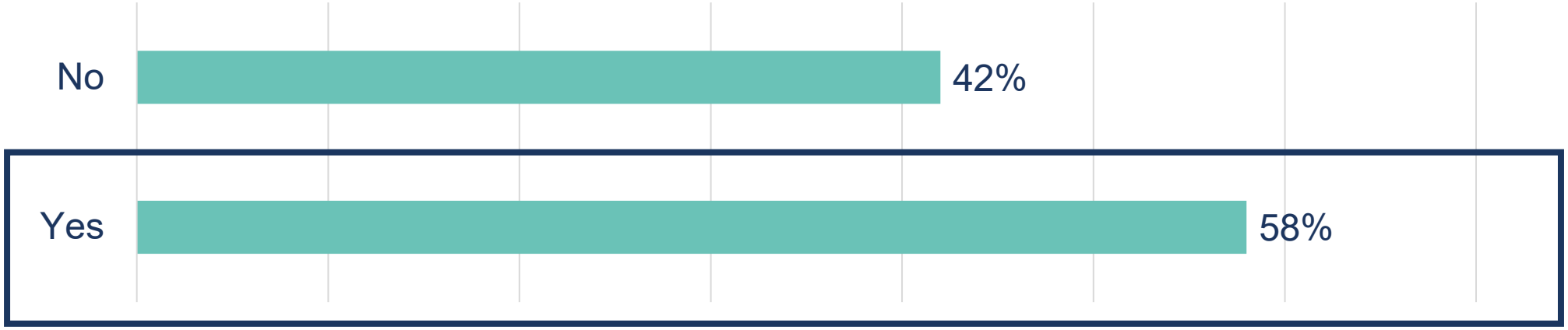
We have a salaried employee who has volunteered to take on the responsibility of snow removal when needed. This will not be their primary responsibility. Can we pay the employee an hourly rate for snow removal?



Question 4

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An employee may perform more than one job for an employer. However, an employee may only have one designation under the Fair Labor Standards Act (FLSA) – exempt or nonexempt. When an employee works two different jobs for an employer, the exemption status is based on the combination of the two jobs' duties as if the employee were performing one job. For the position to be exempt, the employee's "primary duty" must qualify as exempt. The term "primary duty" means the principal, main, major or most important duty that the employee performs. 29 CFR 541.700(a). At a minimum, the employee must spend at least 50% of his/her time on exempt duties.

If the combined duties would qualify the employee as exempt, the FLSA would not require the employer to pay the employee any additional salary above the normal weekly salary. At the same time, however, the FLSA would not prohibit an employer from paying more for the additional work, in any increment or method chosen (including an hourly rate, piece rate, etc.). The only requirement would be to pay the employee his or her current, regular salary, which meets the salary basis test under the FLSA. Of course, not many employees would voluntarily take on a second job without additional compensation, so it is customary that employers that allow such an arrangement would pay an additional rate for the hours worked at the second job, but they would not be required to pay any overtime. While not completely clear, it appears that the salary for the exempt position itself must meet the $684/week threshold under FLSA.

If the combined duties would qualify the employee as nonexempt, the employee would be nonexempt for both jobs, and overtime would need to be paid on all hours worked over 40 in a week. The basic rate on which to compute the overtime would be either the weighted average of the two wages or the rate of the job in which the overtime was earned. More Information

Question 5

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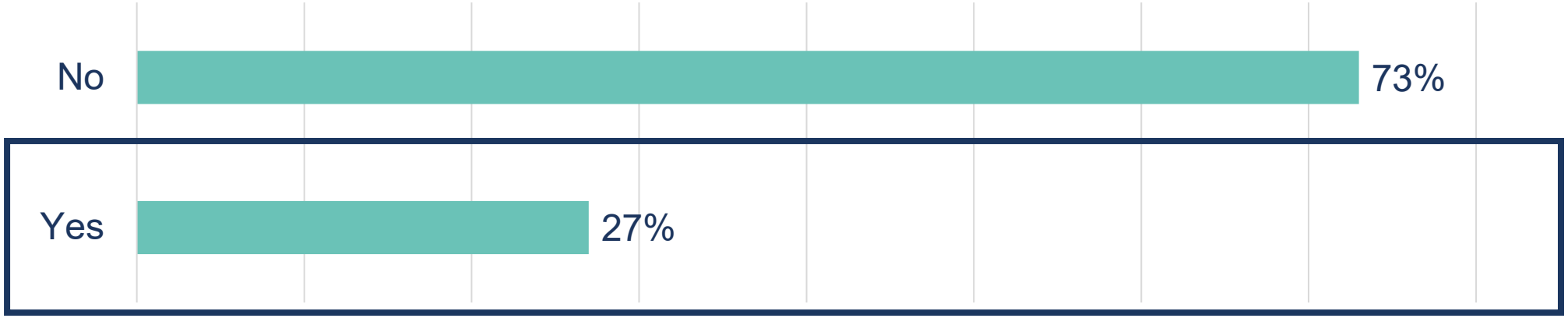
Two PA employees attended a sales conference out of state; attendance was optional. Neither employee is vaccinated so they were required to present a negative COVID test. The testing was done in NC so it was out-of-network and the insurance company is not paying all or some of the cost. Is the employer required to reimburse the employees for the cost of the test?



Question 5

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Yes. This is the Pennsylvania law:

43 P.S. § 1002: It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination, or the cost of furnishing any medical records, required by the employer as a condition of employment, if the applicant or employee works for the employer for one work week: Provided, That the provisions of this act shall not apply where medical examination is required by law as a condition of employment.

It certainly appears that the employer should be paying for the testing.

Question 6A

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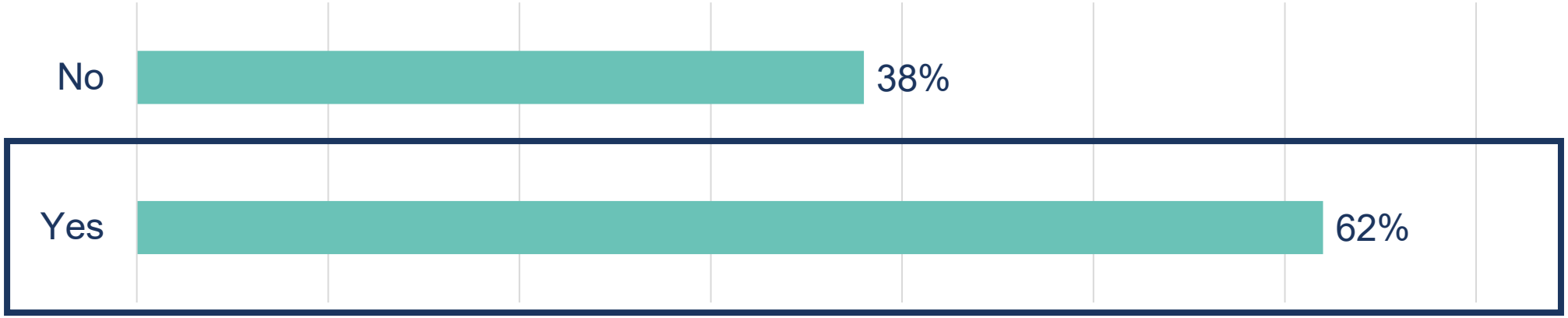
Due to an increase in the number of injuries in their warehouse, we have implemented a lifting test as part of our pre-employment screening. Can we require our existing employees to take this test?



Question 6B

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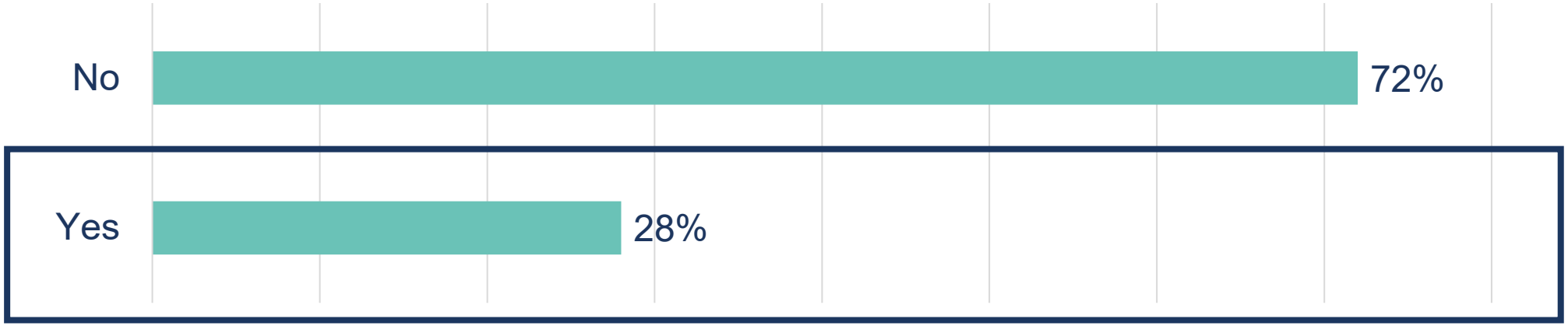
If they fail the test, can we terminate employment?



Question 6A & 6B

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Under the Americans with Disabilities Act, an employer cannot require a medical examination and cannot make inquiries of an employee as to whether such employee may be disabled under the law or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. However, certain physical fitness tests, which measure an employee's performance of physical tasks such as running or lifting, are not considered to be medical examinations, and they therefore are permitted, as long as these tests do not include examinations or inquiries that could be considered medical (for example, measuring heart rate or blood pressure). More Information. A lifting test therefore would not violate the ADA provided that: it is job-related (the job description states a lifting requirement); it is administered to all employees in the same job class; and it does not include an actual medical examination or inquiry. In addition, while terminating an employee for failing the test would not violate the ADA, the employer should be consistent and be prepared to terminate all employees who fail the test.