THE ABC'S OF THE ADA: CONFERENCE ON THE AMERICANS WITH DISABILITIES ACT
MAY 1-3, 1992

FINAL AGENDA

Friday, May 1

GENERAL SESSIONS: OVERVIEW OF ADA

8:00 a.m. Registration and Coffee

9:00 a.m. Welcome and Introductions

9:10 a.m. The ADA: Only the Beginning - Keynote Address
Senator Robert Dole

9:30 a.m. ADA Overview: Key Concepts and Impact
ADA (R)Evolution - Roger Kingsley
Scope and Impact of ADA - Patrisha Wright
Key Concepts in Employment - EEOC Representative

10:30 a.m. Break

10:45 a.m. ADA Overview: Key Concepts (Continued)
State and Local Government Services
Public Accommodations - Amie Amiot
Telecommunications - FCC Representative

11:45 a.m. Exhibits Open
Lunch with Exhibitors

1:30 - 5:00 CONCURRENT TRAINING SESSIONS AND PRODUCT DEMONSTRATIONS

See Product Demonstration Schedule and Description in Product Demo Manual Section

Select from the following Training Sessions:

1:30 - 2:00 Keys to Forensic Preparation - Dogwood
Roy Rowland

1:30 - 2:15 Visual Commmunications in the '90's - Plaza B
Judith Harkins

2:15 - 3:00 TDD Relay Systems: Personnel Training and Issues - Plaza B
Pamela Ransom

2:30 - 3:00 Incorporating ADA Consultation Into Your Practice - Dogwood
Eleanor Stromberg

1:30 - 3:00 Part A. Assistive Listening Systems and the ADA -
Making It All Work - Chestnut
Robert Gilmore

Friday, May 3 continued

3:00 - 3:30 Refreshments with Exhibitors - Plaza A

3:30 - 4:00 Incorporating ADA Consultation Into Your Practice - Dogwood
Eleanor Stromberg

4:00 - 5:00 Individualized Assessments and Communication Profiles - Dogwood
James Healey

3:30 - 5:00 Part B. Assistive Listening Systems and the ADA -
Making It All Work - Chestnut
Robert Gilmore

3:30 - 5:00 Marketing Tools and Strategies - Plaza B
Helen Pollack
Cheryl Russell
Alexis Waters
Fred Whiting

5:00 p.m. - 6:30 p.m. Reception with Exhibitors - Plaza A
and
Our Best Friends: In Action
Hearing And Mobility Assistance Dogs
Demonstrations

Saturday, May 2

GENERAL SESSIONS: ADA REGULATIONS AND COMMUNICATION

8:30 a.m. Employment Issues and Professionals' Roles
Sy Dubow
Roy Rowland
Plaza B

10:15 a.m. Coffee Break

10:30 a.m. Effective Communication and Accessibility Requirements
in Public Accommodations and Public Services
Robert Mather
Plaza B

12:00 p.m. Lunch with Exhibitors - Plaza A

1:30 - 5:00 CONCURRENT TRAINING SESSIONS AND PRODUCT DEMONSTRATIONS

See Product Demonstration Schedule and Description in Product Demo Manual Section

Select from the following Training Sessions:

1:30 - 2:00 Keys to Forensic Preparation - Beech B
Roy Rowland

1:30 - 2:00 Incorporating ADA Consultation Into Your Practice - Beech A
Eleanor Stromberg

2:00 - 3:00 Individualized Assessments and Communication Profiles - Beech B
James Healey

2:15 - 3:00 Strategies for Assessing Facility Communication Accessibility - Beech A
Jo Williams

1:30 - 3:00 Assistive Technology and Applications: Speech/Language - Plaza B
Diane Bristow

1:30 - 3:00 Part A. Assistive Listening Systems and the ADA - Making It All Work - Dogwood
Robert Gilmore

3:00 - 3:30 Refreshments with Exhibitors - Plaza A

3:30 - 4:00 Keys to Forensic Preparation - Beech B
Roy Rowland

4:15 - 5:00 Strategies for Assessing Facility Communication Accessibility - Beech A
Jo Williams

3:30 - 5:00 Part B. Assistive Listening Systems and the ADA - Making It All Work - Dogwood
Robert Gilmore

3:30 - 5:00 Marketing Tools and Strategies - Plaza B
Helen Pollack
Cheryl Russell
Alexis Waters
Fred Whiting

5:00 p.m. Adjourn
7:00 p.m. - Bus to Old Town Alexandria - dinner and shopping
9:00 p.m. - Bus to leave Old Town for Special Tour "Washington Scandals" (order tickets on registration form)
11:00 p.m. - Return to Hotel

Sunday, May 3

GENERAL SESSIONS: PUTTING ADA INTO ACTION

9:00 a.m. Providing Sensitivity and Communication Training to Personnel: A Key Component of Professional Services
Eleanor Stromberg

9:45 a.m. Working with Consumers in Advocacy
Robert Williams

10:15 a.m. Break

10:30 a.m. Case Studies and Model Programs
Zenobia Bagli, Robert Gilmore, Roy Rowland, Eleanor Stromberg, McDonald's Representative

11:45 a.m. ADA: An Evolutionary Force In Your Case Management
James Healey

12:25 p.m. Closing

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MAY 1-3, 1992

FACULTY AND GUESTS

The Honorable Robert Dole (Invited)
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Minority Leader

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Representatives from Equal Employment Opportunity Commission, Federal Communications Commission, McDonald's Corporation.

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THE ABC's OF THE ADA CONFERENCE

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ADA OVERVIEW: KEY CONCEPTS AND IMPACT
Panel Discussion

ADA (R)Evolution
Roger Kingsley

Scope and Impact of ADA
Patrisha Wright

Key Concepts in Employment
EEOC Representative

State and Local Government Services
Amie Amiot

Public Accommodations
Amie Amiot

Telecommunications
FCC Representative

ADA (R)Evolution

Roger Kingsley

Scope and Impact of ADA

Patrisha Wright

Law's Effective Date	Regulations Due by Federal Agency	Enforcement

EMPLOYMENT

Private employers, state and local governments, employment agencies, labor organizations, and labor-management committees.

July 26, 1992 for employers with twenty-five (25) or more employees; July 26, 1994 for employers with fifteen (15) or more employees.	July 26, 1991, regulations implementing title I were published in the Federal Register by the Equal Employment Opportunity Commission (EEOC).	Procedures and remedies identical to those under Title VII of the Civil Rights Act of 1964, which are EEOC enforcement, private right of action, and relief including, hiring, promotion, reinstatement, and back pay.

STATE AND LOCAL GOVERNMENT

All activities of local and state governments.

January 26, 1992	July 26, 1991, regulations implementing title II were published in the Federal Register by the Department of Justice (DOJ).	Remedies identical to those under the Rehabilitation Act of 1973 Section 505, which are private right of action, injunctive relief, and some damages.

PUBLIC ACCOMMODATIONS

All business and service providers.

January 26, 1992, generally; no lawsuit may be filed before July 26, 1992, against businesses with twenty-five (25) or fewer employees and revenue $1 million or less; or before January 26, 1993, for businesses with ten (10) or fewer employees and revenue $500,000 or less.	July 26, 1991, regulations implementing title III, including the ADA Accessibility Guidelines issued by the Architectural and Transportation Barriers Compliance Board, were published by the Department of Justice (DOJ) in the Federal Register.	For individuals, remedies identical to Title II of the Civil Rights Act of 1964, which are private right of action, injunctive relief: For Attorney General enforcement in pattern or practice cases or cases of general importance, with civil penalties and compensatory damages.

New construction / alteration to public accommodations and commercial facilities.

January 26, 1992, for alterations. January 26, 1993, for new construction.	Same as above.	Same as above.

Law's Effective Date	Regulations Due by Federal Agency	Enforcement

PUBLIC TRANSPORTATION

Public transportation (buses, light and rapid rail including fixed-route systems, paratransit, demand response system and transportation facilities).

August 26, 1990, all orders for purchases or leases of new vehicles must be for accessible vehicles; one-car-per-train must be accessible as soon as practicable, but no later than July 26, 1995; paratransit services must be provided after January 26, 1992; new stations built after January 26, 1992, must be accessible. Key stations must be retrofitted by July 26, 1993; with some exceptions allowed up to July 26, 2020.	July 26, 1991, all regulations due from Department of Transportation (DOT).	Remedies identical to those under the Rehabilitation Act of 1973, Section 505, which are private right of action, injunctive relief, and some damages.

Public transportation by intercity Amtrak and commuter rail (including transportation facilities).

By July 26, 2000, Amtrak passenger coaches must have same number of accessible seats as would have been available if every car were built accessible; half of such seats must be available by July 26, 1995. Same one-car-per-train rule and new stations rule as above. All existing Amtrak stations must be retrofitted by July 26, 2010; key commuter stations must be retrofitted by July 26, 1993, with some extensions allowed up to twenty (20) years.	July 26, 1991, all regulations due from Department of Transportation (DOT).	Same as above.

TELECOMMUNICATIONS

July 26, 1993, telecommunications relay services to operate twenty-four (24) hours per day.	Regulations implementing title IV were published by the Federal Communications Commission (FCC) in the Federal Register.	Private right of action and FCC enforcement.

EMPLOYMENT

Q. What employers are covered by the ADA, and when is the coverage effective?

A. The employment provisions of title I of the ADA apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees will be covered starting July 26, 1992, when title I goes into effect. Employers with 15 or more employees will be covered two years later, beginning July 26, 1994.

In addition, the employment practices of State and local governments of any size are covered by title II of the ADA, which goes into effect on January 26, 1992. The standards to be used under title II for determining whether employment discrimination has occurred depend on whether the public entity at issue is also covered by title I. Beginning July 26, 1992, if the public entity is covered by title I, then title I standards will apply. If not, the standards of section 504 of the Rehabilitation Act will apply. From January 26, 1992, when title II goes into effect, until July 26, 1992, when title I goes into effect, public entities will be subject to the section 504 standards.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Q. Who is protected against employment discrimination?

A. Employment discrimination is prohibited against "qualified individuals with disabilities." Persons discriminated against because they have a known association or relationship with a disabled individual also are protected. The ADA defines an "individual with a disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

The first part of the definition makes clear that the ADA applies to persons who have substantial, as distinct from minor, impairments, and that these must be impairments that limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, a substantial hearing or visual impairment, mental retardation, or a learning disability would be covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.

The second part of the definition would include, for example, a person with a history of cancer that is currently in remission or a person with a history of mental illness.

The third part of the definition protects individuals who are regarded and treated as though they have a substantially limiting disability, even though they may not have such an impairment. For example, this provision would protect a severely disfigured qualified individual from being denied employment because an employer feared the "negative reactions" of others.

Q. Who is a "qualified individual with a disability?"

A. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job.

Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, if two persons apply for a job opening as a typist, one a person with a disability who accurately types 50 words per minute, the other a person without a disability who accurately types 75 words per minute, the employer may hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. What is "reasonable accommodation?"

A. Reasonable accommodation is a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees.

Q. What kinds of actions are required to reasonably accommodate applicants and employees?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person becomes disabled and is unable to do the original job. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards in order to make an accommodation, nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will enable the person with a disability to do the job in question.

Q. Must employers be familiar with the many diverse types of disabilities to know whether or how to make a reasonable accommodation?

A. No. An employer is required to accommodate only a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of the job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one. If a disabled person requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The disabled individual requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as "an action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.

Q. Must an employer modify existing facilities to make them accessible?

A. An employer may be required to modify facilities to enable an individual to perform essential job functions and to have equal opportunity to participate in other employment-related activities. For example, if an employee lounge is located in a place inaccessible to a person using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers.

Q. May an employer inquire as to whether a prospective employee is disabled?

A. An employer may not make a pre-employment inquiry on an application form or in an interview as to whether, or to what extent, an individual is disabled. The employer may ask a job applicant whether he or she can perform particular job functions. If the applicant has a disability known to the employer, the employer may ask how he or she can perform job functions that the employer considers difficult or impossible to perform because of the disability, and whether an accommodation would be needed. A job offer may be conditioned on the results of a medical examination, provided that the examination is required for all entering employees in the same job category regardless of disability, and that information obtained is handled according to confidentiality requirements specified in the Act. After an employee enters on duty, all medical examinations and inquiries must be job related and necessary for the conduct of the employer's business. These provisions of the law are intended to prevent the employer from

basing hiring and employment decisions on unfounded assumptions about the effects of a disability.

Q. Does the ADA take safety issues into account?

A. Yes. The ADA expressly permits employers to establish qualification standards that will exclude individuals who pose a direct threat — i.e., a significant risk of substantial harm— to the health or safety of the individual or of others, if that risk cannot be lowered to an acceptable level by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is genuine risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Q. Can an employer refuse to hire an applicant or fire a current employee who is illegally using drugs?

A. Yes. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when an action is taken on the basis of their drug use.

Q. Is testing for illegal drugs permissible under the ADA?

A. Yes. A test for illegal drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

Q. Are people with AIDS covered by the ADA?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q. How does the ADA recognize public health concerns?

A. No provision in the ADA is intended to supplant the role of public health authorities in protecting the community from legitimate health threats. The ADA recognizes the need to strike a balance between the right of a disabled person to be free from discrimination based on unfounded fear and the right of the public to be protected.

Q. What is discrimination based on "relationship or association?"

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person with a disabled spouse from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would

protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. Will the ADA increase litigation burdens on employers?

A. Some litigation is inevitable. However, employers who use the period prior to the effective date of employment coverage to adjust their policies and practices to conform to ADA requirements will be much less likely to have serious litigation concerns. In drafting the ADA, Congress relied heavily on the language of the Rehabilitation Act of 1973 and its implementing regulations. There is already an extensive body of law interpreting the requirements of that Act to which employers can turn for guidance on their ADA obligations. The Equal Employment Opportunity Commission, which has issued regulations implementing the ADA's employment provisions, will publish a technical assistance manual with guidance on how to comply and will provide other assistance to help employers meet ADA requirements. Equal employment opportunity for people with disabilities will be achieved most quickly and effectively through widespread voluntary compliance with the law, rather than through reliance on litigation to enforce compliance.

Q. How will the employment provisions be enforced?

A. The employment provisions of the ADA will be enforced under the same procedures now applicable to race, sex, national origin, and religious discrimination under title VII of the Civil Rights Act of 1964. Complaints regarding actions that occur after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated State human rights agencies. Available remedies will include hiring, reinstatement, back pay, and court orders to stop discrimination.

PUBLIC ACCOMMODATIONS

Q. What are public accommodations?

A. Public accommodations are private entities that affect commerce. The ADA public accommodations requirements extend, therefore, to a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the ADA's requirements for public accommodations.

Q. Will the ADA have any effect on the eligibility criteria used by public accommodations to determine who may receive services?

A. Yes. If a criterion screens out or tends to screen out individuals with disabilities, it may only be used if necessary for the provision of the services. For instance, it would be a violation for a retail store to have a rule excluding all deaf persons from entering the premises, or for a movie theater to exclude all individuals with cerebral palsy. More subtle forms of discrimination are also prohibited. For example, requiring presentation of a driver's license as the sole acceptable means of identification for purposes of paying by check could constitute discrimination against individuals with vision impairments. This would be true if such individuals are ineligible to receive licenses and the use of an alternative means of identification is feasible.

Q. Does the ADA allow public accommodations to take safety factors into consideration in providing services to individuals with disabilities?

A. The ADA expressly provides that a public accommodation may exclude an individual, if that individual poses a direct threat to the health or safety of others that cannot be mitigated by appropriate modifications in the public accommodation's policies or procedures, or by the provision of auxiliary aids. A public accommodation will be permitted to establish objective safety criteria for the operation of its business; however, any safety standard must be based on objective requirements rather than stereotypes or generalizations about the ability of persons with disabilities to participate in an activity.

Q. Are there any limits on the kinds of modifications in policies, practices, and procedures required by the ADA?

A. Yes. The ADA does not require modifications that would fundamentally alter the nature of the services provided by the public accommodation. For example, it would not be discriminatory for a physician specialist who treats only burn patients to refer a deaf individual to another physician for treatment of a broken limb or respiratory ailment. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice.

Q. What kinds of auxiliary aids and services are required by the ADA to ensure effective communication with individuals with hearing or vision impairments?

A. Appropriate auxiliary aids and services may include services and devices such as qualified interpreters, assistive listening devices, notetakers, and written materials for individuals with hearing impairments; and qualified readers, taped texts, and brailled or large print materials for individuals with vision impairments.

Q. Are there any limitations on the ADA's auxiliary aids requirements?

A. Yes. The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and caselaw under section 504 and are to be determined on a case-by-case basis.

Q. Will restaurants be required to have brailled menus?

A. No, not if waiters or other employees are made available to read the menu to a blind customer.

Q. Will a clothing store be required to have brailled price tags?

A. No. Sales personnel could provide price information orally upon request.

Q. Will a bookstore be required to maintain a sign language interpreter on its staff in order to communicate with deaf customers?

A. No, not if employees communicate by pen and notepad when necessary.

Q. Are there any limitations on the ADA's barrier removal requirements for existing facilities?

A. Yes. Barrier removal need be accomplished only when it is "readily achievable" to do so.

Q. What does the term "readily achievable" mean?

A. It means "easily accomplishable and able to be carried out without much difficulty or expense."

Q. What are examples of the types of modifications that would be readily achievable in most cases?

A. Examples include the simple ramping of a few steps, the installation of grab bars where only routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

Q. Will businesses need to rearrange furniture and display racks?

A. Possibly. For example, restaurants may need to rearrange tables and department stores may need to adjust their layout of racks and shelves in order to permit wheelchair access.

Q. Will businesses need to install elevators?

A. Businesses are not required to retrofit their facilities to install elevators unless such installation is readily achievable, which is unlikely in most cases.

Q. When barrier removal is not readily achievable, what kinds of alternative steps are required by the ADA?

A. Alternatives may include such measures as in-store assistance for removing articles from high shelves, home delivery of groceries, or coming to the door to receive or return dry cleaning.

Q. Must alternative steps be taken without regard to cost?

A. No, only readily achievable alternative steps must be undertaken.

Q. How is "readily achievable" determined in a multisite business?

A. In determining whether an action to make a public accommodation accessible would be "readily achievable," the overall size of the parent corporation or entity is only one factor to be considered. The ADA also permits consideration of the financial resources of the particular facility or facilities involved and the administrative or fiscal relationship of the facility or facilities to the parent entity.

Q. Who has responsibility for removing barriers in a shopping mall, the landlord who owns the mall or the tenant who leases the store?

A. Legal responsibility for removing barriers depends upon who has legal authority to make alterations, which is generally determined by the contractual agreement between the landlord and tenant. In most cases the landlord will have full control over common areas.

Q. What does the ADA require in new construction?

A. The ADA requires that all new construction of places of public accommodation, as well as of "commercial facilities" such as office buildings, be accessible. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center, mall, or professional office of a health care provider.

Q. Is it expensive to make all newly constructed public accommodations and commercial facilities accessible?

A. The cost of incorporating accessibility features in new construction is less than one percent of construction costs. This is a small price in relation to the economic benefits to be derived from full accessibility in the future, such as increased employment and consumer spending and decreased welfare dependency.

Q. Must every feature of a new facility be accessible?

A. No, only a reasonable number of elements such as parking spaces and bathrooms must be made accessible in order for a facility to be "readily accessible." Moreover, mechanical areas, such as catwalks and fan rooms, to which access is required only for purposes of maintenance and repairs, might not need to be physically accessible if the essential functions of the work performed in those areas require physical mobility.

Q. What are the ADA requirements for altering facilities?

A. All alterations that could affect the usability of a facility must be made in an accessible manner to the maximum extent feasible. For example, if during renovations a doorway is being relocated, the new doorway must be wide enough to meet the new construction standard for accessibility. When alterations are made to a primary function area, such as the lobby of a bank or the dining area of a cafeteria, an accessible path of travel to the altered area must also be provided. The bathrooms, telephones, and drinking fountains serving that area must also be made accessible. These additional accessibility alterations are only required to the extent that the added accessibility costs are not disproportionate to the overall cost of the alterations. Elevators are generally not required in facilities under three stories or with fewer than 3000 square feet per floor, unless the building is a shopping center, mall, or professional office of a health care provider.

Q. Does the ADA permit a disabled person to sue a business when that individual believes that discrimination is about to occur, or must the individual wait for the discrimination to occur?

A. The ADA public accommodations provisions permit an individual to allege discrimination based on a disabled person's reasonable belief that discrimination is about to occur. This provision allows a person who uses a wheelchair to challenge the planned construction of a new place of public accommodation, such as a shopping mall, that would not be accessible to wheelchair users. The resolution of such challenges prior to the construction of an inaccessible facility would enable any necessary remedial measures to be incorporated in the building at the planning stage, when such changes would be relatively inexpensive.

Q. How does the ADA affect existing State and local building codes?

A. Existing codes remain in effect. The ADA allows the Attorney General to certify that a State law, local building code, or similar ordinance that establishes accessibility requirements meets or exceeds the minimum accessibility requirements for public accommodations and commercial facilities. Any State or local government may apply for certification of its code or ordinance. The Attorney General can certify a code or ordinance only after prior notice and a public hearing at which interested people, including individuals with disabilities, are provided an opportunity to testify against the certification.

Q. What is the effect of certification of a State or local code or ordinance?

A. Certification can be advantageous if an entity has constructed or altered a facility according to a certified code or ordinance. If someone later brings an enforcement proceeding against the entity, the certification is considered "rebuttable evidence" that the State law or local ordinance meets or exceeds the minimum requirements of the ADA. In other words, the entity can argue that the construction or alteration met the requirements of the ADA because it was done in compliance with the State or local code that had been certified.

Q. When are the public accommodations provisions effective?

A. In general, they become effective on January 26, 1992.

Q. How will the public accommodations provisions be enforced?

A. Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed $50,000 for a first violation or $100,000 for any subsequent violation.

MISCELLANEOUS

Q. Is the Federal government covered by the ADA?

A. The ADA does not cover the executive branch of the Federal Government. The executive branch continues to be covered by title V of the Rehabilitation Act of 1973, which prohibits discrimination in services and employment on the basis of handicap and which is a model for the requirements of the ADA. The ADA, however, does cover Congress and other entities in the legislative branch of the Federal Government.

Q. What requirements, other than those mandating nondiscrimination in employment, does the ADA place on State and local governments?

A. All government facilities, services, and communications must be accessible consistent with the requirements of section 504 of the Rehabilitation Act of 1973. Individuals may file complaints with Federal agencies to be designated by the Attorney General or bring private lawsuits.

Q. Does the ADA cover private apartments and private homes?

A. The ADA generally does not cover private residential facilities. These facilities are addressed in the Fair Housing Amendments Act of 1988, which prohibits discrimination on the basis of disability in selling or renting housing. If a building contains both residential and nonresidential portions, only the nonresidential portions are covered by the ADA. For example, in a large hotel that has a residential apartment wing, the residential wing would be covered by the Fair Housing Act and the other rooms would be covered by the ADA.

Q. Does the ADA cover air transportation?

A. Discrimination by air carriers is not covered by the ADA but rather by the Air Carrier Access Act (49 U.S.C. 1374 (c)).

Q. What are the ADA's requirements for public transit buses?

A. The ADA requires the Department of Transportation to issue regulations mandating accessible public transit vehicles and facilities. The regulations must include a requirement that all new fixed-route, public transit buses be accessible and that supplementary paratransit services be provided for those individuals with disabilities who cannot use fixed-route bus service. For information on how to contact the Department of Transportation, see page 19.

Q. How will the ADA make telecommunications accessible?

A. The ADA requires the establishment of telephone relay services for individuals who use telecommunications devices for the deaf (TDD's) or similar devices. The Federal Communications Commission will issue regulations specifying standards for the operation of these services.

Q. Are businesses entitled to any tax benefit to help pay for the cost of compliance?

A. As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers.

The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

For more specific information about ADA requirements affecting Public Services and Public Accommodations contact:

Office on the Americans with Disabilities Act
Civil Rights Division
U.S. Department of Justice
P.O. Box 66118
Washington, D.C. 20035-6118
(202) 514-0301 (Voice)
(202) 514-0383 (TDD)

For more specific information about ADA requirements affecting employment contact:

Equal Employment Opportunity Commission
1801 L Street NW
Washington, DC 20507
800-669-EEOC (Voice)
800-800-3302 (TDD)

For more specific information about ADA requirements affecting transportation contact:

Department of Transportation
400 Seventh Street SW
Washington, DC 20590
(202) 366-9305 (Voice)
(202) 755-7687 (TDD)

For more specific information about requirements for accessible design in new construction and alterations contact:

Architectural and Transportation Barriers
Compliance Board
1111 18th Street NW
Suite 501
Washington, DC 20036
800-USA-ABLE (Voice)
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting telecommunications contact:

Federal Communications Commission
1919 M Street NW
Washington, DC 20554
(202) 632-7260 (Voice)
(202) 632-6999 (TDD)

Key Concepts in Employment

EEOC Representative

U.S. Equal Employment Opportunity Commission

The Americans With Disabilities Act

Your Responsibilities as an Employer

EEOC-BK-17

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in State and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission and State and local civil rights enforcement agencies that work with the Commission.

Are You Covered?

Job discrimination against people with disabilities is illegal if practiced by:

- private employers,
- state and local governments,
- employment agencies,
- labor organizations, and
- labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

- all employers, including State and local government employers, with 25 or more employees after July 26, 1992, and
- all employers, including State and local government employers, with 15 or more employees after July 26, 1994.

Another part of the ADA, enforced by the U.S. Department of Justice, prohibits discrimination in State and local government programs and activities, including discrimination by all State and local governments, regardless of the number of employees, after January 26, 1992.

Because the ADA establishes overlapping responsibilities in both EEOC and DOJ for employment by State and local governments, the Federal enforcement effort will be coordinated by EEOC and DOJ to avoid duplication in investigative and enforcement activities. In addition, since some private and governmental employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ, and the Department of Labor will similarly coordinate the enforcement effort under the ADA and the Rehabilitation Act.

What Employment Practices are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- hiring
- promotion
- training
- lay-off
- pay
- firing
- job assignments
- leave
- benefits
- all other employment related activities.

The ADA prohibits an employer from retaliating against an applicant or employee for asserting his rights under the ADA. The Act also makes it unlawful to discriminate against an applicant or employee, whether disabled or not, because of the individual's family, business, social or other relationship or association with an individual with a disability.

Who Is Protected?

Title I of the ADA protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he has a ***physical or mental impairment*** that ***substantially limits*** a ***major life activity***. The ADA also protects individuals who have a ***record of*** a substantially limiting impairment, and people who are ***regarded as*** having a substantially limiting impairment.

To be protected under the ADA, an individual must have, have a record of, or be regarded as having a ***substantial***, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a ***major life activity*** such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working.

An individual with a disability must also be qualified to perform the ***essential functions*** of the job with or without ***reasonable accommodation***, in order to be protected by the ADA. This means that the applicant or employee must:

- satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and

- be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The ADA does not interfere with your right to hire the best qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits you from discriminating against a qualified applicant or employee because

of her disability.

How Are Essential Functions Determined?

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing).

Factors to consider in determining if a function is essential include:

- whether the reason the position exists is to perform that function,
- the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- the degree of expertise or skill required to perform the function.

Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- the actual work experience of present or past employees in the job,
- the time spent performing a function,
- the consequences of not requiring that an employee perform a function, and
- the terms of a collective bargaining agreement.

What Are My Obligations to Provide Reasonable Accommodations?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- acquiring or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials or policies,

- providing readers and interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and to enjoy benefits and privileges of employment equal to those available to other employees.

It is a violation of the ADA to fail to provide reasonable accommodation to the *known* physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business. Undue hardship means that the accommodation would require significant difficulty or expense.

What is the Best Way to Identify a Reasonable Accommodation?

Frequently, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious. The individual may suggest a reasonable accommodation based upon her own life or work experience. However, when the appropriate accommodation is not readily apparent, you must make a reasonable effort to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job. If this consultation does not identify an appropriate accommodation, you may contact the EEOC, State or local vocational rehabilitation agencies, or State or local organizations representing or providing services to individuals with disabilities. Another resource is the Job Accommodation Network (JAN). JAN is a free consultant service that helps employers make individualized accommodations. The telephone number is 1-800-526-7234.

When Does a Reasonable Accommodation Become An Undue Hardship?

It is not necessary to provide a reasonable accommodation if doing so would cause an *undue hardship*. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation.

If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship. If cost causes the undue hardship, you must also consider whether funding for an accommodation is available

from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. You must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.

Can I Require Medical Examinations or Ask Questions About an Individual's Disability?

It is unlawful to:

- ask an applicant whether she is disabled or about the nature or severity of a disability, or
- to require the applicant to take a medical examination before making a job offer.

You can ask an applicant questions about ability to perform job-related functions, as long as the questions are not phrased in terms of a disability. You can also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will perform job-related functions.

After a job offer is made and prior to the commencement of employment duties, you may require that an applicant take a medical examination if everyone who will be working in the job category must also take the examination. You may condition the job offer on the results of the medical examination. However, if an individual is not hired because a medical examination reveals the existence of a disability, you must be able to show that the reasons for exclusion are job related and necessary for conduct of your business. You also must be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Once you have hired an applicant, you cannot require a medical examination or ask an employee questions about disability unless you can show that these requirements are job related and necessary for the conduct of your business. You may conduct voluntary medical examinations that are part of an employee health program.

The results of all medical examinations or information from inquiries about a disability must be kept confidential, and maintained in separate medical files. You may provide medical information required by State workers' compensation laws to the agencies that administer such laws.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the

basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, it is not a prohibited pre-employment medical examination and you will not have to show that the administration of the test is job related and consistent with business necessity. The ADA does not encourage, authorize or prohibit drug tests.

How will the ADA Be Enforced and What Are the Available Remedies?

The provisions of the ADA which prohibit job discrimination will be enforced by the U.S. Equal Employment Opportunity Commission. After July 26, 1992, individuals who believe they have been discriminated against on the basis of their disability can file a charge with the Commission at any of its offices located throughout the United States. A charge of discrimination must be filed within 180 days of the discrimination, unless there is a state or local law that also provides relief for discrimination on the basis of disability. In those cases, the complainant has 300 days to file a charge.

The Commission will investigate and initially attempt to resolve the charge through conciliation, following the same procedures used to handle charges of discrimination filed under Title VII of the Civil Rights Act of 1964. The ADA also incorporates the remedies contained in Title VII. These remedies include hiring, promotion, reinstatement, back pay, and attorneys fees. Reasonable accommodation is also available as a remedy under the ADA.

How Will EEOC Help Employers Who Want to Comply with the ADA?

The Commission believes that employers want to comply with the ADA, and that if they are given sufficient information on how to comply, they will do so voluntarily.

Accordingly, the Commission will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help employers understand their responsibilities and assist people with disabilities to understand their rights and the law.

In January 1992, EEOC will publish a Technical Assistance Manual, providing practical application of legal requirements to specific employment activities, with a directory of resources to aid compliance. EEOC will publish other educational materials, provide training on the law for employers and for people with disabilities, and participate in meetings and training programs of other organizations. EEOC staff also will respond to

individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about the ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts to settle such differences through alternative dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

Additional Questions and Answers on the Americans with Disabilities Act

Q. What is the relationship between the ADA and the Rehabilitation Act of 1973?

A. The Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by the federal government, federal contractors and by recipients of federal financial assistance. If you were covered by the Rehabilitation Act prior to the passage of the ADA, the ADA will not affect that coverage. Many of the provisions contained in the ADA are based on Section 504 of the Rehabilitation Act and its implementing regulations. If you are receiving federal financial assistance and are in compliance with Section 504, you are probably in compliance with the ADA requirements affecting employment except in those areas where the ADA contains additional requirements. Your nondiscrimination requirements as a federal contractor under Section 503 of the Rehabilitation Act will be essentially the same as those under the ADA; however, you will continue to have additional affirmative action requirements under Section 503 that do not exist under the ADA.

Q. If I have several qualified applicants for a job, does the ADA require that I hire the applicant with a disability?

A. No. You may hire the most qualified applicant. The ADA only makes it unlawful for you to discriminate against a qualified individual with a disability on the basis of disability.

Q. One of my employees is a diabetic, but takes insulin daily to control his diabetes. As a result, the diabetes has no significant impact on his employment. Is he protected by the ADA?

A. Yes. The determination as to whether a person has a disability under the ADA is made without regard to mitigating measures, such as medications, auxiliary aids and reasonable accommodations. If an individual has an impairment that substantially limits a major life activity, she is protected under the ADA, regardless of the fact that the disease or condition or its effects may be corrected or controlled.

Q. One of my employees has a broken arm that will heal but is temporarily unable to perform the essential functions of his job as a mechanic. Is this employee protected by the ADA?

A. No. Although this employee does have an impairment, it does not substantially limit a major life activity if it is of limited duration and will have no long term effect.

Q. Am I obligated to provide a reasonable accommodation for an individual if I am unaware of her physical or mental impairment?

A. No. An employer's obligation to provide reasonable accommodation applies only to *known* physical or mental limitations. However, this does not mean that an applicant or employee must always inform you of a disability. If a disability is obvious, e.g., the applicant uses a wheelchair, the employer "knows" of the disability even if the applicant never mentions it.

Q. How do I determine whether a reasonable accommodation is appropriate and the type of accommodation that should be made available?

A. The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on a case-by-case basis, because the nature and extent of a disabling condition and the requirements of the job will vary. The principal test in selecting a particular type of accommodation is that of *effectiveness*, i.e., whether the accommodation will enable the person with a disability to perform the essential functions of the job. It need not be the best accommodation or the accommodation the individual with a disability would prefer, although primary consideration should be given to the preference of the individual involved. However, as the employer, you have the final discretion to choose between effective accommodations, and you may select one that is least expensive or easier to provide.

Q. When must I consider reassigning an employee with a disability to another job as a reasonable accommodation?

A. When an employee with a disability is unable to perform her present job even with the provision of a reasonable accommodation, you must consider reassigning the employee to an existing position that she can perform with or without a reasonable accommodation. The requirement to consider reassignment applies only to employees and not to

applicants. You are not required to create a position or to bump another employee in order to create a vacancy. Nor are you required to promote an employee with a disability to a higher level position.

Q. What if an applicant or employee refuses to accept an accommodation that I offer?

A. The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may be considered not qualified.

Q. If our business has a health spa in the building, must it be accessible to employees with disabilities?

A. Yes. Under the ADA, workers with disabilities must have equal access to all benefits and privileges of employment that are available to similarly situated employees without disabilities. The duty to provide reasonable accommodation applies to all non-work facilities provided or maintained by you for your employees. This includes cafeterias, lounges, auditoriums, company-provided transportation and counseling services. If making an existing facility accessible would be an undue hardship, you must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless this would be an undue hardship.

Q. If I contract for a consulting firm to develop a training course for my employees, and the firm arranges for the course to be held at a hotel that is inaccessible to one of my employees, am I liable under the ADA?

A. Yes. An employer may not do through a contractual or other relationship what it is prohibited from doing directly. You would be required to provide a location that is readily accessible to, and usable by your employee with a disability unless to do so would create an undue hardship.

Q. What are my responsibilities as an employer for making my facilities accessible?

A. As an employer, you are responsible under Title I of the ADA for making facilities accessible to qualified applicants and employees with disabilities as a reasonable accommodation, unless this would cause undue hardship. Accessibility must

be provided to enable a qualified applicant to participate in the application process, to enable a qualified individual to perform essential job functions and to enable an employee with a disability to enjoy benefits and privileges available to other employees. However, if your business is a place of public accommodation (such as a restaurant, retail store or bank) you have different obligations to provide accessibility to the general public, under Title III of the ADA. Title III also will require places of public accommodation and commercial facilities (such as office buildings, factories and warehouses) to provide accessibility in new construction or when making alterations to existing structures. Further information on these requirements may be obtained from the U.S. Department of Justice, which enforces Title III. (See page 22).

Q. Under the ADA, can an employer refuse to hire an individual or fire a current employee who uses drugs illegally?

A. Yes. Individuals who currently use drugs illegally are specifically excluded from the ADA's protections. However, the ADA does not exclude:

- persons who have successfully completed or are currently in a rehabilitation program and are no longer illegally using drugs, and
- persons erroneously regarded as engaging in the illegal use of drugs.

Q. Does the ADA cover people with AIDS?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q. Can I consider health and safety in deciding whether to hire an applicant or retain an employee with a disability?

A. The ADA permits an employer to require that an individual not pose a direct threat to the health and safety of the individual or others in the work-place. A direct threat means a significant risk of substantial harm. You cannot refuse to hire or fire an individual because of a slightly increased risk of harm to himself or others. Nor can you do so based on a speculative or remote risk. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions. If an applicant or employee with a disability poses a direct threat to the health or safety of himself or others, you must consider whether the risk can be eliminated or reduced

to an acceptable level with a reasonable accommodation.

Q. Am I required to provide additional insurance for employees with disabilities?

A. No. The ADA only requires that you provide an employee with a disability equal access to whatever health insurance coverage you provide to other employees. For example, if your health insurance coverage for certain treatments is limited to a specified number per year, and an employee, because of a disability, needs more than the specified number, the ADA does not require that you provide additional coverage to meet that employee's health insurance needs. The ADA also does not require changes in insurance plans that exclude or limit coverage for pre-existing conditions.

Q. Does the ADA require that I post a notice explaining its requirements?

A. The ADA requires that you post a notice in an accessible format to applicants, employees and members of labor organizations, describing the provisions of the Act. EEOC will provide employers with a poster summarizing these and other Federal legal requirements for nondiscrimination. EEOC will also provide guidance on making this information available in accessible formats for people with disabilities.

For more specific information about ADA requirements affecting ***employment*** contact:

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(202) 663-4900 (Voice), 800-800-3302 (TDD)
(202) 296-6312 (Voice - for 202 Area Code)
(202) 663-4494 (TDD - for 202 Area Code)

For more specific information about ADA requirements affecting ***public accommodations and State and local government services*** contact:

Department of Justice
Office on the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
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400 Seventh Street, SW
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(202) 755-7687 (TDD)

For more specific information about ADA requirements for *telecommunications* contact:

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554
(202) 634-1837
(202) 632-1836 (TDD)

For more specific information about federal disability-related *tax credits and deductions for business* contact:

Internal Revenue Service
Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20044
(202) 566-2000

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This booklet is available in Braille, large print, audiotape and electronic file on computer disk. To obtain accessible formats call the Office of Equal Employment Opportunity on (202) 663-4395 (voice) or (202) 663-4399 (TDD), or write to this office at 1801 L Street, N.W., Washington, D.C. 20507.

U.S. Equal Employment Opportunity Commission

The Americans With Disabilities Act

Your Employment Rights as an Individual With a Disability

EEOC-BK-18

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in State and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission and State and local civil rights enforcement agencies that work with the Commission.

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Job discrimination against people with disabilities is illegal if practiced by:

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- labor organizations,
- and labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

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- all employers, including State and local government employers, with 15 or more employees after July 26, 1994.

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Because the ADA establishes overlapping responsibilities in both EEOC and DOJ for employment by State and local governments, the Federal enforcement effort will be coordinated by EEOC and DOJ to avoid duplication in investigative and enforcement activities. In addition, since some private and governmental employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ, and the Department of Labor will similarly coordinate the enforcement effort under the ADA and the Rehabilitation Act.

Are You Protected by The ADA?

If you have a disability and are qualified to do a job, the ADA protects you from job discrimination on the basis of your disability. Under the ADA, you have a disability if you have a *physical or mental impairment* that *substantially limits a major life activity*. The ADA also protects you if you have a history of such a disability, or if an employer believes that you have such a disability, even if you don't.

To be protected under the ADA, you must have, have a record of, or be regarded as having a *substantial*, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a *major life activity* such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.

If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things. First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses. Second, you must be able to perform the *essential functions* of the job with or without *reasonable accommodation*. Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job.

What is Reasonable Accommodation?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- providing or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials, or policies,
- providing readers and interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

An employer is required to provide a reasonable accommodation to a qualified applicant or employee with a disability unless the employer can show that the accommodation would be an ***undue hardship*** -- that is, that it would require significant difficulty or expense.

What Employment Practices are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- hiring
- job assignments
- pay
- lay off
- firing
- training
- promotions
- benefits
- leave
- all other employment related activities.

It is also unlawful for an employer to retaliate against you for asserting your rights under the ADA. The Act also protects you if you are a victim of discrimination because of your family, business, social or other relationship or association with an individual with a disability.

Can an Employer Require Medical Examinations or Ask Questions About a Disability?

If you are applying for a job, an employer cannot ask you if you are disabled or ask about the nature or severity of your disability. An employer can ask if you can perform the duties of the job with or without reasonable accommodation. An employer can also ask you to describe or to demonstrate how, with or without reasonable accommodation, you will perform the duties of the job.

An employer cannot require you to take a medical examination before you are offered a job. Following a job offer, an employer can condition the offer on your passing a required medical examination, but only if all entering employees for that job category have to take the examination. However, an employer cannot reject you because of information about your disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of the employer's business. The employer cannot refuse to hire you because of your disability if you can perform the essential functions of the job with an accommodation.

Once you have been hired and started work, your employer cannot require that you take a medical examination or ask questions about your disability unless they are related to your job and necessary for the conduct of your employer's business. Your employer may conduct voluntary medical examinations that are

part of an employee health program, and may provide medical information required by State workers' compensation laws to the agencies that administer such laws.

The results of all medical examinations must be kept confidential, and maintained in separate medical files.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use.

What Do I Do If I Think That I'm Being Discriminated Against?

If you think you have been discriminated against in employment on the basis of disability after July 26, 1992, you should contact the U.S. Equal Employment Opportunity Commission. A charge of discrimination generally must be filed within 180 days of the alleged discrimination. You may have up to 300 days to file a charge if there is a State or local law that provides relief for discrimination on the basis of disability. However, to protect your rights, it is best to contact EEOC promptly if discrimination is suspected.

You may file a charge of discrimination on the basis of disability by contacting any EEOC field office, located in cities throughout the United States. If you have been discriminated against, you are entitled to a remedy that will place you in the position you would have been in if the discrimination had never occurred. You may be entitled to hiring, promotion, reinstatement, back pay, or reasonable accommodation, including reassignment. You may also be entitled to attorneys fees.

While the EEOC can only process ADA charges based on actions occurring on or after July 26, 1992, you may already be protected by State or local laws or by other current federal laws. EEOC field offices can refer you to the agencies that enforce those laws.

To contact the EEOC, look in your telephone directory under "U.S. Government." For information and instructions on reaching your local office, call:

202-663-4900 (voice)
1-800-800-3302 (TDD)
(In the Washington, D.C. 202 Area Code, call 202-663-4494 (TDD).)

Can I Get Additional ADA Information and Assistance?

The EEOC will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help people with disabilities understand their rights and to help employers understand their responsibilities under the law.

In January 1992, EEOC will publish a Technical Assistance Manual, providing practical application of legal requirements to specific employment activities, with a directory of resources to aid compliance. EEOC will publish other educational materials, provide training on the law for people with disabilities and for employers, and participate in meetings and training programs of other organizations. EEOC staff also will respond to individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts of employers and individuals with disabilities to settle such differences through alternative methods of dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

More Questions and Answers About the ADA

Q. Is an employer required to provide reasonable accommodation when I apply for a job?

A. Yes. Applicants, as well as employees, are entitled to reasonable accommodation. For example, an employer may be required to provide a sign language interpreter during a job interview for an applicant who is deaf or hearing impaired, unless to do so would impose an undue hardship.

Q. Should I tell my employer that I have a disability?

A. If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.

Q. Do I have to pay for a needed reasonable accommodation?

A. No. The ADA requires that the employer provide the accommodation unless to do so would impose an undue hardship on the operation of the employer's business. If the cost of providing the needed accommodation would be an undue hardship, the employee must be given the choice of providing the accommodation or paying for the portion of the accommodation that causes the undue hardship.

Q. Can an employer lower my salary or pay me less than other employees doing the same job because I need a reasonable accommodation?

A. No. An employer cannot make up the cost of providing a reasonable accommodation by lowering your salary or paying you less than other employees in similar positions.

Q. Does an employer have to make non-work areas used by employees, such as cafeterias, lounges, or employer-provided transportation accessible to people with disabilities?

A. Yes. The requirement to provide reasonable accommodation covers all services, programs, and non-work facilities

provided by the employer. If making an existing facility accessible would be an undue hardship, the employer must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless to do so would be an undue hardship.

Q. If an employer has several qualified applicants for a job, is the employer required to select a qualified applicant with a disability over other applicants without a disability?

A. No. The ADA does not require that an employer hire an applicant with a disability over other applicants because the person has a disability. The ADA only prohibits discrimination on the basis of disability. It makes it unlawful to refuse to hire a qualified applicant with a disability because he is disabled or because a reasonable accommodation is required to make it possible for this person to perform essential job functions.

Q. Can an employer refuse to hire me because he believes that it would be unsafe, because of my disability, for me to work with certain machinery required to perform the essential functions of the job?

A. The ADA permits an employer to refuse to hire an individual if she poses a direct threat to the health or safety of herself or others. A direct threat means a significant risk of substantial harm. The determination that there is a direct threat must be based on objective, factual evidence regarding an individual's present ability to perform essential functions of a job. An employer cannot refuse to hire you because of a slightly increased risk or because of fears that there might be a significant risk sometime in the future. The employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Q. Can an employer offer a health insurance policy that excludes coverage for pre-existing conditions?

A. Yes. The ADA does not affect pre-existing condition clauses contained in health insurance policies even though such clauses may adversely affect employees with disabilities more than other employees.

Q. If the health insurance offered by my employer does not cover all of the medical expenses related to my disability, does the company have to obtain additional coverage for me?

A. No. The ADA only requires that an employer provide employees with disabilities equal access to whatever health insurance coverage is offered to other employees.

Q. I think I was discriminated against because my wife is disabled. Can I file a charge with the EEOC?

A. Yes. The ADA makes it unlawful to discriminate against an individual, whether disabled or not, because of a relationship or association with an individual with a known disability.

Q. Are people with AIDS covered by the ADA?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

For more specific information about ADA requirements affecting *employment* contact:

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(202) 663-4900 (Voice), 800-800-3302 (TDD)
(202) 296-6312 (Voice - for 202 Area Code)
(202) 663-4494 (TDD - for 202 Area Code)

For more specific information about ADA requirements affecting *public accommodations and State and local government services* contact:

Department of Justice
Office on the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-0383 (TDD)

For more specific information about requirements for *accessible design in new construction and alterations* contact:

Architectural and Transportation Barriers Compliance Board
1111 18th Street, NW
Suite 501
Washington, DC 20036
800-USA-ABLE
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting *transportation* contact:

Department of Transportation
400 Seventh Street, SW
Washington, DC 20590
(202) 366-9305
(202) 755-7687 (TDD)

For more specific information about ADA requirements for *telecommunications* contact:

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554
(202) 634-1837
(202) 632-1836 (TDD)

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This booklet is available in Braille, large print, audiotape and electronic file on computer disk. To obtain accessible formats call EEOC's Office of Equal Employment Opportunity on (202) 663-4395 (voice), (202) 663-4399 (TDD), or write this office at 1801 L Street, N.W., Washington, D.C. 20507.

State and Local Government Services

Amie Amiot

Title II Highlights

I. Who is covered by title II of the ADA

II. Overview of Requirements

III. "Qualified Individual with a Disability"

IV. Program Access

V. Integrated Programs

VI. Communications

VII. New Construction and Alterations

VIII. Enforcement

IX. Complaints

X. Designated Agencies

XI. Technical Assistance

I. Who is Covered by Title II of the ADA

- The title II regulation covers "public entities."
- "Public entities" include any State or local government and any of its departments, agencies, or other instrumentalities.
- All activities, services, and programs of public entities are covered, including activities of State legislatures and courts, town meetings, police and fire departments, motor vehicle licensing, and employment.
    - Unlike section 504 of the Rehabilitation Act of 1973, which only covers programs receiving Federal financial assistance, title II extends to all the activities of State and local governments whether or not they receive Federal funds.
- Private entities that operate public accommodations, such as hotels, restaurants, theaters, retail stores, dry cleaners, doctors' offices, amusement parks, and bowling alleys, are not covered by title II but are covered by title III of the ADA and the Department's regulation implementing title III.
- Public transportation services operated by State and local governments are covered by regulations of the Department of Transportation.
    - DOT's regulations establish specific requirements for transportation vehicles and facilities, including a requirement that all new busses must be equipped to provide services to people who use wheelchairs.

II. Overview of Requirements

- State and local governments --
    - May not refuse to allow a person with a disability to participate in a service, program, or activity simply because the person has a disability.
        - For example, a city may not refuse to allow a person with epilepsy to use parks and recreational facilities.
    - Must provide programs and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity.
    - Must eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy their services, programs or activities unless "necessary" for the provisions of the service, program or activity.
        - Requirements that tend to screen out individuals with disabilities, such as requiring a driver's license as the only acceptable means of identification, are also prohibited.

- Safety requirements that are necessary for the safe operation of the program in question, such as requirements for eligibility for drivers' licenses, may be imposed if they are based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

- Are required to make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration in the program would result.

  - For example, a city office building would be required to make an exception to a rule prohibiting animals in public areas in order to admit guide dogs and other service animals assisting individuals with disabilities.

- Must furnish auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.

- May provide special benefits, beyond those required by the regulation, to individuals with disabilities.

- May not place special charges on individuals with disabilities to cover the costs of measures necessary to ensure nondiscriminatory treatment, such as making modifications required to provide program accessibility or providing qualified interpreters.

- Shall operate their programs so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities.

III. "Qualified Individuals with Disabilities"

➤ Title II of the Americans with Disabilities Act provides comprehensive civil rights protections for "qualified individuals with disabilities."

➤ An "individual with a disability" is a person who --

- Has a physical or mental impairment that substantially limits a "major life activity," or

- Has a record of such an impairment, or

- Is regarded as having such an impairment.

➤ Examples of physical or mental impairments include, but are not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. Homosexuality and bisexuality are not physical or mental impairments under the ADA.

- "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- Individuals who currently engage in the illegal use of drugs are not protected by the ADA when an action is taken on the basis of their current illegal use of drugs.
- "Qualified" individuals.
  - A "qualified" individual with a disability is one who meets the essential eligibility requirements for the program or activity offered by a public entity.
  - The "essential eligibility requirements" will depend on the type of service or activity involved.
    - For some activities, such as State licensing programs, the ability to meet specific skill and performance requirements may be "essential."
    - For other activities, such as where the public entity provides information to anyone who requests it, the "essential eligibility requirements" would be minimal.

IV. Program Access

- State and local governments--
  - Must ensure that individuals with disabilities are not excluded from services, programs, and activities because buildings are inaccessible.
  - Need not remove physical barriers, such as stairs, in all existing buildings, as long as they make their programs accessible to individuals who are unable to use an inaccessible existing facility.
  - Can provide the services, programs, and activities offered in the facility to individuals with disabilities through alternative methods, if physical barriers are not removed, such as --
    - Relocating a service to an accessible facility, e.g., moving a public information office from the third floor to the first floor of a building.
    - Providing an aide or personal assistant to enable an individual with a disability to obtain the service.
    - Providing benefits or services at an individual's home, or at an alternative accessible site.
  - May not carry an individual with a disability as a method of providing program access, except in "manifestly exceptional" circumstances.

- Are not required to take any action that would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens. However, public entities must take any other action, if available, that would not result in a fundamental alteration or undue burdens but would ensure that individuals with disabilities receive the benefits or services.

V. Integrated Programs

➤ Integration of individuals with disabilities into the mainstream of society is fundamental to the purposes of the Americans with Disabilities Act.

➤ Public entities may not provide services or benefits to individuals with disabilities through programs that are separate or different, unless the separate programs are necessary to ensure that the benefits and services are equally effective.

➤ Even when separate programs are permitted, an individual with a disability still has the right to choose to participate in the regular program.

- For example, it would not be a violation for a city to offer recreational programs specially designed for children with mobility impairments, but it would be a violation if the city refused to allow children with disabilities to participate in its other recreational programs.

➤ State and local governments may not require an individual with a disability to accept a special accommodation or benefit if the individual chooses not to accept it.

VI. Communications

➤ State and local governments must ensure effective communication with individuals with disabilities.

➤ Where necessary to ensure that communications with individuals with hearing, vision, or speech impairments are as effective as communications with others, the public entity must provide appropriate auxiliary aids.

- "Auxiliary aids" include such services or devices as qualified interpreters, assistive listening headsets, television captioning and decoders, telecommunications devices for deaf persons (TDD's), videotext displays, readers, taped texts, Brailled materials, and large print materials.

- A public entity may not charge an individual with a disability for the use of an auxiliary aid.

➤ Telephone emergency services, including 911 services, must provide direct access to individuals with speech or hearing impairments.

- Public entities are not required to provide auxiliary aids that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. However, public entities must still furnish another auxiliary aid, if available, that does not result in a fundamental alteration or undue burdens.

VII. New Construction and Alterations

- Public entities must ensure that newly constructed buildings and facilities are free of architectural and communication barriers that restrict access or use by individuals with disabilities.

- When a public entity undertakes alterations to an existing building, it must also ensure that the altered portions are accessible.

- The ADA does not require retrofitting of existing buildings to eliminate barriers, but does establish a high standard of accessibility for new buildings.

  - Public entities may choose between two technical standards for accessible design: The Uniform Federal Accessibility Standard (UFAS), established under the Architectural Barriers Act, or the Americans with Disability Act Accessibility Guidelines, adopted by the Department of Justice for places of public accommodation and commercial facilities covered by title III of the ADA.

  - The elevator exemption for small buildings under ADA Accessibility Guidelines would not apply to public entities covered by title II.

VIII. Enforcement

- Private parties may bring lawsuits to enforce their rights under title II of the ADA. The remedies available are the same as those provided under section 504 of the Rehabilitation Act of 1973. A reasonable attorney's fee may be awarded to the prevailing party.

- Individuals may also file complaints with appropriate administrative agencies.

  - The regulation designates eight Federal agencies to handle complaints filed under title II.

  - Complaints may also be filed with any Federal agency that provides financial assistance to the program in question, or with the Department of Justice, which will refer the complaint to the appropriate agency.

IX. Complaints

- Any individual who believes that he or she is a victim of discrimination prohibited by the regulation may file a complaint. Complaints on behalf of classes of individuals are also permitted.

- Complaints should be in writing, signed by the complainant or an authorized representative, and should contain the complainant's name and address and describe the public entity's alleged discriminatory action.

- Complaints may be sent to --

  Coordination and Review Section
  Civil Rights Division
  U.S. Department of Justice
  P.O. Box 66118
  Washington, D.C. 20035-6118.

- Complaints may also be sent to agencies designated to process complaints under the regulation, or to agencies that provide Federal financial assistance to the program in question.

X. Designated Agencies

The following agencies are designated for enforcement of title II for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas --

(1) Department of Agriculture: Farming and the raising of livestock, including extension services.
(2) Department of Education: Education systems and institutions (other than health-related schools), and libraries.
(3) Department of Health and Human Services: Schools of medicine, dentistry, nursing, and other health-related schools; health care and social service providers and institutions, including "grass-roots" and community services organizations and programs; and preschool and daycare programs.
(4) Department of Housing and Urban Development: State and local public housing, and housing assistance and referral.
(5) Department of Interior: Lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.
(6) Department of Justice: Public safety, law enforcement, and the administration of justice, including courts and correctional institutions; commerce and industry, including banking and finance, consumer protection, and insurance; planning, development, and regulation (unless otherwise assigned); State and local government support services; and all other government functions not assigned to other designated agencies.
(7) Department of Labor: Labor and the work force.
(8) Department of Transportation: Transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

XI. Technical Assistance

- The ADA requires that the Federal agencies responsible for issuing ADA regulations provide "technical assistance."

- Technical assistance is the dissemination of information (either directly by the Department or through grants and contracts) to assist the public, including individuals protected by the ADA and entities covered by the ADA, in understanding the new law.

- Methods of providing information include, for example, audio-visual materials, pamphlets, manuals, electronic bulletin boards, checklists, and training.

- The Department issued for public comment on December 5, 1990, a government-wide plan for the provision of technical assistance.

  The Department's efforts focus on raising public awareness of the ADA by providing--

  - Fact sheets and pamphlets in accessible formats,
  - Speakers for workshops, seminars, classes, and conferences,
  - An ADA telephone information line, and
  - Access to ADA documents through an electronic bulletin board for users of personal computers.

- The Department has established a comprehensive program of technical assistance relating to public accommodations and State and local governments.

  - Grants will be awarded for projects to inform individuals with disabilities and covered entities about their rights and responsibilities under the ADA and to facilitate voluntary compliance.
  - The Department will issue a technical assistance manual by January 26, 1992, for individuals or entities with rights or duties under the ADA.

For additional information, contact:

Office on the Americans with Disabilities Act
Civil Rights Division
U.S. Department of Justice
P.O. Box 66118
Washington, D.C 20035-6118
(202) 514-0301 (Voice)
(202) 514-0383 (TDD)
(202) 514-6193 (Electronic Bulletin Board).

U. S. Department of Justice
Civil Rights Division
Office on the Americans with Disabilities Act

THE AMERICANS WITH DISABILITIES ACT

TITLE II TECHNICAL ASSISTANCE MANUAL

January 24, 1992

Foreword

The Americans with Disabilities Act has set our sights on removing the barriers that deny individuals with disabilities an equal opportunity to share in and contribute to the vitality of American life. The ADA means access to jobs, public accommodations, government services, public transportation, and telecommunications — in other words, full participation in, and access to, all aspects of society.

Through the provision of technical assistance, such as this manual, we hope to achieve our goal of making the ADA's promise of equal opportunity for individuals with disabilities a reality while holding costly litigation to a minimum. We anticipate that many of the barriers facing individuals with disabilities will disappear through the sincere, informed efforts of Americans to voluntarily comply with the ADA.

We in the Civil Rights Division wholeheartedly share the goals of the ADA and have committed ourselves to implementing and enforcing this landmark civil rights legislation in the fairest, most effective manner possible.

John R. Dunne
Assistant Attorney General
Civil Rights Division

Public Accommodations

Amie Amiot

Title III Highlights

U. S. Department of Justice
Civil Rights Division
Office on the Americans with Disabilities Act

THE AMERICANS WITH DISABILITIES ACT

TITLE III TECHNICAL ASSISTANCE MANUAL

January 24, 1992

Telecommunications

FCC Representative

POSTAL SERVICE

39 CFR Part 111

Nonmailability of Deceptive Solicitations

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service is amending its regulations on solicitations deceptively implying Federal connection, approval, or endorsement. The purpose of the amendment is merely to reflect that, as provided by recent legislation, the mailing of any solicitation not satisfying the regulations' requirements constitutes *prima facie* evidence that the anti-false-representations provisions of 39 U.S.C. 3005 have been violated.

EFFECTIVE DATE: August 1, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. John F. Ventresco, (202) 268–3085.

SUPPLEMENTARY INFORMATION: On May 8, 1991, the Postal Service adopted regulations (56 FR 21304, as corrected at 56 FR 23730) implementing the Deceptive Mailings Prevention Act of 1990 (Public Law No. 101–524, November 6, 1990). The Act added new subsections to section 3001 of title 39, United States Code. These subsections deal with any solicitation by a nongovernmental entity containing terms or symbols that reasonably could be interpreted or construed as implying a Federal Government connection, approval, or endorsement.

If the soliciting entity does not have such connection, approval, or endorsement, the solicitation is nonmailable unless it: (1) Is contained in a publication the addressee has ordered, and is not on behalf of the publisher; or (2) displays prescribed disclaimers, both on its envelope or outside cover or wrapper, and on the face of the solicitation itself. Further legislation (Public Law No. 102–71, July 10, 1991) has made the mailing of any such nonmailable solicitation actionable as a false-representation scheme, and *prima facie* evidence to support the Postal Service's issuing the remedial orders authorized by section 3005(a) of title 39, United States Code. Section 123.421 of the implementing regulations is being amended to reflect this legislation.

Accordingly, the Postal Service adopts the following amendment to part 123 of the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for part 111 continues to read as follows:

Authority: 5 U.S.C. 552 (a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

PART 123—NONMAILABLE MATTER—WRITTEN, PRINTED, AND GRAPHIC

2. In § 123.421, insert the following sentence after the first sentence: A nonconforming solicitation constitutes *prima facie* evidence of violation of 39 U.S.C. 3005.

A transmittal letter making this change in the Domestic Mail Manual will be published and transmitted automatically to subscribers. Notice of issuance of the transmittal letter will be published in the Federal Register as provided by 39 CFR 111.3.

Stanley F. Mires,

Assistant General Counsel, Legislative Division.

[FR Doc. 91–18150 Filed 7–31–91; 8:45 am]

BILLING CODE 7710–12–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 64

[CC Docket No. 90–571; FCC 91–213]

Telecommunications Services for Hearing and Speech Disabled

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Part 0 of the rules of the Federal Communications Commission (Commission) governing "Commission Organization", 47 CFR part 0, and subpart F of part 64 titled "Furnishing of Customer Premises Equipment and Related Services Needed by Persons with Impaired Hearing, Speech, Vision or Mobility", 47 CFR 64, are amended as set forth in this Report and Order (R&O). The purpose of the R&O is to implement title IV of the Americans with Disabilities Act of 1990 (ADA) which amends title II of the Communications Act of 1934, as amended, by adding new section 225, amending existing section 711, and conforming sections 2(b) and 221(b). See Public Law 101–336, 104 Stat. 327, 366–69 (July 26, 1990). Title IV mandates that the Commission prescribe regulations to implement section 225 not later than one year after the ADA's enactment date of July 26, 1990, and requires each common carrier providing telephone voice transmission services to provide, throughout the area in which it offers service, telecommunications relay services (TRS) for individuals with hearing or speech disabilities, not later than three years after the ADA's enactment date.

EFFECTIVE DATE: September 30, 1991.

FOR FURTHER INFORMATION CONTACT: Linda B. Dubroof, (202) 634–1808 (Voice) and (202) 634–1855 (TT).

SUPPLEMENTARY INFORMATION: This summarizes the Commission's R&O in the matter of Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990 (CC Docket 90–571, FCC 91–213 adopted July 11, 1991 and released July 26, 1991. The R&O and supporting file may be examined in the Commission's Public Reference Room, room 239, 1919 M Street, NW., Washington, DC, during business hours or purchased from the duplicating contractor, Downtown Copy Center, 1114 21st, NW., Washington, DC 20036, (202) 452–1422. The R&O also will be published in the FCC Record.

This proceeding was initiated by the Commission's Notice of Proposed Rulemaking (NPRM) in CC Docket 90–571, FCC 90–376, 5 FCC Rcd 7187 (1990), [55 FR 50037, December 4, 1990], which proposed amendments to parts 0 and 64 of its rules to implement title IV of the ADA. The ADA provides a clear national mandate for the elimination of discrimination against individuals with disabilities and ensures that the Commission play an active role in enforcing the standards established in title IV. The primary purpose of title IV is to further the Communications Act's goal of universal telecommunications services by ensuring that interstate and intrastate TRS are available nationwide, to the extent possible and in the most efficient manner, to individuals in the United States with hearing or speech disabilities.

In its NPRM, the Commission proposed minimum standards designed to implement the provisions of title IV. Interested parties were invited to offer alternative language, additional provisions, or any other suggestions that might foster the intent of Congress to bring functionally equivalent telecommunications services to individuals with hearing or speech disabilities. After reviewing the sixty-one comments and/or reply comments submitted by interested parties, the Commission has modified some of the proposed rules and fashioned a comprehensive set of rules which (a) set forth terminology and definitions; (b) prescribe operational, technical, and functional minimum standards required

of all TRS providers; and (c) delineate the state certification process. The rules are made a part of this publication.

Request for Comments on Funding Mechanisms

The ADA mandates that the Commission prescribe regulations governing the jurisdictional separation of costs, and that costs caused by interstate TRS be recovered from all subscribers for every interstate service and costs caused by intrastate TRS be recovered from the intrastate jurisdiction. The majority of commenters concur that existing accounting and separations rules are adequate to deal with interstate relay services. In order to achieve the goals of the ADA without unnecessarily disrupting TRS as currently provided, the Commission finds that current separations rules are adequate. However, the record is not adequate to determine a specific cost recovery mechanism. Therefore, the Commission seeks specific proposals from interested parties on cost recovery to be submitted to the Common Carrier Bureau no later than 60 days from the release date of this R&O. Responses to these proposals shall be filed not later than 30 days thereafter. All proposals and other comments must reference CC Docket No. 90-571. In particular, parties should address various proposed funding mechanisms and both the advantages and disadvantages of each proposal, including relative administrative costs of various mechanisms, the likely relative costs that would be borne by various interstate carriers under each proposal, and the impact on quality, if any, of the proposals. The Commission notes that in this proceeding some commenters have argued that the costs associated with interstate relay services should be shared. These commenters must make a well reasoned showing that self-funding would be inappropriate. The Commission is also especially interested in learning about different possible funding mechanisms from the experiences of the states.

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. section 601, *et seq.*, the Commission's final analysis in this Report and Order is as follows:

I. Need and Purpose of This Action

This Report and Order amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, *inter alia*, adds section 225 to the communications Act of 1934, as amended, 47 U.S.C. 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to persons in the United States with speech and/or hearing disabilities.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered

The notice of proposed rulemaking in this proceeding (55 FR 50037, December 4, 1990) offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its Report and Order to be the most reasonable course of action under the mandate of section 225 of the Communications Act.

Paperwork Reduction Act Statement

Average reporting burdens for the collections of information are estimated as follows:

State certification: Respondent burden for complying with the certification requirement is 160 hours per submission. Certification remains in effect for five years; one year prior to expiration of certification, a state may apply for renewal as prescribed in the Commission's rules.

Complaints: Five burden hours to file a complaint.

The foregoing estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding burden estimates or any other aspect of the collections of information, including suggestions for reducing the burdens, to the Federal Communications Commission, Office of Managing Director, Paperwork Reduction Project (3060-0463), Washington, DC 20554, and also to the Office of Management and Budget, Paperwork Reduction Project (3060-0463), Washington, DC 20503.

Ordering Clauses

Accordingly, It is Ordered, That, pursuant to sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, parts 0 and 64 of the Commission's Rules and Regulations *are amended* as set forth below, effective 60 days after publication in the Federal Register.

It is Further Ordered, That specific proposals from interested parties on cost recovery shall be submitted to the Common Carrier Bureau, referencing CC Docket No. 90-571, no later than 60 days from the release date of this Report and Order, and responses to these proposals shall be filed not later than 30 days thereafter.

It is Further Ordered, That authority is delegated to the Chief, Common Carrier Bureau to implement the state certification and complaint process provided in the rules adopted herein, and to review specific proposals on cost recovery mechanisms submitted by interested parties.

It is Further Ordered, That, pursuant to the requirements of section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall: (a) Make copies of this Report and Order available to members of the public and (b) shall cause a summary of this Report and Order to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this Report and Order to each state utility commission.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 64

Communications common carriers. Individuals with hearing and speech disabilities, Telecommunications relay services.

Amended Rules

Parts 0 and 64 of the Commission's Rules and Regulations (chapter I of title 47 of the Code of Federal Regulations, parts 0 and 64) are amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 is revised to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.91 is amended by adding new paragraph (m) to read as follows:

§ 0.91 Functions of the Bureau.

* * * * *

(m) Acts upon matters involving telecommunications relay services complaints and certification.

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Subpart F of part 64 (consisting of §§ 64.601–64.608) is revised in its entirety to read as follows:

Subpart F—Telecommunications Relay Services and Related Customer Premises Equipment for Persons With Disabilities

Sec.

Subpart F—Telecommunications Relay Services and Related Customer Premises Equipment for Persons With Disabilities

§ 64.601 Definitions.

As used in this subpart, the following definitions apply:

(1) American Sign Language (ASL): A visual language based on hand shape, position, movement, and orientation of the hands in relation to each other and the body.

(2) ASCII: An acronym for American Standard Code for Information Interexchange which employs an eight bit code and can operate at any standard transmission baud rate including 300, 1200, 2400, and higher.

(3) Baudot: A seven bit code, only five of which are information bits. Baudot is used by some text telephones to communicate with each other at a 45.5 baud rate.

(4) Common carrier or carrier: Any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) of the Communications Act of 1934, as amended (the Act), and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b) of the Act.

(5) Communications assistant (CA): A person who transliterates conversation from text to voice and from voice to text between two end users of TRS. CA supersedes the term "TDD operator."

(6) Hearing carry over (HCO): A reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation.

(7) Telecommunications relay services (TRS): Telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a text telephone or other nonvoice terminal device and an individual who does not use such a device. TRS supersedes the terms "dual party relay system," "message relay services," and "TDD Relay."

(8) Text telephone (TT): A machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system. TT supersedes the term "TDD" or "telecommunications device for the deaf."

(9) Voice carry over (VCO): A reduced form of TRS where the person with the hearing disability is able to speak directly to the other end user. The CA types the response back to the person with the hearing disability. The CA does not voice the conversation.

§ 64.602 Jurisdiction.

Any violation of this subpart by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of the Act by a common carrier engaged in interstate communication.

§ 64.603 Provision of services.

Each common carrier providing telephone voice transmission services shall provide, not later than July 26, 1993, in compliance with the regulations prescribed herein, throughout the area in which it offers services, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with these regulations:

(a) With respect to intrastate telecommunications relay services in any state that does not have a certified program under § 64.605 and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with § 64.604; or

(b) With respect to intrastate telecommunications relay services in any state that has a certified program under § 64.605 for such state, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under § 64.605 for such state.

§ 64.604 Mandatory minimum standards.

(a) Operational standards.

(1) Communications assistant (CA). TRS providers are responsible for requiring that CAs be sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities; and that CAs have competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette.

(2) Confidentiality and conversation content. Consistent with the obligations of common carrier operators, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call. CAs are prohibited from intentionally altering a relayed conversation and must relay all conversation verbatim unless the relay user specifically requests summarization.

(3) Types of calls. Consistent with the obligations of common carrier operators, CAs are prohibited from refusing single or sequential calls or limiting the length of calls utilizing relay services. TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call will be placed on the carriers. Providers of TRS are permitted to decline to complete a call because credit authorization is denied. CAs shall handle emergency calls in the same manner as they handle any other TRS calls.

(b) Technical standards.

(1) ASCII and Baudot. TRS shall be capable of communicating with ASCII and Baudot format, at any speed generally in use.

(2) Speed of answer. TRS shall include adequate staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network. TRS shall, except during network failure, answer 85% of all calls within 10 seconds and no more than 30 seconds shall elapse between receipt of dialing information and the dialing of the requested number.

(3) Equal access to interexchange carriers. TRS users shall have access to their chosen interexchange carrier through the TRS, and to all other operator services, to the same extent that such access is provided to voice users.

(4) TRS facilities. TRS shall operate every day, 24 hours a day. TRS shall have redundancy features functionally equivalent to the equipment in normal central offices, including uninterruptible power for emergency use. TRS shall transmit conversations between TT and voice callers in real time. Adequate network facilities shall be used in conjunction with TRS so that under projected calling volume the probability of a busy response due to loop trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(5) Technology. No regulation set forth in this subpart is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to person with disabilities. VCO and HCO technology are required to be standard features of TRS.

(c) Functional standards.

(1) Enforcement. Subject to § 64.603, the Commission shall resolve any complaint alleging a violation of this section within 180 days after the complaint is filed.

(2) Public access to information. Carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TT numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of TRS.

(3) Rates. TRS users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

(4) Jurisdictional separation of costs.

(i) General. Where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service. Costs caused by intrastate TRS providers shall be recovered from the intrastate jurisdiction. In a state that has a certified program under § 64.605, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section.

(5) Complaints.

(i) Referral of complaint. If a complaint to the Commission alleges a violation of this subpart with respect to intrastate TRS within a state and certification of the program of such state under § 64.605 is in effect, the Commission shall refer such complaint to such state expeditiously.

(ii) Jurisdiction of Commission. After referring a complaint to a state under paragraph (c)(5)(i) of this section, or if a complaint is filed directly with a state, the Commission shall exercise jurisdiction over such complaint only if:

(A) final action under such state program has not been taken within:

(*1*) 180 days after the complaint is filed with such state; or

(*2*) a shorter period as prescribed by the regulations of such state; or

(B) the Commission determines that such state program is no longer qualified for certification under § 64.605.

(iii) Complaint procedures.

(A) Content. A complaint shall be in writing, addressed to the Federal Communications Commission, Common Carrier Bureau, TRS Complaints, Washington, DC 20554, or addressed to the appropriate state office, and shall contain:

(*1*) the name and address of the complainant,

(*2*) the name and address of the defendant against whom the complaint is made,

(*3*) a complete statement of the facts, including supporting data, where available, showing that such defendant did or omitted to do anything in contravention of this subpart, and

(*4*) the relief sought.

(B) Amended complaints. An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

(C) Number of copies. An original and two copies of all pleadings shall be filed.

(D) Service.

(*1*) Except where a complaint is referred to a state pursuant to § 64.604(c)(5)(i), or where a complaint is filed directly with a state, the Commission will serve on the named party a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.

(*2*) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of § 1.47 of this chapter. Proof of such service shall also be made in accordance with the requirements of said section.

(E) Answers to complaints and amended complaints. Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the defense and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an answer within the time and in the manner prescribed may be deemed in default.

(F) Replies to answers or amended answers. Within 10 days after service of an answer or an amended answer, a complainant may file and serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matter. Failure to reply will not be deemed an admission of any allegation.

contained in such answer or amended answer.

(G) Defective pleadings. Any pleading filed in a complaint proceeding that is not in substantial conformity with the requirements of the applicable rules in this subpart may be dismissed.

§ 64.605 State certification.

(a) State documentation. Any state, through its office of the governor or other delegated executive office empowered to provide TRS, desiring to establish a state program under this section shall submit, not later than October 1, 1992, documentation to the Commission addressed to the Federal Communications Commission, Chief, Common Carrier Bureau, TRS Certification Program, Washington, DC 20554, and captioned "TRS State Certification Application." All documentation shall be submitted in narrative form, shall clearly describe the state program for implementing intrastate TRS, and the procedures and remedies for enforcing any requirements imposed by the state program. The Commission shall give public notice of states filing for certification including notification in the Federal Register.

(b) Requirements for certification. After review of state documentation, the Commission shall certify, by letter, or order, the state program if the Commission determines that the state certification documentation:

(1) Establishes that the state program meets or exceeds all operational, technical, and functional minimum standards contained in § 64.604;

(2) Establishes that the state program makes available adequate procedures and remedies for enforcing the requirements of the state program; and

(3) Where a state program exceeds the mandatory minimum standards contained in § 64.604, the state establishes that its program in no way conflicts with federal law.

(c) Certification period. State certification shall remain in effect for five years. One year prior to expiration of certification, a state may apply for renewal of its certification by filing documentation as prescribed by paragraphs (a) and (b) of this section.

(d) Method of funding. Except as provided in § 64.604, the Commission shall not refuse to certify a state program based solely on the method such state will implement for funding intrastate TRS, but funding mechanisms, if labeled, shall be labeled in a manner that promote national understanding of TRS and do not offend the public.

(e) Suspension or revocation of certification. The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a state whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this subpart, to ensure continuity of TRS.

§ 64.606 Furnishing related customer premises equipment.

(a) Any communications common carrier may provide, under tariff, customer premises equipment (other than hearing aid compatible telephones as defined in part 68 of this chapter, needed by persons with hearing, speech, vision or mobility disabilities. Such equipment may be provided to persons with those disabilities or to associations or institutions who require such equipment regularly to communicate with persons with disabilities. Examples of such equipment include, but are not limited to, artificial larynxes, bone conductor receivers and TTs.

(b) Any carrier which provides telecommunications devices for persons with hearing and/or speech disabilities, whether or not pursuant to tariff, shall respond to any inquiry concerning:

(1) The availability (including general price levels) of TTs using ASCII, Baudot, or both formats; and

(2) The compatibility of any TT with other such devices and computers.

§ 64.607 Provision of hearing aid compatible telephones by exchange carriers.

In the absence of alternative suppliers in an exchange area, an exchange carrier must provide a hearing aid compatible telephone, as defined in part 68 of this chapter, and provide related installation and maintenance services for such telephones on a detariffed basis to any customer with a hearing disability who requests such equipment or services.

§ 64.608 Enforcement of related customer premises equipment rules.

Enforcement of §§ 64.606 and 64.607 is delegated to those state public utility or public service commissions which adopt those sections and provide for their enforcement.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 91-18153 Filed 7-31-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 91-117; RM-7670]

Radio Broadcasting Services; Edgewater, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 226C3 for Channel 226A at Edgewater, Florida, and modifies the construction permit (BPH-880406MI) to specify operation on the higher class channel, at the request of deHaro Radio, Ltd. See 56 FR 19827, April 30, 1991. Channel 226C3 can be allotted to Edgewater in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, with a site restriction of 8.4 kilometers (5.2 miles) south of the community. The coordinates are North Latitude 28-54-52 and West Longitude 80-53-48. With this action, this proceeding is terminated.

EFFECTIVE DATE: September 9, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 91-117, adopted July 17, 1991, and released July 26, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel 226A and adding Channel 226C3 at Edgewater.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-18150 Filed 7-31-91; 8:45 am]

BILLING CODE 6712-01-M

TELECOMMUNICATIONS RELAY SERVICES

Title IV of the ADA requires common carriers that provide telephone voice transmission services to provide telecommunications relay services. Relay services make telephone communication possible between people who do not have TDD's and people who use TDD's. A TDD is a text telephone that makes telephone communication accessible to people who are speech and/or hearing impaired. Telephone conversation is transmitted in a visible, printed format. When using a telecommunications relay service, a trained relay operator, or communications assistant, transmits conversation between a person using a TDD and a person using a voice telephone.

For example: If an employer wished to call a person who is deaf to set up a job interview, s/he can call the relay service by voice and give the operator the applicant's telephone number. The operator will then call the applicant by TDD. When the applicant answers the telephone using a TDD, the operator will voice the applicant's message to the employer. The employer can speak directly to the applicant, with the relay operator transmitting the employer's voiced words by TDD.

Listed below are telephone numbers for state relay services.* Because the availability of telecommunications relay services is rapidly growing and changing, some of the following telephone numbers may change and new numbers may be added for states currently without relay services that are not included in this list.

Alabama

(800) 548-2546 (TDD)
(800) 548-2547 (Voice)

Arkansas

(501) 661-2736 (TDD)
(501) 661-2821

Arizona

(800) 367-8939 (TDD)
(800) 842-4681 (Voice)

Phoenix

(602) 231-0961 (TDD)
(602) 275-5779 (Voice)

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* Numbers provided by the Federal Communications Commission as of January 1992.

California

Until March 10,1992

(800) 342-5966 (TDD)
(800) 342-5833 (Voice)

After March 10, 1992

(800) 735-2929 (TDD)
(800) 735-2922 (Voice)

Colorado

(800) 659-2656 (TDD)
(800) 659-3656 (Voice)

Connecticut

(203) 242-1011 (TDD)
(203) 243-8724 (Voice)

203 Area

(800) 842-9710 (TDD)
(800) 833-8134 (Voice)

Delaware

(800) 232-5460 (TDD)
(800) 232-5470 (Voice)

Georgia

(800) 255-0056 (TDD)
(800) 255-0135 (Voice)

Hawaii

(808) 643-8833 (TDD)
(808) 643-8255

Illinois

(800) 526-0844 (TDD)
(800) 526-0857 (Voice)

Kansas

(800) 766-3777 (TDD/Voice)

Kentucky

(800) 648-6056 (TDD)
(800) 648-6057 (Voice)

Louisiana

(800) 256-6004 (TDD/Voice)

Baton Rouge

(318) 262-5377 (TDD/Voice)

Maine

(800) 437-1220 (TDD)
(800) 457-1220 (Voice)

207 Area

(207) 955-3313 (TDD)
(207) 955-3777 (Voice)

Maryland

(800) 735-2258 (TDD/Voice)

Massachusetts

(800) 439-2370 (TDD/Voice)

Michigan

(800) 649-3777 (TDD/Voice)

Minnesota

(800) 657-3529 (TDD/Voice)

612 Area

(612) 297-5353 (TDD/Voice)

Mississippi

(800) 251-5325 (TDD)
(800) 544-5000 (Voice)

Missouri

(800) 735-2966 (TDD)
(800) 735-2466 (Voice)

Montana

(800) 253-4091 (TDD)
(800) 253-4093 (Voice)

Nebraska

(800) 833-7352 (TDD)
(800) 833-0920 (Voice)

Nevada

(800) 326-4868 (TDD)
(800) 326-6888 (Voice)

New Hampshire

(800) 735-2964 (TDD/Voice)

New Jersey

(800) 852-7899 (TDD)
(800) 852-7897 (Voice)

New Mexico

(800) 659-8331 (TDD)
(800) 659-1779 (Voice)

New York

(800) 662-1220 (TDD)
(800) 421-1220 (Voice)

North Carolina

(800) 735-2962 (TDD)
(800) 735-8262 (Voice)

Oklahoma

918 Area

(800) 722-0353 (TDD)
(918) 663-4071 (Voice

405 Area

(800) 522-8506 (TDD)
(405) 942-8188 (Voice)

Oregon

Salem

(503) 223-1353 (TDD/Voice)

Until March 31, 1992

(800) 526-0661 (TDD/Voice)

Pennsylvania

(800) 654-5984 (TDD)
(800) 654-5988 (Voice)

South Dakota

(800) 622-1770 (TDD/Voice)

Sioux Falls

(605) 339-6464 (TDD/Voice)

Tennessee

(800) 848-0298 (TDD)
(800) 848-0299 (Voice)

Texas

(800) 735-2989 (TDD)
(800) 735-2988 (Voice)

Utah

(801) 298-8245 (TDD)
(801) 298-9484 (Voice)

Vermont

(800) 253-0191 (TDD)
(800) 253-0195 (Voice)

Virginia

(800) 828-1120 (TDD)
(800) 828-1140 (Voice)

Washington

(800) 833-6388 (TDD/Voice)

Seattle

(206) 587-5500 (TDD/Voice)

EMPLOYMENT ISSUES AND PROFESSIONALS' ROLES

Sy Dubow
Roy Rowland

Employment Issues and Professionals' Roles

Sy Dubow

Employment Issues and Professionals' Roles

Roy Rowland

TITLE I

EQUAL EMPLOYMENT OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

1. Background

The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.

However, while the Civil Rights Act of 1964 prohibits any consideration of personal characteristics such as race or national origin, the ADA necessarily takes a different approach. When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.

The ADA thus establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired. While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.

However, where that individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose an undue hardship. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself.

This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability. Of course, the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions.

This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs. For this reason, neither the ADA nor this regulation can supply the "correct" answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and take into account, the disabling condition involved.

2. Introduction

The Equal Employment Opportunity Commission (the Commission or EEOC) is responsible for enforcement of title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. (1990), which prohibits employment discrimination on the basis of disability. The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. This Appendix represents the

Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The Appendix addresses the major provisions of this part and explains the major concepts of disability rights.

The terms "employer" or "employer or other covered entity" are used interchangeably throughout the Appendix to refer to all covered entities subject to the employment provisions of the ADA.

3. Summary

On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. Section 106 of the ADA requires that the Equal Employment Opportunity Commission (EEOC) issue substantive regulations implementing title I (Employment) within one year of the date of enactment of the Act. Pursuant to this mandate, the Commission is publishing a new part 1630 to its regulations to implement title I and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to employment. New part 1630 prohibits discrimination against qualified individuals with disabilities in all aspects of employment.

EFFECTIVE DATE: July 26, 1992.

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy Legal Counsel, (202) 663-4638 (voice), (202) 663-7026 (TDD) or Christopher G. Bell, Acting Associate Legal Counsel for Americans with Disabilities Act Services, (202) 663-4679 (voice), (202) 663-7026.

Copies of this final rule and interpretive appendix may be obtained by calling the Office of Communications and Legislative Affairs at (202) 663-4900. Copies in alternate formats may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4398 or (202) 663-4395 (voice) or (202) 663-4399 (TDD). The alternate formats available are: large print, braille, electronic file on computer disk, and audio-tape.

SUPPLEMENTARY INFORMATION:

4. Rulemaking History

The Commission actively solicited and considered public comment in the development of part 1630. On August 1, 1990, the Commission published an advance notice of proposed rulemaking (ANPRM), 55 FR 31192, informing the public that the Commission had begun the process of developing substantive regulations pursuant to title I of the ADA and inviting comment from interested groups and individuals. The comment period ended on August 31, 1990. In response to the ANPRM, the Commission received 138 comments from various disability rights organizations, employer groups, and individuals. Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2400 representatives from disability rights organizations and employer groups participated in these meetings.

On February 28, 1991, the Commission published a notice of proposed rulemaking (NPRM), 56 FR 8578, setting forth proposed part 1630 for public comment. The comment period ended April 29, 1991. In response to the NPRM, the Commission received 697 timely comments from interested groups and individuals. In many instances, a comment was submitted on behalf of several parties and represented the views of numerous groups, employers, or individuals with disabilities. The comments have been analyzed and considered in the development of this final rule.

5. Overview of Regulations

The format of part 1630 reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR part 104. Accordingly, in developing part 1630, the Commission has been guided by the Section 504 regulations and the case law interpreting those regulations.

It is the intent of Congress that the regulations implementing the ADA be comprehensive and easily understood. Part 1630, therefore, defines terms not previously defined in the regulations implementing Section 504 of the Rehabilitation Act, such as "substantially limits," "essential functions," and "reasonable accommodation." Of necessity, many of the determinations that may be required by this part must be made on a case-by-case basis. Where possible, part 1630 establishes parameters to serve as guidelines in such inquiries.

The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. Therefore, part 1630 is accompanied by an Appendix. This Appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The Appendix addresses the major provisions of part 1630 and explains the major concepts of disability rights. Further, the Appendix cites to the authority, such as the legislative history of the ADA and case law interpreting Section 504 of the Rehabilitation Act, that provides the basis and purpose of the rule and interpretative guidance.

More detailed guidance on specific issues will be forthcoming in the Commission's Compliance Manual. Several Compliance Manual sections and policy guidances on ADA issues are currently under development and are expected to be issued prior to the effective date of the Act. Among the issues to be addressed in depth are the theories of discrimination; definitions of disability and of qualified individual with a disability; reasonable accommodation and undue hardship, including the scope of reassignment; and pre-employment inquiries.

To assist us in the development of this guidance, the Commission requested comment in the NPRM from disability rights organizations, employers, unions, state agencies concerned with employment or workers compensation practices, and interested individuals on specific questions about insurance, workers' compensation, and collective bargaining agreements. Many commenters responded to these questions, and several commenters addressed other matters pertinent to these areas. The Commission has considered these comments in the development of the final rule and will continue to consider them as it develops further ADA guidance.

In the NPRM, the Commission raised questions about a number of insurance-related matters. Specifically, the Commission asked commenters to discuss risk assessment and classification, the relationship between "risk" and "cost," and whether employers should consider the effects that changes in insurance coverage will have on individuals with disabilities before making those changes. Many commenters provided information about insurance practices and explained some of the considerations that affect insurance decisions. In addition, some commenters discussed their experiences with insurance plans and coverage. The commenters presented a wide range of opinions

on insurance-related matters, and the Commission will consider the comments as it continues to analyze these complex matters.

The Commission received a large number of comments concerning inquiries about an individual's workers' compensation history. Many employers asserted that such inquiries are job related and consistent with business necessity. Several individuals with disabilities and disability rights organizations, however, argued that such inquiries are prohibited pre-employment inquiries and are not job related and consistent with business necessity. The Commission has addressed this issue in the interpretive guidance accompanying section 1630.14(a) and will discuss the matter further in future guidance.

There was little controversy about the submission of medical information to workers' compensation offices. A number of employers and employer groups pointed out that the workers' compensation offices of many states request medical information in connection with the administration of second-injury funds. Further, they noted that the disclosure of medical information may be necessary to the defense of a workers' compensation claim. The Commission has responded to these comments by amending the interpretive guidance accompanying section 1630.14(b). This amendment, discussed below, notes that the submission of medical information to workers' compensation offices in accordance with state workers' compensation laws is not inconsistent with section 1630.14(b). The Commission will address this area in greater detail and will discuss other issues concerning workers' compensation matters in future guidances, including the policy guidance on pre-employment inquiries.

With respect to collective bargaining agreements, the Commission asked commenters to discuss the relationship between collective bargaining agreements and such matters as undue hardship, reassignment to a vacant position, the determination of what constitutes a "vacant" position, and the confidentiality requirements of the ADA. The comments that we received reflected a wide variety of views. For example, some commenters argued that it would always be an undue hardship for an employer to provide a reasonable accommodation that conflicted with the provisions of a collective bargaining agreement. Other commenters, however, argued that an accommodation's effect on an agreement should not be considered when assessing undue hardship. Similarly, some commenters stated that the appropriateness of reassignment to a vacant position should depend upon the provisions of a collective bargaining agreement while others asserted that an agreement cannot limit the right to reassignment. Many commenters discussed the relationship between an agreement's seniority provisions and an employer's reasonable accommodation obligations.

In response to comments, the Commission has amended section 1630.2(n)(3) to include "the terms of a collective bargaining agreement" in the types of evidence relevant to determining the essential functions of a position. The Commission has made a corresponding change to the interpretive guidance on section 1630.2(n)(3). In addition, the Commission has amended the interpretive guidance on section 1630.15(d) to note that the terms of a collective bargaining agreement may be relevant to determining whether an accommodation would pose an undue hardship on the operation of a covered entity's business.

The divergent views expressed in the public comments demonstrate the complexity of employment-related issues concerning insurance, workers' compensation, and collective bargaining agreement matters. These highly complex issues require extensive research and analysis and warrant further consideration. Accordingly, the Commission has decided to address the issues in depth in future

Compliance Manual sections and policy guidances. The Commission will consider the public comments that it received in response to the NPRM as it develops further guidance on the application of title I of the ADA to these matters.

The Commission has also decided to address burdens-of-proof issues in future guidance documents, including the Compliance Manual section on the theories of discrimination. Many commenters discussed the allocation of the various burdens of proof under title I of the ADA and asked the Commission to clarify those burdens. The comments in this area addressed such matters as determining whether a person is a qualified individual with a disability, job relatedness and business necessity, and undue hardship. The Commission will consider these comments as it prepares further guidance in this area.

A discussion of other significant comments and an explanation of the changes made in part 1630 since publication of the NPRM follows.

6. Section-by-Section Analysis of Comments and Revisions

Section 1630.1 Purpose, applicability, and construction

The Commission has made a technical correction to section 1630.1(a) by adding section 506(e) to the list of statutory provisions implemented by this part. Section 506(e) of the ADA provides that the failure to receive technical assistance from the federal agencies that administer the ADA is not a defense to failing to meet the obligations of title I.

Some commenters asked the Commission to note that the ADA does not preempt state claims, such as state tort claims, that confer greater remedies than are available under the ADA. The Commission has added a paragraph to that effect in the Appendix discussion of sections 1630.1(b) and (c). This interpretation is consistent with the legislative history of the Act. See H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 69-70 (1990) [hereinafter referred to as House Judiciary Report].

In addition, the Commission has made a technical amendment to the Appendix discussion to note that the ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. The Commission has also amended the discussion to refer to a direct threat that cannot be eliminated "or reduced" through reasonable accommodation. This language is consistent with the regulatory definition of direct threat. (See section 1630.2(r), below.)

Section 1630.2 Definitions

Section 1630.2(h) Physical or mental impairment

The Commission has amended the interpretive guidance accompanying section 1630.2(h) to note that the definition of the term "impairment" does not include characteristic predisposition to illness or disease.

In addition, the Commission has specifically noted in the interpretive guidance that pregnancy is not an impairment. This change responds to the numerous questions that the Commission has received

concerning whether pregnancy is a disability covered by the ADA. Pregnancy, by itself, is not an impairment and is therefore not a disability.

Section 1630.2(j) Substantially limits

The Commission has revised the interpretive guidance accompanying section 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989) [hereinafter referred to as Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 52 (1990) [hereinafter referred to as House Labor Report]; House Judiciary Report at 28. The Commission has also revised the examples in the third paragraph of this section's guidance. The examples now focus on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures. These revisions respond to comments from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage of individuals with disabilities who function well because of assistive devices or other mitigating measures.

In an amendment to the paragraph concerning the factors to consider when determining whether an impairment is substantially limiting, the Commission has provided a second example of an impairment's "impact." This example notes that a traumatic head injury's affect on cognitive functions is the "impact" of that impairment.

Many commenters addressed the provisions concerning the definition of "substantially limits" with respect to the major life activity of working (section 1630.2(j)(3)). Some employers generally supported the definition but argued that it should be applied narrowly. Other employers argued that the definition is too broad. Disability rights groups and individuals with disabilities, on the other hand, argued that the definition is too narrow, unduly limits coverage, and places an onerous burden on individuals seeking to establish that they are covered by the ADA. The Commission has responded to these comments by making a number of clarifications in this area.

The Commission has revised section 1630.2(j)(3)(ii) and the accompanying interpretive guidance to note that the listed factors "may" be considered when determining whether an individual is substantially limited in working. This revision clarifies that the factors are relevant to, but are not required elements of, a showing of a substantial limitation in working.

Disability rights groups asked the Commission to clarify that "substantially limited in working" applies only when an individual is not substantially limited in any other major life activity. In addition, several other commenters indicated confusion about whether and when the ability to work should be considered when assessing if an individual has a disability. In response to these comments, the Commission has amended the interpretive guidance by adding a new paragraph clarifying the circumstances under which one should determine whether an individual is substantially limited in the major life activity of working. This paragraph makes clear that a determination of whether an individual is substantially limited in the ability to work should be made only when the individual is not disabled in any other major life activity. Thus, individuals need not establish that they are substantially limited in working if they already have established that they are, have a record of, or are regarded as being substantially limited in another major life activity.

The proposed interpretive guidance in this area provided an example concerning a surgeon with a slight hand impairment. Several commenters expressed concern about this example. Many of these comments indicated that the example confused, rather than clarified, the matter. The Commission, therefore, has deleted this example. To explain further the application of the "substantially limited in working" concept, the Commission has provided another example (concerning a commercial airline pilot) in the interpretive guidance.

In addition, the Commission has clarified that the terms "numbers and types of jobs" (see section 1630.2(j)(3)(ii)(B)) and "numbers and types of other jobs" (see section 1630.2(j)(3)(ii)(C)) do not require an onerous evidentiary showing.

In the proposed Appendix, after the interpretive guidance accompanying section 1630.2(l), the Commission included a discussion entitled "Frequently Disabling Impairments." Many commenters expressed concern about this discussion. In response to these comments, and to avoid confusion, the Commission has revised the discussion and has deleted the list of frequently disabling impairments. The revised discussion now appears in the interpretive guidance accompanying section 1630.2(j).

Section 1630.2(l) Is regarded as having such an impairment

Section 1630.2(l)(3) has been changed to refer to "a substantially limiting impairment" rather than "such an impairment." This change clarifies that an individual meets the definition of the term "disability" when a covered entity treats the individual as having a substantially limiting impairment. That is, section 1630.2(l)(3) refers to any substantially limiting impairment, rather than just to one of the impairments described in sections 1630.2(l)(1) or (2).

The proposed interpretive guidance on section 1630.2(l) stated that, when determining whether an individual is regarded as substantially limited in working, "it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used." The Commission specifically requested comment on this proposal, and many commenters addressed this issue. The Commission has decided to eliminate this assumption and to revise the interpretive guidance. The guidance now explains that an individual meets the "regarded as" part of the definition of disability if he or she can show that a covered entity made an employment decision because of a perception of a disability based on "myth, fear, or stereotype." This is consistent with the legislative history of the ADA. See House Judiciary Report at 30.

Section 1630.2(m) Qualified individual with a disability

Under the proposed part 1630, the first step in determining whether an individual with a disability is a qualified individual with a disability was to determine whether the individual "satisfies the requisite skill, experience and education requirements of the employment position" the individual holds or desires. Many employers and employer groups asserted that the proposed regulation unduly limited job prerequisites to skill, experience, and education requirements and did not permit employers to consider other job-related qualifications. To clarify that the reference to skill, experience, and education requirements was not intended to be an exhaustive list of permissible qualification requirements, the Commission has revised the phrase to include "skill, experience, education, and other job-related requirements." This revision recognizes that other types of job-related requirements may be relevant to determining whether an individual is qualified for a position.

Many individuals with disabilities and disability rights groups asked the Commission to emphasize that the determination of whether a person is a qualified individual with a disability must be made at the time of the employment action in question and cannot be based on speculation that the individual will become unable to perform the job in the future or may cause increased health insurance or workers' compensation costs. The Commission has amended the interpretive guidance on section 1630.2(m) to reflect this point. This guidance is consistent with the legislative history of the Act. See Senate Report at 26, House Labor Report at 55, 136; House Judiciary Report at 34, 71.

Section 1630.2(n) Essential functions

Many employers and employer groups objected to the use of the terms "primary" and "intrinsic" in the definition of essential functions. To avoid confusion about the meanings of "primary" and "intrinsic," the Commission has deleted these terms from the definition. The final regulation defines essential functions as "fundamental job duties" and notes that essential functions do not include the marginal functions of a position.

The proposed interpretive guidance accompanying section 1630.2(n)(2)(ii) noted that one of the factors in determining whether a function is essential is the number of employees available to perform a job function or among whom the performance of that function can be distributed. The proposed guidance explained that "[t]his may be a factor either because the total number of employees is low, or because of the fluctuating demands of the business operations." Some employers and employer groups expressed concern that this language could be interpreted as requiring an assessment of whether a job function could be distributed among all employees in any job at any level. The Commission has amended the interpretive guidance on this factor to clarify that the factor refers only to distribution among "available" employees.

Section 1630.2(n)(3) lists several kinds of evidence that are relevant to determining whether a particular job function is essential. Some employers and unions asked the Commission to recognize that collective bargaining agreements may help to identify a position's essential functions. In response to these comments, the Commission has added "[t]he terms of a collective bargaining agreement" to the list. In addition, the Commission has amended the interpretive guidance to note specifically that this type of evidence is relevant to the determination of essential functions. This addition is consistent with the legislative history of the Act. See Senate Report at 32; House Labor Report at 63.

Proposed section 1630.2(n)(3) referred to the evidence on the list as evidence "that may be considered in determining whether a particular function is essential." The Commission has revised this section to refer to evidence "of" whether a particular function is essential. The Commission made this revision in response to concerns about the meaning of the phrase "may be considered." In that regard, some commenters questioned whether the phrase meant that some of the listed evidence might not be considered when determining whether a function is essential to a position. This revision clarifies that all of the types of evidence on the list, when available, are relevant to the determination of a position's essential functions. As the final rule and interpretive guidance make clear, the list is not an exhaustive list of all types of relevant evidence. Other types of available evidence may also be relevant to the determination.

The Commission has amended the interpretive guidance concerning section 1630.2(n)(3)(ii) to make

clear that covered entities are not required to develop and maintain written job descriptions. Such job descriptions are relevant to a determination of a position's essential functions, but they are not required by part 1630.

Several commenters suggested that the Commission establish a rebuttable presumption in favor of the employer's judgment concerning what functions are essential. The Commission has not done so. On that point, the Commission notes that the House Committee on the Judiciary specifically rejected an amendment that would have created such a presumption. See House Judiciary Report at 33-34.

The last paragraph of the interpretive guidance on section 1630.2(n) notes that the inquiry into what constitutes a position's essential functions is not intended to second guess an employer's business judgment regarding production standards, whether qualitative or quantitative. In response to several comments, the Commission has revised this paragraph to incorporate examples of qualitative production standards.

Section 1630.2(o) Reasonable accommodation

The Commission has deleted the reference to undue hardship from the definition of reasonable accommodation. This is a technical change reflecting that undue hardship is a defense to, rather than an aspect of, reasonable accommodation. As some commenters have noted, a defense to a term should not be part of the term's definition. Accordingly, we have separated the concept of undue hardship from the definition of reasonable accommodation. This change does not affect the obligations of employers or the rights of individuals with disabilities. Accordingly, a covered entity remains obligated to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless to do so would impose an undue hardship on the operation of the covered entity's business. See section 1630.9.

With respect to section 1630.2(o)(1)(i), some commenters expressed confusion about the use of the phrase "qualified individual with a disability." In that regard, they noted that the phrase has a specific definition under this part (see section 1630.2(m)) and questioned whether an individual must meet that definition to request an accommodation with regard to the application process. The Commission has substituted the phrase "qualified applicant with a disability" for "qualified individual with a disability." This change clarifies that an individual with a disability who requests a reasonable accommodation to participate in the application process must be eligible only with respect to the application process.

The Commission has modified section 1630.2(o)(1)(iii) to state that reasonable accommodation includes modifications or adjustments that enable employees with disabilities to enjoy benefits and privileges that are "equal" to (rather than "the same" as) the benefits and privileges that are enjoyed by other employees. This change clarifies that such modifications or adjustments must ensure that individuals with disabilities receive equal access to the benefits and privileges afforded to other employees but may not be able to ensure that the individuals receive the same results of those benefits and privileges or precisely the same benefits and privileges.

Many commenters discussed whether the provision of daily attendant care is a form of reasonable accommodation. Employers and employer groups asserted that reasonable accommodation does not include such assistance. Disability rights groups and individuals with disabilities, however, asserted

that such assistance is a form of reasonable accommodation but that this part did not make that clear. To clarify the extent of the reasonable accommodation obligation with respect to daily attendant care, the Commission has amended the interpretive guidance on section 1630.2(o) to make clear that it may be a reasonable accommodation to provide personal assistants to help with specified duties related to the job.

The Commission also has amended the interpretive guidance to note that allowing an individual with a disability to provide and use equipment, aids, or services that an employer is not required to provide may also be a form of reasonable accommodation. Some individuals with disabilities and disability rights groups asked the Commission to make this clear.

The interpretive guidance points out that reasonable accommodation may include making non-work areas accessible to individuals with disabilities. Many commenters asked the Commission to include rest rooms in the examples of accessible areas that may be required as reasonable accommodations. In response to those comments, the Commission has added rest rooms to the examples.

In response to other comments, the Commission has added a paragraph to the guidance concerning job restructuring as a form of reasonable accommodation. The new paragraph notes that job restructuring may involve changing when or how an essential function is performed.

Several commenters asked the Commission to provide additional guidance concerning the reasonable accommodation of reassignment to a vacant position. Specifically, commenters asked the Commission to clarify how long an employer must wait for a vacancy to arise when considering reassignment and to explain whether the employer is required to maintain the salary of an individual who is reassigned from a higher-paying position to a lower-paying one. The Commission has amended the discussion of reassignment to refer to reassignment to a position that is vacant "within a reasonable amount of time ... in light of the totality of the circumstances." In addition, the Commission has noted that an employer is not required to maintain the salaries of reassigned individuals with disabilities if it does not maintain the salaries of individuals who are not disabled.

Section 1630.2(p) Undue hardship

The Commission has substituted "facility" or "facilities" for "site" or "sites" in section 1630.2(p)(2) and has deleted the definition of the term "site." Many employers and employer groups expressed concern about the use and meaning of the term "site." The final regulation's use of the terms "facility" and "facilities" is consistent with the language of the statute.

The Commission has amended the last paragraph of the interpretive guidance accompanying section 1630.2(p) to note that, when the cost of a requested accommodation would result in an undue hardship and outside funding is not available, an individual with a disability should be given the option of paying the portion of the cost that constitutes an undue hardship. This amendment is consistent with the legislative history of the Act. See Senate Report at 36; House Labor Report at 69.

Several employers and employer groups asked the Commission to expand the list of factors to be considered when determining if an accommodation would impose an undue hardship on a covered entity by adding another factor: the relationship of an accommodation's cost to the value of the position at issue, as measured by the compensation paid to the holder of the position. Congress,

however, specifically rejected this type of factor. See House Judiciary Report at 41 (noting that the House Judiciary Committee rejected an amendment proposing that an accommodation costing more than ten percent of the employee's salary be treated as an undue hardship). The Commission, therefore, has not added this to the list.

Section 1630.2(q) Qualification standards

The Commission has deleted the reference to direct threat from the definition of qualification standards. This revision is consistent with the revisions the Commission has made to sections 1630.10 and 1630.15(b). (See discussion below).

Section 1630.2(r) Direct threat

Many disability rights groups and individuals with disabilities asserted that the definition of direct threat should not include a reference to the health or safety of the individual with a disability. They expressed concern that the reference to "risk to self" would result in direct threat determinations that are based on negative stereotypes and paternalistic views about what is best for individuals with disabilities. Alternatively, the commenters asked the Commission to clarify that any assessment of risk must be based on the individual's present condition and not on speculation about the individual's future condition. They also asked the Commission to specify evidence other than medical knowledge that may be relevant to the determination of direct threat.

The final regulation retains the reference to the health or safety of the individual with a disability. As the Appendix notes, this is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act.

To clarify the direct threat standard, the Commission has made four revisions to section 1630.2(r). First, the Commission has amended the first sentence of the definition of direct threat to refer to a significant risk of substantial harm that cannot be eliminated "or reduced" by reasonable accommodation. This amendment clarifies that the risk need not be eliminated entirely to fall below the direct threat definition; instead, the risk need only be reduced to the level at which there no longer exists a significant risk of substantial harm. In addition, the Commission has rephrased the second sentence of section 1630.2(r) to clarify that an employer's direct threat standard must apply to all individuals, not just to individuals with disabilities. Further, the Commission has made clear that a direct threat determination must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job." This clarifies that a determination that employment of an individual would pose a direct threat must involve an individualized inquiry and must be based on the individual's current condition. In addition, the Commission has added "the imminence of the potential harm" to the list of factors to be considered when determining whether employment of an individual would pose a direct threat. This change clarifies that both the probability of harm and the imminence of harm are relevant to direct threat determinations. This definition of direct threat is consistent with the legislative history of the Act. See Senate Report at 27, House Labor Report at 56-57, 73-75, House Judiciary Report at 45-46.

Further, the Commission has amended the interpretive guidance on section 1630.2(r) to highlight the individualized nature of the direct threat assessment. In addition, the Commission has cited ex-

amples of evidence other than medical knowledge that may be relevant to determining whether employment of an individual would pose a direct threat.

Section 1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability"

Many commenters asked the Commission to clarify that the term "rehabilitation program" includes self-help groups. In response to these comments, the Commission has amended the interpretive guidance in this area to include a reference to professionally recognized self-help programs.

The Commission has added a paragraph to the guidance on section 1630.3 to note that individuals who are not excluded under this provision from the definitions of the terms "disability" and "qualified individual with a disability" must still establish that they meet those definitions to be protected by part 1630. Several employers and employer groups asked the Commission to clarify that individuals are not automatically covered by the ADA simply because they do not fall into one of the exclusions listed in this section.

The proposed interpretive guidance on section 1630.3 noted that employers are entitled to seek reasonable assurances that an individual is not currently engaging in the illegal use of drugs. In that regard, the guidance stated, "It is essential that the individual offer evidence, such as a drug test, to prove that he or she is not currently engaging" in such use. Many commenters interpreted this guidance to require individuals to come forward with evidence even in the absence of a request by the employer. The Commission has revised the interpretive guidance to clarify that such evidence is required only upon request.

1630.6 Contractual or other arrangements

The Commission has added a sentence to the first paragraph of the interpretive guidance on section 1630.6 to clarify that this section has no impact on whether one is a covered entity or employer as defined by section 1630.2.

The proposed interpretive guidance on contractual or other relationships noted that section 1630.6 applied to parties on either side of the relationship. To illustrate this point, the guidance stated that "a copier company would be required to ensure the provision of any reasonable accommodation necessary to enable its copier service representative with a disability to service a client's machine." Several employers objected to this example. In that respect, the commenters argued that the language of the example was too broad and could be interpreted as requiring employers to make all customers' premises accessible. The Commission has revised this example to provide a clearer, more concrete indication of the scope of the reasonable accommodation obligation in this area.

In addition, the Commission has clarified the interpretive guidance by noting that the existence of a contractual relationship adds no new obligations "under this part."

1630.8 Relationship or association with an individual with a disability

The Commission has added the phrase "or otherwise discriminate against" to section 1630.8. This change clarifies that harassment or any other form of discrimination against a qualified individual

because of the known disability of a person with whom the individual has a relationship or an association is also a prohibited form of discrimination.

The Commission has revised the first sentence of the interpretive guidance to refer to a person's relationship or association with an individual who has a "known" disability. This revision makes the language of the interpretive guidance consistent with the language of the regulation. In addition, to reflect current, preferred terminology, the Commission has substituted the term "people who have AIDS" for the term "AIDS patients." Finally, the Commission has added a paragraph to clarify that this provision applies to discrimination in other employment privileges and benefits, such as health insurance benefits.

1630.9 Not making reasonable accommodation

Section 1630.9(c) provides that "[a] covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance...." Some employers asked the Commission to revise this section and to state that the failure to receive technical assistance is a defense to not providing reasonable accommodation. The Commission has not made the requested revision. Section 1630.9(c) is consistent with section 506(e) of the ADA, which states that the failure to receive technical assistance from the federal agencies that administer the ADA does not excuse a covered entity from compliance with the requirements of the Act.

The first paragraph of the interpretive guidance accompanying section 1630.9 notes that the reasonable accommodation obligation does not require employers to provide adjustments or modifications that are primarily for the personal use of the individual with a disability. The Commission has amended this guidance to clarify that employers may be required to provide items that are customarily personal-use items where the items are specifically designed or required to meet job-related needs.

In addition, the Commission has amended the interpretive guidance to clarify that there must be a nexus between an individual's disability and the need for accommodation. Thus, the guidance notes that an individual with a disability is "otherwise qualified" if he or she is qualified for the job except that, "because of the disability," the individual needs reasonable accommodation to perform the essential functions of the job. Similarly, the guidance notes that employers are required to accommodate only the physical or mental limitations "resulting from the disability" that are known to the employer.

In response to commenters' requests for clarification, the Commission has noted that employers may require individuals with disabilities to provide documentation of the need for reasonable accommodation when the need for a requested accommodation is not obvious.

In addition, the Commission has amended the last paragraph of the interpretive guidance on the "Process of Determining the Appropriate Reasonable Accommodation." This amendment clarifies that an employer must consider allowing an individual with a disability to provide his or her own accommodation if the individual wishes to do so. The employer, however, may not require the individual to provide the accommodation.

1630.10 Qualification standards, tests, and other selection criteria

The Commission has added the phrase "on the basis of disability" to section 1630.10(a) to clarify that a selection criterion that is not job related and consistent with business necessity violates this section only when it screens out an individual with a disability (or a class of individuals with disabilities) on the basis of disability. That is, there must be a nexus between the exclusion and the disability. A selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section. The Commission has made similar changes to the interpretive guidance on this section.

Proposed section 1630.10(b) stated that a covered entity could use as a qualification standard the requirement that an individual not pose a direct threat to the health or safety of the individual or others. Many individuals with disabilities objected to the inclusion of the direct threat reference in this section and asked the Commission to clarify that the direct threat standard must be raised by the covered entity as a defense. In that regard, they specifically asked the Commission to move the direct threat provision from section 1630.10 (qualification standards) to section 1630.15 (defenses). The Commission has deleted the direct threat provision from section 1630.10 and has moved it to section 1630.15. This is consistent with section 103 of the ADA, which refers to defenses and states (in section 103(b)) that the term "qualification standards" may include a requirement that an individual not pose a direct threat.

1630.11 Administration of tests

The Commission has revised the interpretive guidance concerning section 1630.11 to clarify that a request for an alternative test format or other testing accommodation generally should be made prior to the administration of the test or as soon as the individual with a disability becomes aware of the need for accommodation. In addition, the Commission has amended the last paragraph of the guidance on this section to note that an employer can require a written test of an applicant with dyslexia if the ability to read is "the skill the test is designed to measure." This language is consistent with the regulatory language, which refers to the skills a test purports to measure.

Some commenters noted that certain tests are designed to measure the speed with which an applicant performs a function. In response to these comments, the Commission has amended the interpretive guidance to state that an employer may require an applicant to complete a test within a specified time frame if speed is one of the skills being tested.

In response to comments, the Commission has amended the interpretive guidance accompanying section 1630.14(a) to clarify that employers may invite applicants to request accommodations for taking tests. (See section 1630.14(a), below)

1630.12 Retaliation and coercion

The Commission has amended section 1630.12 to clarify that this section also prohibits harassment.

1630.13 Prohibited medical examinations and inquiries

In response to the Commission's request for comment on certain workers' compensation matters,

many commenters addressed whether a covered entity may ask applicants about their history of workers' compensation claims. Many employers and employer groups argued that an inquiry about an individual's workers' compensation history is job related and consistent with business necessity. Disability rights groups and individuals with disabilities, however, asserted that such an inquiry could disclose the existence of a disability. In response to comments and to clarify this matter, the Commission has amended the interpretive guidance accompanying section 1630.13(a). The amendment states that an employer may not inquire about an individual's workers' compensation history at the pre-offer stage.

The Commission has made a technical change to section 1630.13(b) by deleting the phrase "unless the examination or inquiry is shown to be job-related and consistent with business necessity" from the section. This change does not affect the substantive provisions of section 1630.13(b). The Commission has incorporated the job-relatedness and business-necessity requirement into a new section 1630.14(c), which clarifies the scope of permissible examinations or inquiries of employees. (See section 1630.14(c), below.)

1630.14 Medical examinations and inquiries specifically permitted

Section 1630.14(a) Acceptable pre-employment inquiry

Proposed section 1630.14(a) stated that a covered entity may make pre-employment inquiries into an applicant's ability to perform job-related functions. The interpretive guidance accompanying this section noted that an employer may ask an individual whether he or she can perform a job function with or without reasonable accommodation.

Many employers asked the Commission to provide additional guidance in this area. Specifically, the commenters asked whether an employer may ask how an individual will perform a job function when the individual's known disability appears to interfere with or prevent performance of job-related functions. To clarify this matter, the Commission has amended section 1630.14(a) to state that a covered entity "may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." The Commission has amended the interpretive guidance accompanying section 1630.14(a) to reflect this change.

Many commenters asked the Commission to state that employers may inquire, before tests are taken, whether candidates will require any reasonable accommodations to take the tests. They asked the Commission to acknowledge that such inquiries constitute permissible pre-employment inquiries. In response to these comments, the Commission has added a new paragraph to the interpretive guidance on section 1630.14(a). This paragraph clarifies that employers may ask candidates to inform them of the need for reasonable accommodation within a reasonable time before the administration of the test and may request documentation verifying the need for accommodation.

The Commission has received many comments from law enforcement and other public safety agencies concerning the administration of physical agility tests. In response to those comments, the Commission has added a new paragraph clarifying that such tests are not medical examinations.

Many employers and employer groups have asked the Commission to discuss whether employers may invite applicants to self-identify as individuals with disabilities. In that regard, many of the

may require employee medical examinations, such as fitness-for-duty examinations, that are job related and consistent with business necessity. New section 1630.14(c) clarifies this by expressly permitting covered entities to require employee medical examinations and inquiries that are job related and consistent with business necessity. The information obtained from such examinations or inquiries must be treated as a confidential medical record. This section also incorporates the last sentence of proposed section 1630.14(c). The remainder of proposed section 1630.14(c) has become section 1630.14(d).

To comport with this technical change in the regulation, the Commission has made corresponding changes in the interpretive guidance. Thus, the Commission has moved the second paragraph of the proposed guidance on section 1630.13(b) to the guidance on section 1630.14(c). In addition, the Commission has reworded the paragraph to note that this provision permits (rather than does not prohibit) certain medical examinations and inquiries.

Some commenters asked the Commission to clarify whether employers may make inquiries or require medical examinations in connection with the reasonable accommodation process. The Commission has noted in the interpretive guidance that such inquiries and examinations are permissible when they are necessary to the reasonable accommodation process described in this part.

1630.15 Defenses

The Commission has added a sentence to the interpretive guidance on section 1630.15(a) to clarify that the assertion that an insurance plan does not cover an individual's disability or that the disability would cause increased insurance or workers' compensation costs does not constitute a legitimate, nondiscriminatory reason for disparate treatment of an individual with a disability. This clarification, made in response to many comments from individuals with disabilities and disability rights groups, is consistent with the legislative history of the ADA. See Senate Report at 85; House Labor Report at 136; House Judiciary Report at 71.

The Commission has amended section 1630.15(b) by stating that the term "qualification standard" may include a requirement that an individual not pose a direct threat. As noted above, this is consistent with section 103 of the ADA and responds to many comments from individuals with disabilities.

The Commission has made a technical correction to section 1630.15(c) by changing the phrase "an individual or class of individuals with disabilities" to "an individual with a disability or a class of individuals with disabilities."

Several employers and employer groups asked the Commission to acknowledge that undue hardship considerations about reasonable accommodations at temporary work sites may be different from the considerations relevant to permanent work sites. In response to these comments, the Commission has amended the interpretive guidance on section 1630.15(d) to note that an accommodation that poses an undue hardship in a particular job setting, such as a temporary construction site, may not pose an undue hardship in another setting. This guidance is consistent with the legislative history of the ADA. See House Labor Report at 69-70; House Judiciary Report at 41-42.

The Commission also has amended the interpretive guidance to note that the terms of a collective bargaining agreement may be relevant to the determination of whether a requested accommodation

would pose an undue hardship on the operation of a covered entity's business. This amendment, which responds to commenters' requests that the Commission recognize the relevancy of collective bargaining agreements, is consistent with the legislative history of the Act. See Senate Report at 32; House Labor Report at 63.

Section 1630.2(p)(2)(v) provides that the impact of an accommodation on the ability of other employees to perform their duties is one of the factors to be considered when determining whether the accommodation would impose an undue hardship on a covered entity. Many commenters addressed whether an accommodation's impact on the morale of other employees may be relevant to a determination of undue hardship. Some employers and employer groups asserted that a negative impact on employee morale should be considered an undue hardship. Disability rights groups and individuals with disabilities, however, argued that undue hardship determinations must not be based on the morale of other employees. It is the Commission's view that a negative effect on morale, by itself, is not sufficient to meet the undue hardship standard. Accordingly, the Commission has noted in the guidance on section 1630.15(d) that an employer cannot establish undue hardship by showing only that an accommodation would have a negative impact on employee morale.

1630.16 Specific activities permitted

The Commission has revised the second sentence of the interpretive guidance on section 1630.16(b) to state that an employer may hold individuals with alcoholism and individuals who engage in the illegal use of drugs to the same performance and conduct standards to which it holds "all of its" other employees. In addition, the Commission has deleted the term "otherwise" from the third sentence of the guidance. These revisions clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards.

Many commenters asked the Commission to clarify that the drug testing provisions of section 1630.16(c) pertain only to tests to determine the illegal use of drugs. Accordingly, the Commission has amended section 1630.16(c)(1) to refer to the administration of "such" drug tests and section 1630.16(c)(3) to refer to information obtained from a "test to determine the illegal use of drugs." We have also made a change in the grammatical structure of the last sentence of section 1630.16(c)(1). We have made similar changes to the corresponding section of the interpretive guidance. In addition, the Commission has amended the interpretive guidance to state that such tests are neither encouraged, "authorized," nor prohibited. This amendment conforms the language of the guidance to the language of section 1630.16(c)(1).

The Commission has revised section 1630.16(e)(1) to refer to communicable diseases that "are" (rather than "may be") transmitted through the handling of food. Several commenters asked the Commission to make this technical change, which adopts the statutory language.

Several commenters also asked the Commission to conform the language of proposed sections 1630.16(f)(1) and (2) to the language of sections 501(c)(1) and (2) of the Act. The Commission has made this change. Thus, sections 1630.16(f)(1) and (2) now refer to risks that are "not inconsistent with State law."

commenters noted that Section 503 of the Rehabilitation Act imposes certain obligations on government contractors. The interpretive guidance accompanying sections 1630.1(b) and (c) notes that "title I of the ADA would not be a defense to failing to collect information required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act." To reiterate this point, the Commission has amended the interpretive guidance accompanying section 1630.14(a) to note specifically that this section does not restrict employers from collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act.

Section 1630.14(b) Employment entrance examinations

Section 1630.14(b) has been amended to include the phrase "(and/or inquiry)" after references to medical examinations. Some commenters were concerned that the regulation as drafted prohibited covered entities from making any medical inquiries or administering questionnaires that did not constitute examinations. This change clarifies that the term "employment entrance examinations" includes medical inquiries as well as medical examinations.

Section 1630.14(b)(2) has been revised to state that the results of employment entrance examinations "shall not be used for any purpose inconsistent with this part." This language is consistent with the language used in section 1630.14(c)(2).

The second paragraph of the proposed interpretive guidance on this section referred to "relevant" physical and psychological criteria. Some commenters questioned the use of the term "relevant" and expressed concern about its meaning. The Commission has deleted this term from the paragraph.

Many commenters addressed the confidentiality provisions of this section. They noted that it may be necessary to disclose medical information in defense of workers' compensation claims or during the course of other legal proceedings. In addition, they pointed out that the workers' compensation offices of many states request such information for the administration of second-injury funds or for other administrative purposes.

The Commission has revised the last paragraph of the interpretive guidance on section 1630.14(b) to reflect that the information obtained during a permitted employment entrance examination or inquiry may be used only "in a manner not inconsistent with this part." In addition, the Commission has added language clarifying that it is permissible to submit the information to state workers' compensation offices.

Several commenters asked the Commission to clarify whether information obtained from employment entrance examinations and inquiries may be used for insurance purposes. In response to these comments, the Commission has noted in the interpretive guidance that such information may be used for insurance purposes described in section 1630.16(f).

Section 1630.14(c) Examination of employees

The Commission has added a new section 1630.14(c), Examination of employees, that clarifies the scope of permissible medical examinations and inquiries. Several employers and employer groups expressed concern that the proposed version of part 1630 did not make it clear that covered entities

7. Executive Order 12291 and Regulatory Flexibility Act

The Commission published a Preliminary Regulatory Impact Analysis on February 28, 1991 (56 FR 8578). Based on the Preliminary Regulatory Impact Analysis, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small business entities. The Commission is issuing this final rule at this time in the absence of a Final Regulatory Impact Analysis in order to meet the statutory deadline. The Commission's Preliminary Regulatory Impact Analysis was based upon existing data on the costs of reasonable accommodation. The Commission received few comments on this aspect of its rulemaking. Because of the complexity inherent in assessing the economic costs and benefits of this rule and the relative paucity of data on this issue, the Commission will further study the economic impact of the regulation and intends to issue a Final Regulatory Impact Analysis prior to January 1, 1992. As indicated above, the Preliminary Regulatory Impact Analysis was published on February 28, 1991 (56 F.R. 8578) for comment. The Commission will also provide a copy to the public upon request by calling the Commission's Office of Communications and Legislative Affairs at (202) 663-4900. Commenters are urged to provide additional information as to the costs and benefits associated with this rule. This will further facilitate the development of a Final Regulatory Impact Analysis. Comments must be received by September 26, 1991. Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street, NW, Washington, D.C. 20507.

As a convenience to commenters, the Executive Secretariat will accept public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll-free number). Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat Staff at (202) 663-4078. (This is not a toll-free number).

Comments received will be available for public inspection in the EEOC Library, room 6502, by appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays from October 15, 1991, until the Final Regulatory Impact Analysis is published. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment call (202) 663-4630 (voice), (202) 663-4630 (TDD).

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Handicapped, Individuals with disabilities.

For the Commission,

(Signed)
Evan J. Kemp, Jr.
Chairman.

8. Annotated Regulations

Accordingly, 29 CFR Chapter XIV is amended by adding part 1630 to read as follows:

PART 1630-- REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

Authority: 42 U.S.C. 12116.

REGULATION

1630.1 Purpose, applicability, and construction.

(a) Purpose. The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) Applicability. This part applies to "covered entities" as defined at section 1630.2(b).

(c) Construction. -- (1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973

INTERPRETIVE GUIDANCE

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The Americans with Disabilities Act was signed into law on July 26, 1990. It is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled. The purpose of title I and this part is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses the term "disabilities" rather than the term "handicaps" used in the Rehabilitation Act of 1973, 29 U.S.C. 701-796. Substantively, these terms are equivalent. As noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' as used in previous laws, such as the Rehabilitation Act of 1973 ...." H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 26-27 (1990) [hereinafter House Judiciary Report]; see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter House Labor Report].

The use of the term "Americans" in the title of the ADA is not intended to imply that the Act only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality.

Section 1630.1(b) and (c) Applicability and Construction

Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any state or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense

REGULATION

1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer. -- (1) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer

INTERPRETIVE GUIDANCE

Sections 1630.2(a)-(f) Commission, Covered Entity, etc.

The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," and "Employer." These terms are to be given the same meaning under the ADA that they are given under title VII.

In general, the term "employee" has the same meaning that it is given under title VII. However, the ADA's definition of "employee" does not contain an exception, as does title VII, for elected officials and their personal staffs. It should be further noted that all state and local governments are covered by title II of the ADA whether or not they are also covered by this part. Title II, which is enforced by the Department of Justice, becomes effective on January 26, 1992. See 28 CFR part 35.

The term "covered entity" is not found in title VII. However, the title VII definitions of the entities included in the term "covered entity" (e.g., employer, employment agency, etc.) are applicable to the ADA.

REGULATION

means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include --

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

INTERPRETIVE GUIDANCE

REGULATION

(g) Disability means, with respect to an individual --

(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment. (See section 1630.3 for exceptions to this definition).

INTERPRETIVE GUIDANCE

Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment.

To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

REGULATION

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

INTERPRETIVE GUIDANCE

Section 1630.2(h) Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23; House Labor Report at 52; House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

REGULATION

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

INTERPRETIVE GUIDANCE

Section 1630.2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

REGULATION

(j) Substantially limits. -- (1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of "working" --

(i) The term "substan-

INTERPRETIVE GUIDANCE

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be

REGULATION

tially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not

INTERPRETIVE GUIDANCE

substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments.

REGULATION

utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

INTERPRETIVE GUIDANCE

Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) the geographical area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a special-

REGULATION

INTERPRETIVE GUIDANCE

ized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985); E.E Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs

REGULATION

INTERPRETIVE GUIDANCE

(e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

REGULATION

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

INTERPRETIVE GUIDANCE

Section 1630.2(k) Record of a Substantially Limiting Condition

The second part of the definition provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52-53; House Judiciary Report at 29.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under part 1630. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in part 1630. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of part 1630, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

REGULATION

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

INTERPRETIVE GUIDANCE

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) the individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does

REGULATION

INTERPRETIVE GUIDANCE

not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and sterotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have

identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

REGULATION

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See section 1630.3 for exceptions to this definition).

INTERPRETIVE GUIDANCE

Section 1630.2(m) Qualified Individual with a Disability

The ADA prohibits discrimination on the basis of disability against qualified individuals with disabilities. The determination of whether an individual with a disability is "qualified" should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in the Rehabilitation Act caselaw as determining whether the individual is "otherwise qualified" for the position. See Senate Report at 33; House Labor Report at 64-65. (See section 1630.9 Not Making Reasonable Accommodation).

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position. House Labor Report at 55.

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers' compensation costs.

REGULATION

(n) Essential functions. -

(1) In general. The term "essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

INTERPRETIVE GUIDANCE

Section 1630.2(n) Essential Functions

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the following factors listed in part 1630.

The first factor is whether the position exists to perform a particular function. For example, an individual may be hired to proofread documents. The ability to proofread the documents would then be an essential function, since this is the only reason the position exists.

The second factor in determining whether a function is essential is the number of other employees available to perform that job function or among whom the performance of that job function can be distributed. This may be a factor either because the total number of available employees is low, or because of the fluctuating demands of the business operation. For example, if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited. In such a situation, functions that might not be essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done.

REGULATION

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

INTERPRETIVE GUIDANCE

See Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

A similar situation might occur in a larger work force if the workflow follows a cycle of heavy demand for labor intensive work followed by low demand periods. This type of workflow might also make the performance of each function during the peak periods more critical and might limit the employer's flexibility in reorganizing operating procedures. See Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987).

The third factor is the degree of expertise or skill required to perform the function. In certain professions and highly skilled positions the employee is hired for his or her expertise or ability to perform the particular function. In such a situation, the performance of that specialized task would be an essential function.

Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. Part 1630 lists various types of evidence, such as an established job description, that should be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.

Although part 1630 does not require employers to develop or maintain job descriptions, written job descriptions prepared before advertising or interviewing applicants for the job, as well as the employer's judgment as to what functions are essential are among the relevant evidence to be considered in determining whether a particular function is essential. The terms of a collective bargaining agreement are also relevant to the determination of whether a particular function is essential. The work experience of past employees in the job or of current employees in similar jobs is likewise relevant to the determination of whether a particular function is essential. See H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 58 (1990) [hereinafter Conference Report]; House Judiciary Report at 33-34. See also Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988).

The time spent performing the particular function may also be an indicator of whether that function is essential. For example,

REGULATION

INTERPRETIVE GUIDANCE

if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function. The consequences of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. (See section 1630.10 Qualification Standards, Tests and Other Selection Criteria). If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

REGULATION

(o) Reasonable accommodation. -- (1) The term "reasonable accommodation" means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work

INTERPRETIVE GUIDANCE

Section 1630.2(o) Reasonable Accommodation

An individual is considered a "qualified individual with a disability" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

Part 1630 lists the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation. Senate Report at 31; House Labor Report at 62; House Judiciary Report at 39.

It may also be a reasonable accommodation to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as a reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.

The accommodations included on the list of reasonable ac-

REGULATION

schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

INTERPRETIVE GUIDANCE

commodations are generally self explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, training rooms, restrooms, etc., may be required as reasonable accommodations.

Another of the potential accommodations listed is "job restructuring." An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position. See Senate Report at 31; House Labor Report at 62.

An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job. See Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979).

An employer or other covered entity may also restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until

REGULATION

INTERPRETIVE GUIDANCE

later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour. Likewise, as a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually.

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.

Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances. As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation. See Senate Report at 31-32; House Labor Report at 63.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in section 1630.9 Not Making Reasonable Accommodation.

REGULATION

(p) Undue hardship. --

(1) In general. "Undue hardship" means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv)The type of operation

INTERPRETIVE GUIDANCE

Section 1630.2(p) Undue Hardship

An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's or other covered entity's business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The "undue hardship" provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. See Senate Report at 35; House Labor Report at 67.

For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. The fact that that particular accommodation poses an undue hardship, however, only means that the employer is not required to provide that accommodation. If there is another accommodation that will not create an undue hardship, the employer would be required to provide the alternative accommodation.

An employer's claim that the cost of a particular accommodation will impose an undue hardship will be analyzed in light of the factors outlined in part 1630. In part, this analysis requires a determination of whose financial resources should be considered in deciding whether the accommodation is unduly costly. In some cases the financial resources of the employer or other covered entity in its entirety should be considered in determining whether the cost of an accommodation poses an undue hardship. In other cases, consideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will actually be required to provide the accommodation. See House Labor Report at 68-69; House Judiciary Report at 40-41; see also Conference Report at 56-57.

REGULATION

or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

INTERPRETIVE GUIDANCE

If the employer or other covered entity asserts that only the financial resources of the facility where the individual will be employed should be considered, part 1630 requires a factual determination of the relationship between the employer or other covered entity and the facility that will provide the accommodation. As an example, suppose that an independently owned fast food franchise that receives no money from the franchisor refuses to hire an individual with a hearing impairment because it asserts that it would be an undue hardship to provide an interpreter to enable the individual to participate in monthly staff meetings. Since the financial relationship between the franchisor and the franchise is limited to payment of an annual franchise fee, only the financial resources of the franchise would be considered in determining whether or not providing the accommodation would be an undue hardship. See House Labor Report at 68; House Judiciary Report at 40.

If the employer or other covered entity can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., a State vocational rehabilitation agency, or if Federal, State or local tax deductions or tax credits are available to offset the cost of the accommodation. If the employer or other covered entity receives, or is eligible to receive, monies from an external source that would pay the entire cost of the accommodation, it cannot claim cost as an undue hardship. In the absence of such funding, the individual with a disability requesting the accommodation should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business. To the extent that such monies pay or would pay for only part of the cost of the accommodation, only that portion of the cost of the accommodation that could not be recovered - the final net cost to the entity - may be considered in determining undue hardship. (See section 1630.9 Not Making Reasonable Accommodation). See Senate Report at 36; House Labor Report at 69.

REGULATION

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

INTERPRETIVE GUIDANCE

REGULATION

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

INTERPRETIVE GUIDANCE

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) the duration of the risk;
(2) the nature and severity of the potential harm;
(3) the likelihood that the potential harm will occur; and
(4) the imminence of the potential harm.

Such consideration must rely on objective, factual evidence - - not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes - - about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experi-

ence of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56; House Labor Report at 73-74; House Judiciary Report at 45. See also Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982).

REGULATION

1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."

(a) The terms disability and qualified individual with a disability do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) Drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C 812).

(2) Illegal use of drugs means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms "disability" and "qualified" individual with a disability may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

INTERPRETIVE GUIDANCE

Section 1630.3 Exceptions to the Definitions of "Disability" and "Qualified Individual with a Disability"

Section 1630.3 (a) through (c) Illegal Use of Drugs

Part 1630 provides that an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of this part when the employer or other covered entity acts on the basis of such use. Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.

Employers, for example, may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination. The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. See Conference Report at 64.

Individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs are not excluded from the definitions of the terms "disability" and "qualified individual with a disability." Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definitions of those terms. The term "rehabilitation program" refers to both in-patient and out-patient programs, as well as to appropriate employee assistance programs, professionally recognized self-help programs, such as Narcotics Anonymous, or other programs that provide professional (not necessarily medical) assistance and counseling for individuals who illegally use drugs. See Conference Report at 64; see also House Labor Report at 77; House Judiciary Report at 47.

It should be noted that this provision simply provides that certain individuals are not excluded from the definitions of "disability" and "qualified individual with a disability." Consequently, such individuals are still required to establish that they satisfy the requirements of these definitions in order to be protected by the ADA and this part. An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to

REGULATION

(2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b)(1) or (2) of this section is no longer engaging in the illegal use of drugs. (See section 1630.16(c) Drug testing).

(d) Disability does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

INTERPRETIVE GUIDANCE

demonstrate that he or she meets the definition of "disability" as defined in this part.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. (See section 1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

REGULATION

1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

INTERPRETIVE GUIDANCE

Section 1630.4 Discrimination Prohibited

This provision prohibits discrimination against a qualified individual with a disability in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973.

Part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

REGULATION

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term "discrimination" includes, but is not limited to, the acts described in sections 1630.5 through 1630.13 of this part.

INTERPRETIVE GUIDANCE

REGULATION

1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

INTERPRETIVE GUIDANCE

Section 1630.5 Limiting, Segregating and Classifying

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of section 1630.4. Covered entities are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement.

Thus, for example, it would be a violation of this part for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. It would be a violation of this part for an employer to adopt a separate track of job promotion or progression for employees with disabilities based on a presumption that employees with disabilities are uninterested in, or incapable of, performing particular jobs. Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges. It would also be a violation of this part to deny employment to an applicant or employee with a disability based on generalized fears about the safety of an individual with such a disability, or based on generalized assumptions about the absenteeism rate of an individual with such a disability.

In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

So, for example, it would be permissible for an employer to

REGULATION

INTERPRETIVE GUIDANCE

offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g. limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28-29; House Labor Report at 58-59; House Judiciary Report at 36.

Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees, or reduces the amount of medical insurance coverage that it will provide to all employees, is not in violation of this part, even if the benefits reduction has an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons are in violation of this part. See Alexander v. Choate, 469 U.S. 287 (1985). See Senate Report at 85; House Labor Report at 137. (See also, the discussion at section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans).

REGULATION

1630.6 Contractual or other arrangements.

(a) In general. It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(b) Contractual or other arrangement defined. The phrase "contractual or other arrangement or relationship" includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) Application. This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

INTERPRETIVE GUIDANCE

Section 1630.6 Contractual or Other Arrangements

An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. This provision does not affect the determination of whether or not one is a "covered entity" or "employer" as defined in section 1630.2.

This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect.

Part 1630 notes that this provision applies to parties on either side of the contractual or other relationship. This is intended to highlight that an employer whose employees provide services to others, like an employer whose employees receive services, must ensure that those employees are not discriminated against on the basis of disability. For example, a copier company whose service representative is a dwarf could be required to provide a stepstool, as a reasonable accommodation, to enable him to perform the necessary repairs. However, the employer would not be required, as a reasonable accommodation, to make structural changes to its customer's inaccessible premises.

The existence of the contractual relationship adds no new obligations under part 1630. The employer, therefore, is not liable through the contractual arrangement for any discrimination by the contractor against the contractor's own employees or applicants, although the contractor, as an employer, may be liable for such discrimination.

An employer or other covered entity, on the other hand, cannot evade the obligations imposed by this part by engaging in a contractual or other relationship. For example, an employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement. See Conference Report at 59; House Labor Report at 59-61; House Judiciary Report at 36-37.

REGULATION

INTERPRETIVE GUIDANCE

To illustrate, assume that an employer is seeking to contract with a company to provide training for its employees. Any responsibilities of reasonable accommodation applicable to the employer in providing the training remain with that employer even if it contracts with another company for this service. Thus, if the training company were planning to conduct the training at an inaccessible location, thereby making it impossible for an employee who uses a wheelchair to attend, the employer would have a duty to make reasonable accommodation unless to do so would impose an undue hardship. Under these circumstances, appropriate accommodations might include (1) having the training company identify accessible training sites and relocate the training program; (2) having the training company make the training site accessible; (3) directly making the training site accessible or providing the training company with the means by which to make the site accessible; (4) identifying and contracting with another training company that uses accessible sites; or (5) any other accommodation that would result in making the training available to the employee.

As another illustration, assume that instead of contracting with a training company, the employer contracts with a hotel to host a conference for its employees. The employer will have a duty to ascertain and ensure the accessibility of the hotel and its conference facilities. To fulfill this obligation the employer could, for example, inspect the hotel first-hand or ask a local disability group to inspect the hotel. Alternatively, the employer could ensure that the contract with the hotel specifies it will provide accessible guest rooms for those who need them and that all rooms to be used for the conference, including exhibit and meeting rooms, are accessible. If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory, for the cost of any accommodation needed to provide access to the hotel and conference, and for any other costs accrued by the employer. (In addition, the hotel may also be independently liable under title III of the ADA). However, this would not relieve the employer of its responsibility under this part nor shield it from charges of discrimination by its own employees. See House Labor Report at 40; House Judiciary Report at 37.

REGULATION

1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

INTERPRETIVE GUIDANCE

REGULATION

1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

INTERPRETIVE GUIDANCE

Section 1630.8 Relationship or Association with an Individual with a Disability

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

This provision also applies to other benefits and privileges of employment. For example, an employer that provides health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report at 61-62; House Judiciary Report at 38-39.

REGULATION

1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

INTERPRETIVE GUIDANCE

Section 1630.9 Not Making Reasonable Accommodation

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

It should be noted, however, that the provision of such items may be required as a reasonable accommodation where such items are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office.

The term "supported employment," which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional ("job coach") to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as "supported employment." For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of a qualified individual with a disability as a reasonable accommodation. However, an employer would not be

required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of section 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. That individual is not entitled to a reasonable accommodation because the individual is not "otherwise qualified" for the position.

REGULATION

INTERPRETIVE GUIDANCE

On the other hand, if the individual has graduated from an accredited law school and passed the bar examination, the individual would be "otherwise qualified." The law firm would thus be required to provide a reasonable accommodation, such as a machine that magnifies print, to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. See Senate Report at 33-34; House Labor Report at 64-65.

The reasonable accommodation that is required by this part should provide the qualified individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an employee disabled by a back impairment with a state-of-the art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. See Senate Report at 35; House Labor Report at 66; see also Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that are known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation. See Senate Report at 34; House Labor Report at 65.

REGULATION

INTERPRETIVE GUIDANCE

Process of Determining the Appropriate Reasonable Accommodation

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34-35; House Labor Report at 65-67.

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) analyze the particular job involved and determine its purpose and essential functions;

(2) consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate

REGULATION

INTERPRETIVE GUIDANCE

accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from state or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that, as provided in section 1630.9(c) of this part, the failure to obtain or receive technical assistance from the federal agencies that administer the ADA will not excuse

Regulation

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

Interpretive Guidance

the employer from its reasonable accommodation obligation. Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. It should also be noted that the individual's willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation should the individual for any reason be unable or unwilling to continue to provide the accommodation.

Reasonable Accommodation Process Illustrated

The following example illustrates the informal reasonable accommodation process. Suppose a Sack Handler position requires that the employee pick up fifty pound sacks and carry them from the company loading dock to the storage room, and that a sack handler who is disabled by a back impairment requests a reasonable accommodation. Upon receiving the request, the employer analyzes the Sack Handler job and determines that the essential function and purpose of the job is not the requirement that the job holder physically lift and carry the sacks, but the requirement that the job holder cause the sack to move from the loading dock to the storage room.

The employer then meets with the sack handler to ascertain precisely the barrier posed by the individual's specific disability to the performance of the job's essential function of relocating the sacks. At this meeting the employer learns that the individual can, in fact, lift the sacks to waist level, but is prevented by his or her disability from carrying the sacks from the loading dock to the storage room. The employer and the individual agree that any of a number of potential accommodations, such as the provision of a dolly, hand truck, or cart, could enable the individual to transport the sacks that he or she has lifted.

REGULATION

INTERPRETIVE GUIDANCE

Upon further consideration, however, it is determined that the provision of a cart is not a feasible effective option. No carts are currently available at the company, and those that can be purchased by the company are the wrong shape to hold many of the bulky and irregularly shaped sacks that must be moved. Both the dolly and the hand truck, on the other hand, appear to be effective options. Both are readily available to the company, and either will enable the individual to relocate the sacks that he or she has lifted. The sack handler indicates his or her preference for the dolly. In consideration of this expressed preference, and because the employer feels that the dolly will allow the individual to move more sacks at a time and so be more efficient than would a hand truck, the employer ultimately provides the sack handler with a dolly in fulfillment of the obligation to make reasonable accommodation.

Section 1630.9(b).

This provision states that an employer or other covered entity cannot prefer or select a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual's need for an accommodation cannot enter into the employer's or other covered entity's decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d).

The purpose of this provision is to clarify that an employer or other covered entity may not compel a qualified individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided would not be required to accept a reader as an accommodation. However, if the individual were not able to read unaided and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 65; House Judiciary Report at 71-72.

REGULATION

1630.10 Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

INTERPRETIVE GUIDANCE

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that that criteria, as used by the employer, are job-related to the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under Section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing Section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See Senate Report at 37-39; House Labor Report at 70-72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. (See section 1630.2(n) Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

REGULATION

1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

INTERPRETIVE GUIDANCE

Section 1630.11 Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. If, when the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

REGULATION

INTERPRETIVE GUIDANCE

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (e.g., through an interview, or through education, license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. (See section 1630.9 Not Making Reasonable Accommodation) See Senate Report at 37-38; House Labor Report at 70-72; House Judiciary Report at 42; see also Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); Crane v. Dole, 617 F. Supp. 156 (D.D.C. 1985).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

REGULATION

1630.12 Retaliation and coercion.

(a) Retaliation. It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) Coercion, interference or intimidation. It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

INTERPRETIVE GUIDANCE

REGULATION

1630.13 Prohibited medical examinations and inquiries.

(a) Pre-employment examination or inquiry. Except as permitted by section 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) Examination or inquiry of employees. Except as permitted by section 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

INTERPRETIVE GUIDANCE

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 39; House Labor Report at 75; House Judiciary Report at 44.

REGULATION

1630.14 Medical examinations and inquiries specifically permitted.

(a) Acceptable pre-employment inquiry. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

INTERPRETIVE GUIDANCE

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation. For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category. So, for example, it would not be permitted for an employer to request that an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration.

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function

REGULATION

INTERPRETIVE GUIDANCE

must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function. If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Rather, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

An employer is permitted to ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer within a reasonable established time period prior to the administration of the test. The employer may also request that documentation of the need for the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats. (See section 1630.11 Administration of Tests).

Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. (See section 1630.9 Not Making Reasonable Accommodation: Process of Determining the Appropriate Reasonable Accommodation).

REGULATION

(b) Employment entrance examination. A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(1) Information obtained under paragraph (b) of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require

INTERPRETIVE GUIDANCE

As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act is not restricted by this part. (See section 1630.1(b) and (c) Applicability and Construction).

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59-60; Senate Report at 39; House Labor Report at 73-74; House Judiciary Report at 43.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance

Regulation

emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

(3) Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See section 1630.15(b) Defenses to charges of discriminatory application of selection criteria).

(c) Examination of employees. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

Interpretive Guidance

examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating this part.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part.

Consistent with this section and with section 1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in section 1630.16(f).

Section 1630.14(c) Examination of employees

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers or other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part. This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are

REGULATION

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

(d) Other acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program

INTERPRETIVE GUIDANCE

required by medical standards or requirements established by Federal, state, or local law that are consistent with the ADA and this part (or in the case of a federal standard, with Section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74-75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription

REGULATION

available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

INTERPRETIVE GUIDANCE

drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 75; House Judiciary Report at 43-44.

REGULATION

1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a)Disparate treatment charges. It may be a defense to a charge of disparate treatment brought under sections 1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) Charges of discriminatory application of selection criteria. -- (1) In general. It may be a defense to a charge of discrimination, as described in section 1630.10, that an alleged application of

INTERPRETIVE GUIDANCE

Section 1630.15 Defenses

The section on defenses in part 1630 is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of a individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15(b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, i.e., that

REGULATION

qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See section 1630.2(r) defining direct threat).

(c) Other disparate impact charges. It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

INTERPRETIVE GUIDANCE

screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

REGULATION

(d) Charges of not making reasonable accommodation. It may be a defense to a charge of discrimination, as described in section 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

"

INTERPRETIVE GUIDANCE

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (e.g., no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at section 1630.5 Limiting, Segregating and Classifying, and section 1630.10 Qualification Standards, Tests, and Other Selection Criteria.

Section 1630.15(d) Defense to Not Making Reasonable Accommodation

An employer or other covered entity alleged to have discriminated because it did not make a reasonable accommodation, as required by this part, may offer as a defense that it would have been an undue hardship to make the accommodation.

It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship, as defined in section 1630.2(p), and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite. See House Judiciary Report at 42.

The concept of undue hardship that has evolved under Section 504 of the Rehabilitation Act and is embodied in this part is unlike the "undue hardship" defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed

REGULATION

INTERPRETIVE GUIDANCE

to satisfy the "de minimis" title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68-69; House Judiciary Report at 40-41.

Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business' thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

It should be noted, moreover, that the employer would not be able to show undue hardship if the disruption to its employees were the result of those employees' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.

REGULATION

(e) Conflict with other federal laws. It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) Additional defenses. It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by sections 1630.14 or 1630.16.

INTERPRETIVE GUIDANCE

Section 1630.15(e) Defense - Conflicting Federal Laws and Regulations

There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a non-exclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

REGULATION

1630.16 Specific activities permitted.

(a) Religious entities. A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.

(b) Regulation of alcohol and drugs. A covered entity:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

INTERPRETIVE GUIDANCE

Section 1630.16 Specific Activities Permitted

Section 1630.16(a) Religious Entities

Religious organizations are not exempt from title I of the ADA or this part. A religious corporation, association, educational institution, or society may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria. See Senate Report at 42; House Labor Report at 76-77; House Judiciary Report at 46.

Section 1630.16(b) Regulation of Alcohol and Drugs

This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds all of its other employees. Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part. As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of part 1630 when the employer acts on the basis of such use.

REGULATION

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(c) Drug testing. -- (1) General policy. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its

INTERPRETIVE GUIDANCE

Section 1630.16(c) Drug Testing

This provision reflects title I's neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual's medical condition beyond whether the individual

REGULATION

job applicants or employees is not a violation of section 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) Transportation Employees. This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) Confidentiality. Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of

INTERPRETIVE GUIDANCE

is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47.

REGULATION

section 1630.14(b)(2) and (3) of this part.

(d) Regulation of smoking. A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) Infectious and communicable diseases; food handling jobs. -- (1) In general. Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) Effect on state or other laws. This part does not

INTERPRETIVE GUIDANCE

Section 1630.16(e) Infectious and Communicable Diseases; Food Handling Jobs

This provision addressing food handling jobs applies the "direct threat" analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.

If no such reasonable accommodation is possible, the employer may refuse to assign, or to continue to assign the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual. However, if the individual is a current employee, the employer would be required to consider the accommodation of reassignment to a vacant position not involving food handling for which the individual is qualified. Conference Report at 61-63. (See section 1630.2(r) Direct Threat).

REGULATION

preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) Health insurance, life insurance, and other benefit plans. --(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

INTERPRETIVE GUIDANCE

Section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans

This provision is a limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans. It does not apply to those who establish, sponsor, observe or administer plans not involving benefits, such as liability insurance plans.

The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This provision is not intended to disrupt the current regulatory structure for self-insured employers. These employers may establish, sponsor, observe, or administer the terms of a bona fide benefit plan not subject to state laws that regulate insurance. This provision is also not intended to disrupt the current nature of insurance underwriting, or current insurance industry practices in sales, underwriting, pricing, administrative and other services, claims and similar insurance related activities based on classification of risks as regulated by the States.

The activities permitted by this provision do not violate part 1630 even if they result in limitations on individuals with

REGULATION

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f)(1),(2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

INTERPRETIVE GUIDANCE

disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part. Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted.

However, an employer or other covered entity cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks. Part 1630 requires that decisions not based on risk classification be made in conformity with non-discrimination requirements. See Senate Report at 84-86; House Labor Report at 136-138; House Judiciary Report at 70-71. See the discussion of section 1630.5 Limiting, Segregating and Classifying.

I. TITLE I: AN OVERVIEW OF LEGAL REQUIREMENTS

This chapter of the manual provides a brief overview of the basic requirements of Title I of the ADA. Following chapters look at these and other requirements in more detail and illustrate how they apply to specific employment practices.

Who Must Comply with Title I of the ADA?

Private employers, state and local governments, employment agencies, labor unions, and joint labor-management committees must comply with Title I of the ADA. The ADA calls these "covered entities." For simplicity, this manual generally refers to all covered entities as "employers," except where there is a specific reason to emphasize the responsibilities of a particular type of entity.

An employer cannot discriminate against qualified applicants and employees on the basis of disability. The ADA's requirements ultimately will apply to employers with 15 or more employees. To give smaller employers more time to prepare for compliance, coverage is phased in two steps as follows:

Number of employees	Coverage begins
25 or more	July 26, 1992
15 or more	July 26, 1994

Covered employers are those who have 25 or more employees (1992) or 15 or more employees (1994), including part-time employees, working for them for 20 or more calendar weeks in the current or preceding calendar year. The ADA's definition of "employee" includes U.S. citizens who work for American companies, their subsidiaries, or firms controlled by Americans outside the USA. However, the Act provides an exemption from coverage for any action in compliance with the ADA which would violate the law of the foreign country in which a workplace is located.

(Note that state and local governments, regardless of size, are covered by employment nondiscrimination requirements under Title II of the ADA as of January 26, 1992. See Coordination of Overlapping Federal Requirements below.)

The definition of "employer" includes persons who are "agents" of the employer, such as managers, supervisors, foremen, or others who act for the employer, such as agencies used to conduct background checks on candidates. Therefore, the employer is responsible for actions of such persons that may violate the law. These coverage requirements are similar to those of Title VII of the Civil Rights Act of 1964.

Special Situations

Religious organizations are covered by the ADA, but they may give employment preference to people of their own religion or religious organization.

> **For example**: A church organization could require that its employees be members of its religion. However, it could not discriminate in employment on the basis of disability against members of its religion.

The **legislative branch** of the U.S. Government is covered by the ADA, but is governed by different enforcement procedures established by the Congress for its employees.

Certain individuals appointed by elected officials of state and local governments also are covered by the special enforcement procedures established for Congressional employees.

Who Is Exempt?

Executive agencies of the U.S. Government are exempt from the ADA, but these agencies are covered by similar nondiscrimination requirements and additional affirmative employment requirements under Section 501 of the Rehabilitation Act of 1973. Also exempted from the ADA (as they are from Title VII of the Civil Rights Act) are corporations fully owned by the U.S. Government, Indian tribes, and bona fide private membership clubs that are not labor organizations and that are exempt from taxation under the Internal Revenue Code.

Who Is Protected by Title I?

The ADA prohibits employment discrimination against "qualified individuals with disabilities." A qualified individual with a disability is:

an individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

To understand who is and who is not protected by the ADA, it is first necessary to understand the Act's definition of an "individual with a disability" and then determine if the individual meets the Act's definition of a "qualified individual with a disability."

The ADA definition of individual with a disability is very specific. A person with a "disability" is an individual who:

- has a physical or mental impairment that substantially limits one or more of his/her major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

(See Chapter II.)

Individuals Specifically not Protected by the ADA

The ADA specifically states that certain individuals are not protected by its provisions:

Persons who currently use drugs illegally

Individuals who currently use drugs illegally are not individuals with disabilities protected under the Act when an employer takes action because of their continued use of drugs. This includes people who use prescription drugs illegally as well as those who use illegal drugs.

However, people who have been rehabilitated and do not currently use drugs illegally, or who are in the process of completing a rehabilitation program may be protected by the ADA. (See Chapter VIII.)

Other specific exclusions

The Act states that homosexuality and bisexuality are not impairments and therefore are not disabilities under the ADA. In addition, the Act specifically excludes a number of behavior disorders from the definition of "individual with a disability." (See Chapter II.)

Employment Practices Regulated by Title I of the ADA

Employers cannot discriminate against people with disabilities in regard to any employment practices or terms, conditions, and privileges of employment. This prohibition covers all aspects of the employment process, including:

- application
- testing
- hiring
- assignments
- evaluation
- disciplinary actions
- training
- promotion
- medical examinations
- layoff/recall
- termination
- compensation
- leave
- benefits

Actions which Constitute Discrimination

The ADA specifies types of actions that may constitute discrimination. These actions are discussed more fully in the following chapters, as indicated:

1) Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability. (See Chapter VII.)

2) Participating in a contractual or other arrangement or relationship that subjects an employer's qualified applicant or employee with a disability to discrimination. (See Chapter VII.)

3) Denying employment opportunities to a qualified individual because s/he has a relationship or association with a person with a disability. (See Chapter VII.)

4) Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the business. (See Chapters III. and VII.)

5) Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability unless they are job-related and necessary for the business. (See Chapter IV.)

6) Failing to use employment tests in the most effective manner to measure actual abilities. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or speaking skills of an employee or applicant with a disability (unless those are the skills the test is designed to measure). (See Chapter V.)

7) Denying an employment opportunity to a qualified individual because s/he has a relationship or association with an individual with a disability. (See Chapter VII.)

8) Discriminating against an individual because s/he has opposed an employment practice of the employer or filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the Act. (See Chapter X.)

Reasonable Accommodation and the Undue Hardship Limitation

Reasonable accommodation

Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination. Reasonable accommodation is any change in the work environment or in the way things are usually done that results in equal employment opportunity for an individual with a disability.

An employer must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an undue hardship on the operation of its business.

Some examples of reasonable accommodation include:

- making existing facilities used by employees readily accessible to, and usable by, an individual with a disability;
- job restructuring;
- modifying work schedules;
- reassignment to a vacant position;
- acquiring or modifying equipment or devices;
- adjusting or modifying examinations, training materials, or policies;
- providing qualified readers or interpreters.

An employer is not required to lower quality or quantity standards to make an accommodation. Nor is an employer obligated to provide personal use items, such as glasses or hearing aids, as accommodations.

Undue hardship

An employer is not required to provide an accommodation if it will impose an undue hardship on the operation of its business. **Undue hardship** is defined by the ADA as an action that is:

> **"excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."**

In determining undue hardship, factors to be considered include the nature and cost of the accommodation in relation to the size, the financial resources, the nature and structure of the employer's operation, as well as the impact of the accommodation on the specific facility providing the accommodation. (See Chapter III.)

Health or Safety Defense

An employer may require that an individual not pose a "direct threat" to the health or safety of himself/herself or others. A health or safety risk can only be considered if it is "a significant risk of substantial harm." Employers cannot deny an employment opportunity merely because of a slightly increased risk. An assessment of "direct threat" must be strictly based on valid medical analyses and/or other objective evidence, and not on speculation. Like any qualification standard, this requirement must apply to all applicants and employees, not just to people with disabilities.

If an individual appears to pose a direct threat because of a disability, the employer must first try to eliminate or reduce the risk to an acceptable level with reasonable accommodation. If an effective accommodation cannot be found, the employer may refuse to hire an applicant or discharge an employee who poses a direct threat. (See Chapter IV.)

Pre-employment Inquiries and Medical Examinations

An employer may not ask a job applicant about the existence, nature, or severity of a disability. **Applicants** may be asked about their ability to perform specific job functions. An employer may not make medical inquiries or conduct a medical examination until after a job offer has been made. A job offer may be conditioned on the results of a medical examination or inquiry,

but only if this is required for all entering employees in similar jobs. Medical examinations of **employees** must be job-related and consistent with the employer's business needs. (See Chapters V. and VI.)

Drug and Alcohol Use

It is not a violation of the ADA for employers to use drug tests to find out if applicants or employees are currently illegally using drugs. Tests for illegal use of drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal users of drugs and alcoholics to the same performance and conduct standards as other employees. (See Chapter VIII.)

Enforcement and Remedies

The U.S. Equal Employment Opportunity Commission (EEOC) has responsibility for enforcing compliance with Title I of the ADA. An individual with a disability who believes that (s)he has been discriminated against in employment can file a charge with EEOC. The procedures for processing charges of discrimination under the ADA are the same as those under Title VII of the Civil Rights Act of 1964. (See Chapter X.)

Remedies that may be required of an employer who is found to have discriminated against an applicant or employee with a disability include compensatory and punitive damages, back pay, front pay, restored benefits, attorney's fees, reasonable accommodation, reinstatement, and job offers. (See Chapter X.)

Posting Notices

An employer must post notices concerning the provisions of the ADA. The notices must be accessible, as needed, to persons with visual or other reading disabilities. A new equal employment opportunity (EEO) poster, containing ADA provisions and other federal employment nondiscrimination provisions may be obtained by writing EEOC at 1801 L Street N.W., Washington, D.C., 20507, or calling 1-800-669-EEOC or 1-800-800-3302 (TDD).

Coordination of Overlapping Federal Requirements

Employers covered by Title I of the ADA also may be covered by other federal requirements that prohibit discrimination on the basis of disability. The ADA directs the agencies with enforcement authority for these legal requirements to coordinate their activities to prevent duplication and avoid conflicting standards. Overlapping requirements exist for both public and private employers.

Title II of the ADA, enforced by the U.S. Department of Justice, prohibits discrimination in all **state and local government programs and activities**, including employment, after January 26, 1992.

The Department of Justice regulations implementing Title II provide that EEOC's Title I regulations will constitute the employment nondiscrimination requirements for those state and local governments covered by Title I (governments with 25 or more employees after July 26, 1992; governments with 15 or more employees after July 26, 1994). If a government is not covered by Title I, or until it is covered, the Title II employment nondiscrimination requirements will be those in the Department of Justice coordination regulations applicable to federally assisted programs under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of federal financial assistance.

Section 504 employment requirements in most respects are the same as those of Title I, because the ADA was based on the Section 504 regulatory requirements. (Note that governments receiving federal financial assistance, as well as federally funded private entities, will continue to be covered by Section 504.)

In addition, some **private employers** are covered by Section 503 of the Rehabilitation Act. Section 503 requires nondiscrimination and affirmative action by federal contractors and subcontractors to employ and advance individuals with disabilities, and is enforced by the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor.

The EEOC, the Department of Labor, the Department of Justice and the other agencies that enforce Section 504 (i.e., Federal agencies with programs of financial assistance) will coordinate their enforcement efforts under the ADA and the Rehabilitation Act, to assure consistent standards and to eliminate unnecessary duplication. (See Chapter X. For further information see Resource Directory: "Federal Agencies that Enforce Other Laws Prohibiting Discrimination on the Basis of Disability.")

II. WHO IS PROTECTED BY THE ADA?

INDIVIDUAL WITH A DISABILITY
QUALIFIED INDIVIDUAL WITH A DISABILITY

2.1 Introduction

The ADA protects qualified individuals with disabilities from employment discrimination. Under other laws that prohibit employment discrimination, it usually is a simple matter to know whether an individual is covered because of his or her race, color, sex, national origin or age. But to know whether a person is covered by the employment provisions of the ADA can be more complicated. It is first necessary to understand the Act's very specific definitions of **"disability"** and **"qualified individual with a disability."** Like other determinations under the ADA, deciding who is a "qualified" individual is a case-by case process, depending on the circumstances of the particular employment situation.

2.2 Individual With a Disability

The ADA has a three-part definition of "disability." This definition, based on the definition under the Rehabilitation Act, reflects the specific types of discrimination experienced by people with disabilities. Accordingly, it is not the same as the definition of disability in other laws, such as state workers' compensation laws or other federal or state laws that provide benefits for people with disabilities and disabled veterans.

Under the ADA, an individual with a disability is a person who has:

- a physical or mental **impairment** that **substantially limits** one or more **major life activities;**
- a **record** of such an impairment; or
- is **regarded as** having such an impairment.

2.1(a) An Impairment that Substantially Limits Major Life Activities

The first part of this definition has three major subparts that further define who is and who is not protected by the ADA.

(i) A Physical or Mental Impairment

A physical impairment is defined by the ADA as:

> "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine."

A mental impairment is defined by the ADA as:

> "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Neither the statute nor EEOC regulations list all diseases or conditions that make up "physical or mental impairments," because it would be impossible to provide a comprehensive list, given the variety of possible impairments.

A person's impairment is determined without regard to any medication or assistive device that s/he may use.

> **For example**: A person who has epilepsy and uses medication to control seizures, or a person who walks with an artificial leg would be considered to have an impairment, even if the medicine or prosthesis reduces the impact of that impairment.

An impairment under the ADA is a physiological or mental disorder; simple physical characteristics, therefore, such as eye or hair color, lefthandedness, or height or weight within a normal range, are not impairments. A physical condition that is not the result of a physiological disorder, such as pregnancy, or a predisposition to a certain disease would not be an impairment. Similarly, personality traits such as poor judgment, quick temper or irresponsible behavior, are not themselves impairments. Environmental, cultural, or economic disadvantages, such as lack of education or a prison record also are not impairments.

> **For example**: A person who cannot read due to dyslexia is an individual with a disability because dyslexia, which is a learning disability, is an impairment. But a person who cannot read because she dropped out of school is not

an individual with a disability, because lack of education is not an impairment.

"Stress" and "depression" are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder.

> **For example**: A person suffering from general "stress" because of job or personal life pressures would not be considered to have an impairment. However, if this person is diagnosed by a psychiatrist as having an identifiable stress disorder, s/he would have an impairment that may be a disability.

A person who has a contagious disease has an impairment. For example, infection with the Human Immunodeficiency Virus (HIV) is an impairment. The Supreme Court has ruled that an individual with tuberculosis which affected her respiratory system had an impairment under Section 504 of the Rehabilitation Act*. However, although a person who has a contagious disease may be covered by the ADA, an employer would not have to hire or retain a person whose contagious disease posed a direct threat to health or safety, if no reasonable accommodation could reduce or eliminate this threat. (See Health and Safety Standards, Chapter IV.)

(ii) Major Life Activities

To be a disability covered by the ADA, an impairment must substantially limit one or more **major life activities**. These are activities that an average person can perform with little or no difficulty. Examples are:

- **walking**
- **speaking**
- **breathing**
- **performing manual tasks**
- **seeing**
- **hearing**
- **learning**
- **caring for oneself**
- **working**

These are examples only. Other activities such as sitting, standing, lifting, or reading are also major life activities.

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* School Board of Nassau Cty. v. Arline, 480 U.S. 273 (1987).

(iii) Substantially Limits

An impairment is only a "disability" under the ADA if it **substantially limits** one or more major life activities. An individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an average person in the general population.

The regulations provide three factors to consider in determining whether a person's impairment substantially limits a major life activity.

- **its nature and severity;**
- **how long it will last or is expected to last;**
- **its permanent or long term impact, or expected impact.**

These factors must be considered because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the **effect** of an impairment or condition on the life of a particular person. Some impairments, such as blindness, deafness, HIV infection or AIDS, are by their nature substantially limiting, but many other impairments may be disabling for some individuals but not for others, depending on the impact on their activities.

> **For example**: Although cerebral palsy frequently significantly restricts major life activities such as speaking, walking and performing manual tasks, an individual with very mild cerebral palsy that only slightly interferes with his ability to speak and has no significant impact on other major life activities is not an individual with a disability under this part of the definition.

The determination as to whether an individual is substantially limited must always be based on the effect of an impairment on that individual's life activities.

> **For example**: An individual who had been employed as a receptionist-clerk sustained a back injury that resulted in considerable pain. The pain permanently restricted her ability to walk, sit, stand, drive, care for her home, and engage in recreational activities. Another individual who had been employed as a general laborer had sustained a

back injury, but was able to continue an active life, including recreational sports, and had obtained a new position as a security guard. The first individual was found by a court to be an individual with a disability; the second individual was found not significantly restricted in any major life activity, and therefore not an individual with a disability.

Sometimes, an individual may have two or more impairments, neither of which by itself substantially limits a major life activity, but that together have this effect. In such a situation, the individual has a disability.

For example: A person has a mild form of arthritis in her wrists and hands and a mild form of osteoporosis. Neither impairment by itself substantially limits a major life activity. Together, however, these impairments significantly restrict her ability to lift and perform manual tasks. She has a disability under the ADA.

Temporary Impairments

Employers frequently ask whether "temporary disabilities" are covered by the ADA. How long an impairment lasts is a factor to be considered, but does not by itself determine whether a person has a disability under the ADA. The basic question is whether an impairment "substantially limits" one or more major life activities. This question is answered by looking at the extent, duration, and impact of the impairment. Temporary, non-chronic impairments that do not last for a long time and that have little or no long term impact usually are not disabilities.

For example: Broken limbs, sprains, concussions, appendicitis, common colds, or influenza generally would not be disabilities. A broken leg that heals normally within a few months, for example, would not be a disability under the ADA. However, if a broken leg took significantly longer than the normal healing period to heal, and during this period the individual could not walk, s/he would be considered to have a disability. Or, if the leg did not heal properly, and resulted in a permanent impairment that significantly restricted walking or other major life activities, s/he would be considered to have a disability.

Substantially Limited in Working

It is not necessary to consider if a person is substantially limited in the major life activity of "working" if the person is substantially limited in any other major life activity.

> **For example**: If a person is substantially limited in seeing, hearing, or walking, there is no need to consider whether the person is also substantially limited in working.

In general, a person will not be considered to be substantially limited in working if s/he is substantially limited in performing only a **particular** job for one employer, or unable to perform a very specialized job in a particular field.

> **For example**: A person who cannot qualify as a commercial airline pilot because of a minor vision impairment, but who could qualify as a co-pilot or a pilot for a courier service, would not be considered substantially limited in working just because he could not perform a particular job. Similarly, a baseball pitcher who develops a bad elbow and can no longer pitch would not be substantially limited in working because he could no longer perform the specialized job of pitching in baseball.

But a person need not be totally unable to work in order to be considered substantially limited in working. The person must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, compared to an average person with similar training, skills, and abilities.

The regulations provide factors to help determine whether a person is substantially limited in working. These include:

- the **type of job** from which the individual has been disqualified because of the impairment;
- the **geographical area** in which the person may reasonably expect to find a job;
- the **number and types of jobs using similar training, knowledge, skill, or abilities** from which the individual is disqualified within the geographical area, and/or

- the **number and types of other jobs in the area that do not involve similar training, knowledge, skill, or abilities** from which the individual also is disqualified because of the impairment.

  For example: A person would be considered significantly restricted in a "class of jobs" if a back condition prevents him from working in any heavy labor job. A person would be considered significantly limited in the ability to perform "a broad range of jobs in various classes" if she has an allergy to a substance found in most high-rise office buildings in the geographic area in which she could reasonably seek work, and the allergy caused extreme difficulty in breathing. In this case, she would be substantially limited in the ability to perform the many different kinds of jobs that are performed in high-rise buildings. By contrast, a person who has a severe allergy to a substance in the particular office in which she works, but who is able to work in many other offices that do not contain this substance, would not be significantly restricted in working.

  For example: A computer programmer develops a vision impairment that does not substantially limit her ability to see, but because of poor contrast is unable to distinguish print on computer screens. Her impairment prevents her from working as a computer operator, programmer, instructor, or systems analyst. She is substantially limited in working, because her impairment prevents her from working in the class of jobs requiring use of a computer.

In assessing the "number" of jobs from which a person might be excluded by an impairment, the regulations make clear that it is only necessary to indicate an approximate number of jobs from which an individual would be excluded (such as "few," "many," "most"), compared to an average person with similar training, skills and abilities, to show that the individual would be significantly limited in working.

Specific Exclusions

A person **who currently illegally uses drugs is not protected by the ADA**, as an "individual with a disability", when an employer acts on the basis of such use. However, former drug addicts who have been successfully rehabilitated may be protected by the Act. (See Chapter VIII). (See also

discussion below of a person "regarded as" a drug addict.)

Homosexuality and **bisexuality** are not impairments and therefore are not disabilities covered by the ADA. The Act also states that the term "disability" does not include the following sexual and behavioral disorders:

- transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- compulsive gambling, kleptomania, or pyromania; or
- psychoactive substance use disorders resulting from current illegal use of drugs.

The discussion so far has focused on the first part of the definition of an "individual with a disability," which protects people who currently have an impairment that substantially limits a major life activity. The second and third parts of the definition protect people who may or may not actually have such an impairment, but who may be subject to discrimination because they have a record of or are regarded as having such an impairment.

2.2(b) Record of a Substantially Limiting Condition

This part of the definition protects people who have a history of a disability from discrimination, whether or not they currently are substantially limited in a major life activity.

For example: It protects people with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, controlled or in remission. It also protects people with a history of mental illness.

This part of the definition also protects people who may have been misclassified or misdiagnosed as having a disability.

For example: It protects a person who may at one time have been erroneously classified as having mental retardation or having a learning disability. These people have a record of disability. (If an employer relies on any record [such as an educational, medical or employment record] containing such information to make an adverse employment decision about a person who currently is qualified to perform a job, the action is

subject to challenge as a discriminatory practice.)

Other examples of individuals who have a record of disability, and of potential violations of the ADA if an employer relies on such a record to make an adverse employment decision:

- A job applicant formerly was a patient at a state institution. When very young she was misdiagnosed as being psychopathic and this misdiagnosis was never removed from her records. If this person is otherwise qualified for a job, and an employer does not hire her based on this record, the employer has violated the ADA.

- A person who has a learning disability applies for a job as secretary/receptionist. The employer reviews records from a previous employer indicating that he was labeled as "mentally retarded." Even though the person's resume shows that he meets all requirements for the job, the employer does not interview him because he doesn't want to hire a person who has mental retardation. This employer has violated the ADA.

- A job applicant was hospitalized for treatment for cocaine addiction several years ago. He has been successfully rehabilitated and has not engaged in the illegal use of drugs since receiving treatment. This applicant has a record of an impairment that substantially limited his major life activities. If he is qualified to perform a job, it would be discriminatory to reject him based on the record of his former addiction.

In the last example above, the individual was protected by the ADA because his drug **addiction** was an impairment that substantially limited his major life activities. However, if an individual had a record of casual drug use, s/he would not be protected by the ADA, because casual drug use, as opposed to addiction, does not substantially limit a major life activity.

To be protected by the ADA under this part of the definition, a person must have a record of a physical or mental impairment that substantially limits one or more major life activities. A person would not be protected, for example, merely because s/he has a record of being a "disabled veteran," or a record of "disability" under another Federal statute or program unless this person also met the ADA definition of an individual with a record of a disability.

2.2(c) Regarded as Substantially Limited

This part of the definition protects people who are not substantially limited in a major life activity from discriminatory actions taken because they are perceived to have such a limitation. Such protection is necessary, because, as the Supreme Court has stated and the Congress has reiterated, "society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments."

The legislative history of the ADA indicates that Congress intended this part of the definition to protect people from a range of discriminatory actions based on "myths, fears and stereotypes" about disability, which occur even when a person does not have a substantially limiting impairment.

An individual may be protected under this part of the definition in three circumstances:

1. The individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment.

   For example: An employee has controlled high blood pressure which does not substantially limit his work activities. If an employer reassigns the individual to a less strenuous job because of unsubstantiated fear that the person would suffer a heart attack if he continues in the present job, the employer has "regarded" this person as disabled.

2. The individual has an impairment that is substantially limiting because of attitudes of others toward the condition.

   For example: An experienced assistant manager of a convenience store who had a prominent facial scar was passed over for promotion to store manager. The owner promoted a less experienced part-time clerk, because he believed that customers and vendors would not want to look at this person. The employer discriminated against her on the basis of disability, because he perceived and treated her as a person with a substantial limitation.

3. The individual may have no impairment at all, but is regarded by an employer as having a substantially limiting impairment.

For example: An employer discharged an employee based on a rumor that the individual had HIV disease. This person did not have any impairment, but was treated as though she had a substantially limiting impairment.

This part of the definition protects people who are "perceived" as having disabilities from employment decisions based on stereotypes, fears, or misconceptions about disability. It applies to decisions based on unsubstantiated concerns about **productivity, safety, insurance, liability, attendance, costs of accommodation, accessibility, workers' compensation costs or acceptance by co-workers and customers.**

Accordingly, if an employer makes an adverse employment decision based on unsubstantiated beliefs or fears that a person's perceived disability will cause problems in areas such as those listed above, and cannot show a legitimate, nondiscriminatory reason for the action, that action would be discriminatory under this part of the definition.

2.3 Qualified Individual with a Disability

To be protected by the ADA, a person must not only be an individual with a disability, but must be qualified. An employer is not required to hire or retain an individual who is not qualified to perform a job. The regulations define a qualified individual with a disability as a person with a disability who:

"satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."

There are two basic steps in determining whether an individual is "qualified" under the ADA:

(1) Determine if the individual meets necessary prerequisites for the job, such as:

- education;
- work experience;
- training;

- skills;
- licenses;
- certificates;
- other job-related requirements, such as good judgment or ability to work with other people.

For example: The first step in determining whether an accountant who has cerebral palsy is qualified for a certified public accountant job is to determine if the person is a licensed CPA. If not, s/he is not qualified. Or, if it is a company's policy that all its managers have at least three years' experience working with the company, an individual with a disability who has worked for two years for the company would not be qualified for a managerial position.

This first step is sometimes referred to as determining if an individual with a disability is **"otherwise qualified."** Note, however, that if an individual meets all job prerequisites except those that s/he cannot meet because of a disability, and alleges discrimination because s/he is "otherwise qualified" for a job, the employer would have to show that the requirement that screened out this person is "job related and consistent with business necessity." (See Chapter IV)

If the individual with a disability meets the necessary job prerequisites:

(2) Determine if the individual can perform the essential functions of the job, with or without reasonable accommodation.

This second step, a key aspect of nondiscrimination under the ADA, has two parts:

- Identifying "essential functions of the job"; and
- Considering whether the person with a disability can perform these functions, unaided or with a "reasonable accommodation."

The ADA requires an employer to focus on the essential functions of a job to determine whether a person with a disability is qualified. This is an important nondiscrimination requirement. Many people with disabilities who can perform essential job functions are denied employment because they cannot do things that are only marginal to the job.

For example: A file clerk position description may state that the person holding the job answers the telephone, but if in fact the basic functions of the job are to file and retrieve written materials, and telephones actually or usually are handled by other employees, a person whose hearing impairment prevents use of a telephone and who is qualified to do the basic file clerk functions should not be considered unqualified for this position.

2.3(a) Identifying the Essential Functions of a Job

Sometimes it is necessary to identify the essential functions of a job in order to know whether an individual with a disability is "qualified" to do the job. The regulations provide guidance on identifying the essential functions of the job. The first consideration is **whether employees in the position actually are required to perform the function.**

For example: A job announcement or job description for a secretary or receptionist may state that typing is a function of the job. If, in fact, the employer has never or seldom required an employee in that position to type, this could not be considered an essential function.

If a person holding a job does perform a function, the next consideration is **whether removing that function would fundamentally change the job.**

The regulations list several reasons why a function could be considered essential:

1. **The position exists to perform the function.**

For example:

- A person is hired to proofread documents. The ability to proofread accurately is an essential function, because this is the reason that this position exists.
- A company advertises a position for a "floating" supervisor to substitute when regular supervisors on the day, night, and graveyard shifts are absent. The only reason this position exists is to have someone who can work on any of the three shifts in place of an absent supervisor. Therefore, the ability to work at any time of day is an essential function of the job.

2. **There are a limited number of other employees available to perform the function, or among whom the function can be distributed.**

   This may be a factor because there are only a few other employees, or because of fluctuating demands of a business operation.

   For example: It may be an essential function for a file clerk to answer the telephone if there are only three employees in a very busy office and each employee has to perform many different tasks. Or, a company with a large workforce may have periods of very heavy labor-intensive activity alternating with less active periods. The heavy work flow during peak periods may make performance of each function essential, and limit an employer's flexibility to reassign a particular function.

3. **A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.**

   For example, A company wishes to expand its business with Japan. For a new sales position, in addition to sales experience, it requires a person who can communicate fluently in the Japanese language. Fluent communication in the Japanese language is an essential function of the job.

The regulation also lists several types of **evidence** to be considered in determining whether a function is essential. This list is not all-inclusive, and factors not on the list may be equally important as evidence. Evidence to be considered includes:

a. The employer's judgment

An employer's judgment as to which functions are essential is important evidence. However, the legislative history of the ADA indicates that Congress did not intend that this should be the only evidence, or that it should be the prevailing evidence. Rather, the employer's judgment is a factor to be considered along with other relevant evidence.

However, the consideration of various kinds of evidence to determine which functions are essential does not mean that an employer will be second-guessed on production standards, setting the quality or quantity of work that must be performed by a

person holding a job, or be required to set lower standards for the job.

For example: If an employer requires its typists to be able to accurately type 75 words per minute, the employer is not required to show that such speed and accuracy are "essential" to a job or that less accuracy or speed would not be adequate. Similarly, if a hotel requires its housekeepers to thoroughly clean 16 rooms per day, it does not have to justify this standard as "essential." However, in each case, if a person with a disability is disqualified by such a standard, the employer should be prepared to show that it does in fact require employees to perform at this level, that these are not merely paper requirements and that the standard was not established for a discriminatory reason.

b. A written job description prepared before advertising or interviewing applicants for a job

The ADA does not require an employer to develop or maintain job descriptions. A written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. However, the job description will not be given greater weight than other relevant evidence.

A written job description may state that an employee performs a certain essential function. The job description will be evidence that the function is essential, but if individuals currently performing the job do not in fact perform this function, or perform it very infrequently, a review of the actual work performed will be more relevant evidence than the job description.

If an employer uses written job descriptions, the ADA does not require that they be limited to a description of essential functions or that "essential functions" be identified. However, if an employer wishes to use a job description as evidence of essential functions, it should in some way identify those functions that the employer believes to be important in accomplishing the purpose of the job.

If an employer uses written job descriptions, they should be reviewed to be sure that they accurately reflect the actual functions of the current job. Job descriptions written years ago frequently are inaccurate.

For example: A written job description may state that an employee reads temperature and pressure gauges and adjusts machine controls to reflect these readings. The job description will be evidence that these functions are essential. However, if this job description is not up-to-date, and in fact temperature and pressure are now determined automatically, the machine is controlled by a computer and the current employee does not perform the stated functions or does so very infrequently, a review of actual work performed will be more relevant evidence of what the job requires.

In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function if an accommodation would enable this person to perform the job in a different way, and the accommodation does not impose an undue hardship. Although it may be essential that a function be performed, frequently it is not essential that it be performed in a particular way.

For example: In a job requiring use of a computer, the essential function is the **ability to access, input, and retrieve information from the computer.** It is not "essential" that a person in this job enter information manually, or visually read the information on the computer screen. Adaptive devices or computer software can enable a person without arms or a person with impaired vision to perform the essential functions of the job.

Similarly, an essential function of a job on a loading dock may be to move heavy packages from the dock to a storage room, rather than to lift and carry packages from the dock to the storage room.

(See also discussion of Job Analysis and Essential Functions of a Job, below).

If the employer intends to use a job description as evidence of essential functions, the job description must be prepared before advertising or interviewing for a job; a job description prepared after an alleged discriminatory action will not be considered as evidence.

c. The amount of time spent performing the function

For example: If an employee spends most of the time or a majority of the time operating one machine, this would be evidence that operating this machine was an essential function.

d. The consequences of not requiring a person in this job to perform a function

Sometimes a function that is performed infrequently may be essential because there will be serious consequences if it is not performed.

For example:

- An airline pilot spends only a few minutes of a flight landing a plane, but landing the plane is an essential function because of the very serious consequences if the pilot could not perform this function.
- A firefighter may only occasionally have to carry a heavy person from a burning building, but being able to perform this function would be essential to the firefighter's job.
- A clerical worker may spend only a few minutes a day answering the telephones, but this could be an essential function if no one else is available to answer the phones at that time, and business calls would go unanswered.

e. The terms of a collective bargaining agreement

Where a collective bargaining agreement lists duties to be performed in particular jobs, the terms of the agreement may provide evidence of essential functions. However, like a position description, the agreement would be considered along with other evidence, such as the actual duties performed by people in these jobs.

f. Work experience of people who have performed a job in the past and work experience of people who currently perform similar jobs

The work experience of previous employees in a job and the experience of current employees in similar jobs provide pragmatic evidence of actual duties performed. The employer should consult such employees and observe their work operations to identify

essential job functions, since the tasks actually performed provide significant evidence of these functions.

g. Other relevant factors

The nature of the work operation and the employer's organizational structure may be factors in determining whether a function is essential.

For example:

- A particular manufacturing facility receives large orders for its product intermittently. These orders must be filled under very tight deadlines. To meet these deadlines, it is necessary that each production worker be able to perform a variety of different tasks with different requirements. All of these tasks are essential functions for a production worker at that facility. However, another facility that receives orders on a continuous basis finds it most efficient to organize an assembly line process, in which each production worker repeatedly performs one major task. At this facility, this single task may be the only essential function of the production worker's job.

- An employer may structure production operations to be carried out by a "team" of workers. Each worker performs a different function, but every worker is required, on a rotating basis, to perform each different function. In this situation, all the functions may be considered to be essential for the job, rather than the function that any one worker performs at a particular time.

Changing Essential Job Functions

The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability's qualifications for a job are evaluated in relation to its essential functions.

For example: A grocery store may have two different jobs at the checkout stand, one titled, "checkout clerk" and the other "bagger." The essential functions of the checkout clerk are entering the price for each item into a cash register, receiving money, making change, and passing items to the bagger. The essential functions of the bagging job are putting items into bags, giving the bags to the

customer directly or placing them in grocery carts.

For legitimate business reasons, the store management decides to combine the two jobs in a new job called "checker-bagger." In the new job, each employee will have to perform the essential functions of both former jobs. Each employee now must enter prices in a new, faster computer-scanner, put the items in bags, give the bags to the customer or place them in carts. The employee holding this job would have to perform all of these functions. There may be some aspects of each function, however, that are not "essential" to the job, or some possible modification in the way these functions are performed, that would enable a person employed as a "checker" whose disability prevented performance of all the bagging operations to do the new job.

For example: If the checker's disability made it impossible to lift any item over one pound, s/he might not be qualified to perform the essential bagging functions of the new job. But if the disability only precluded lifting items of more than 20 pounds, it might be possible for this person to perform the bagging functions, except for the relatively few instances when items or loaded bags weigh more than 20 pounds. If other employees are available who could help this individual with the few heavy items, perhaps in exchange for some incidental functions that they perform, or if this employee could keep filled bags loads under 20 pounds, then bagging loads over 20 pounds would not be an essential function of the new job.

2.3(b) Job Analysis and the "Essential Functions" of a Job

The ADA does not require that an employer conduct a job analysis or any particular form of job analysis to identify the essential functions of a job. The information provided by a job analysis may or may not be helpful in properly identifying essential job functions, depending on how it is conducted.

The term "job analysis" generally is used to describe a formal process in which information about a specific job or occupation is collected and analyzed. Formal job analysis may be conducted by a number of different methods. These methods obtain different kinds of information that is used for different purposes. Some of these methods will not provide information sufficient to determine if an individual with a disability is qualified to perform "essential" job functions.

For example: One kind of formal job analysis looks at specific job tasks and classifies jobs according to how these tasks deal with data, people, and objects. This type of job analysis is used to set wage rates for various jobs; however, it may not be adequate to identify the essential functions of a particular job, as required by the ADA. Another kind of job analysis looks at the kinds of knowledge, skills, and abilities that are necessary to perform a job. This type of job analysis is used to develop selection criteria for various jobs. The information from this type of analysis sometimes helps to measure the importance of certain skills, knowledge and abilities, but it does not take into account the fact that people with disabilities often can perform essential functions using other skills and abilities.

Some job analysis methods ask current employees and their supervisors to rate the importance of general characteristics necessary to perform a job, such as "strength," "endurance," or "intelligence," without linking these characteristics to specific job functions or specific tasks that are part of a function. Such general information may not identify, for example, whether upper body or lower body "strength" is required, or whether muscular endurance or cardiovascular "endurance" is needed to perform a particular job function. Such information, by itself, would not be sufficient to determine whether an individual who has particular limitations can perform an essential function with or without an accommodation.

As already stated, the ADA does not require a formal job analysis or any particular method of analysis to identify the essential functions of a job. A small employer may wish to conduct an informal analysis by observing and consulting with people who perform the job or have previously performed it and their supervisors. If possible, it is advisable to observe and consult with several workers under a range of conditions, to get a better idea of all job functions and the different ways they may be performed. Production records and workloads also may be relevant factors to consider.

To identify essential job functions under the ADA, a job analysis should focus on the purpose of the job and the importance of actual job functions in achieving this purpose. Evaluating "importance" may include consideration of the frequency with which a function is performed, the amount of time spent on the function, and the consequences if the function is not performed. The analysis may include information on the work environment (such as unusual heat, cold, humidity, dust, toxic substances or stress factors). The job analysis may contain information on the manner in which a job currently is performed, but should not conclude that ability to

perform the job **in that manner** is an essential function, unless there is no other way to perform the function without causing undue hardship. A job analysis will be most helpful for purposes of the ADA if it focuses on the **results** or **outcome** of a function, not solely on the way it customarily is performed.

For example:

- An essential function of a computer programmer job might be described as "ability to develop programs that accomplish necessary objectives," rather than "ability to manually write programs." Although a person currently performing the job may write these programs by hand, that is not the essential function, because programs can be developed directly on the computer.

- If a job requires mastery of information contained in technical manuals, this essential function would be "ability to learn technical material," rather than "ability to read technical manuals." People with visual and other reading impairments could perform this function using other means, such as audiotapes.

- A job that requires objects to be moved from one place to another should state this essential function. The analysis may note that the person in the job "lifts 50 pound cartons to a height of 3 or 4 feet and loads them into truck-trailers 5 hours daily," but should not identify the "ability to manually lift and load 50 pound cartons" as an essential function unless this is the only method by which the function can be performed without causing an undue hardship.

A job analysis that is focused on outcomes or results also will be helpful in establishing appropriate qualification standards, developing job descriptions, conducting interviews, and selecting people in accordance with ADA requirements. It will be particularly useful in helping to identify accommodations that will enable an individual with specific functional abilities and limitations to perform the job. (See Chapter III.)

2.3(c) Perform Essential Functions "With or Without Reasonable Accommodation"

Many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation. However, if an individual with a disability who is otherwise qualified

cannot perform one or more essential job functions because of his or her disability, the employer, in assessing whether the person is qualified to do the job, must consider whether there are modifications or adjustments that would enable the person to perform these functions. Such modifications or adjustments are called **"reasonable accommodations."**

Reasonable accommodation is a key nondiscrimination requirement under the ADA. An employer must first consider reasonable accommodation in determining whether an individual with a disability is qualified; reasonable accommodation also must be considered when making many other employment decisions regarding people with disabilities. The following chapter discusses the employer's obligation to provide reasonable accommodation and the limits to that obligation. The chapter also provides examples of reasonable accommodations.

III. THE REASONABLE ACCOMMODATION OBLIGATION

3.1 Overview of Legal Obligations

- An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business.
- Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.
- The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes.
- An employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation, unless it would cause an undue hardship.
- An employer does not have to make an accommodation for an individual who is not otherwise qualified for a position.
- Generally, it is the obligation of an individual with a disability to request a reasonable accommodation.
- A qualified individual with a disability has the right to refuse an accommodation. However, if the individual cannot perform the essential functions of the job without the accommodation, s/he may not be qualified for the job.
- If the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of providing the accommodation or paying that portion of the cost which would constitute an undue hardship.

3.2 Why Is a Reasonable Accommodation Necessary?

Reasonable accommodation is a key nondiscrimination requirement of the ADA because of the special nature of discrimination faced by people with disabilities. Many people with disabilities can perform jobs without any

need for accommodations. But many others are excluded from jobs that they are qualified to perform because of unnecessary barriers in the workplace and the work environment. The ADA recognizes that such barriers may discriminate against qualified people with disabilities just as much as overt exclusionary practices. For this reason, the ADA requires **reasonable accommodation** as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities.

People with disabilities are restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that make it difficult to get into and around a work site or to use necessary work equipment. Some are excluded or limited by the way people communicate with each other. Others are excluded because of rigid work schedules that allow no flexibility for people with special needs caused by disability. Many are excluded only by barriers in other people's minds; these include unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers.

Under the ADA, when an individual with a disability is qualified to perform the essential functions of a job except for functions that cannot be performed because of related limitations and existing job barriers, an employer must try to find a reasonable accommodation that would enable this person to perform these functions. The reasonable accommodation should reduce or eliminate unnecessary barriers between the individual's abilities and the requirements for performing the essential job functions.

3.3 What Is a Reasonable Accommodation?

Reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. An equal employment opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to an average similarly-situated employee without a disability. The ADA requires reasonable accommodation in three aspects of employment:

- **to ensure equal opportunity in the application process;**
- **to enable a qualified individual with a disability to perform the essential functions of a job; and**
- **to enable an employee with a disability to enjoy equal benefits and privileges of employment.**

same level of performance or to enjoy benefits or privileges equal to those of an average similarly-situated nondisabled person. However, the accommodation does not have to ensure equal results or provide exactly the same benefits or privileges.

> **For example**: An employer provides an employee lunchroom with food and beverages on the second floor of a building that has no elevator. If it would be an undue hardship to install an elevator for an employee who uses a wheelchair, the employer must provide a comparable facility on the first floor. The facility does not have to be exactly the same as that on the second floor, but must provide food, beverages and space for the disabled employee to eat with co-workers. It would not be a reasonable accommodation merely to provide a place for this employee to eat by himself. Nor would it be a reasonable accommodation to provide a separate facility for the employee if access to the common facility could be provided without undue hardship. For example, if the lunchroom was only several steps up, a portable ramp could provide access.

The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability; it does not apply to accommodations that a disabled person may request for some other reason.

> **For example**: Reassignment is one type of accommodation that may be required under the ADA. If an employee whose job requires driving loses her sight, reassignment to a vacant position that does not require driving would be a reasonable accommodation, if the employee is qualified for that position with or without an accommodation. However, if a blind computer operator working at an employer's Michigan facility requested reassignment to a facility in Florida because he prefers to work in a warmer climate, this would not be a reasonable accommodation required by the ADA. In the second case, the accommodation is not needed because of the employee's disability.

A reasonable accommodation need not be the best accommodation available, as long as it is effective for the purpose; that is, it gives the person with a disability an equal opportunity to be considered for a job, to perform the essential functions of the job, or to enjoy equal benefits and privileges of the job.

> **For example**: An employer would not have to hire a full-time reader for a blind employee if a co-worker is available as a part-time reader when needed, and this will enable the blind employee to perform his job duties effectively.