ADA - Title I

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This material is furnished with the express understanding that while this publication is designed to provide accurate and authoritative information with regard to the subject matter covered, it should not be construed as a complete or all inclusive explanation. This reference material is not intended and should not be construed as providing legal advise or giving legal opinions.

Adapted from The Americans with Disabilities Act, Employer/Employee Rights and Responsibilities, A Guide for Iowa, published by the Client Assistance Program, Division of Persons with Disabilities, Iowa Department of Human Rights.

This material can be made available in alternative formats such as audio tape and large print upon request to the State Office of Diversity and Equal Opportunity, ADA/Disability Coordinator at (651)297-8849/V or Minnesota Relay at 800-627-3529.

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The Americans with Disabilities Act of 1990

The authors of the ADA recognized that there are two powerful components of our American business and industry: Employers and employees. The authors intended that this law address the needs of both groups in achieving a viable workforce and productive society. The law was intended to reflect the balance between employer and employee.

While not intended as legal advice, this material contains information on Title I of the ADA. Title I is directly related to the employment provisions of the law and addresses both employers and employees. Both of these groups have responsibilities and rights under the ADA and this material addresses the balance of rights and responsibilities of the law.

This law was designed to remove the barriers which prevent qualified persons from enjoying equal employment opportunities solely because of a disability. ADA represents Americans at their best. It demonstrates America recognizing the vitality and abilities of all people to contribute to our society, particularly in the area of employment.

This is a civil rights law. It prohibits discrimination of persons with disabilities and encourages the recognition of persons with disabilities as full and participating citizens in American society. It recognizes that persons with disabilities are members of the American work force and are an excellent resource for American employers.

Who is a person with a disability?

The ADA protects the rights of persons with disabilities.

The ADA says that a person with a disability is:

1. Someone who has substantial difficulty performing a major life activity (such as breathing, walking, talking, seeing, hearing, learning, etc.) as a result of a physical or mental impairment. This has to be substantial difficulty performing a major life activity and not just temporary.
2. Someone who has a past record of a disability. The person may no longer have an impairment but had a record of a disability in the past.
3. The person is regarded or perceived as having a disability.

The ADA also protects anyone who associates with someone who has a disability.

What are my rights and responsibilities as a person with a disability under Title I of the ADA?

As a person with a disability, you have both rights and responsibilities in the area of employment. An employer cannot discriminate against you because of your disability, if you are qualified for the job. To be qualified you have to be able to do the essential functions of the job, with or without reasonable accommodation. An employer must provide you a reasonable accommodation to help you carry out the essential functions of the job as long as the accommodation does not create an undue hardship to the employer.

As a person with a disability, you also have responsibilities. You must be qualified (with or without reasonable accommodation) and you must also meet the employment expectations of your employer. It is the balance of rights and responsibilities that makes this law functional for all Americans.

What are my rights and responsibilities as an employer under Title I of

the ADA?

If you employ fifteen or more people, you are covered by the Americans with Disabilities Act. Title I of the ADA requires that you do not discriminate against qualified persons with disabilities in your employment practices.

It is imperative that key personnel be aware of the ADA and their obligations under this law. Managers and supervisors should have working knowledge of the significant aspects of the ADA. These terms include:

- Qualified individual with a disability
- Essential functions of the job
- Reasonable accommodation
- Undue hardship
- Direct threat to the health or safety of self or others
- Pre-employment inquiries
- Post offer medical inquiries and examinations
- Case-by-case basis.

As an employer, you have responsibilities under this law. You cannot discriminate against a qualified person with a disability in any aspect of employment practice. You must provide a reasonable accommodation to enable the person with a disability to carry out the essential functions of the job and to participate in employment activities and practices of your organization, unless the accommodation causes an undue hardship. You must consider reasonable accommodation when it is requested and appropriate to the situation. This applies to both applicants and employees.

You also have rights. You can establish and monitor the employment practices for your organization. You can select the most qualified person for a job. You can set the standards and expectations of your agency.

It is balance and responsibilities that makes this law work for Americans.

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Job Qualifications - Employer

As an employer, you have rights.

- You may have job qualifications.
- You may require work experience.
- You may require education.
- You may require specific skills.
- You may require an employee to meet health or safety standards.
- You may require specific licenses or certifications.
- You may have physical and mental requirements.
- You may have qualification standards that an individual not pose a threat to the health or safety of others or to themselves.

As an employer, you have responsibilities.

- You have the responsibility to ensure that your requirements do not screen out or tend to screen out an individual with a disability solely on the basis of the disability.
- You have the responsibility to ensure that any job requirements and qualifications that do screen out or tend to screen out persons with disabilities are job related and consistent with business necessity.

Job-Related and Consistent with Business Necessity

If a qualification tends to screen out persons with disabilities, it must be job related. The qualification must be a real and actual measure for the specific job (not a general class of jobs).

If a standard excludes a person because of a disability, that standard must relate to the essential functions of the job. If the standard does not relate to the essential functions of the job, it is not consistent with business necessity.

Job Qualifications - Applicant

As an applicant with a disability, you have rights.

- You have the right to be considered for any job for which you are qualified.
- An employer cannot discriminate against you on the basis of your disability, if you can perform the essential functions of the job.
- You have the right as an individual with a disability to request a reasonable accommodation to enable you to carry out the essential functions of the job.

As an applicant with a disability, you have responsibilities.

- You have the responsibility to meet the minimum qualifications of the job for which you are applying.
- You have the responsibility to be able to perform the essential functions of the job.
- If you need a reasonable accommodation to enable you to carry out the essential functions of the job, you must tell the employer you need the accommodation.
- If the employer requests medical documentation of the need for an accommodation, you must provide specific, relevant documentation.

Qualified Individual With A Disability

Title I of the ADA protects a qualified individual with a disability. An individual is qualified when that

person meets the necessary qualifications of the job and can carry out the essential functions of the job with or without reasonable accommodation.

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Job Duties - Employer

As an employer, you have rights.

- You decide what is an essential function of the job.
- You decide what is a marginal function of the job.
- You do not have to eliminate or reassign essential functions of the job to accommodate a person with a disability.
- You do not have to change essential functions of the job.

As an employer, you have responsibilities.

- You have the responsibility to provide a reasonable accommodation so a qualified person with a disability can do the essential functions of the job.
- You have the responsibility to eliminate or reassign marginal functions as a reasonable accommodation to a qualified person with a disability.

Determining Essential Functions

- Is the function actually being performed?
- Would removing the function fundamentally alter the nature of the job?
- Does the position exist to perform the function?
- Is there limited staff available to perform the function?
- Is the function highly specialized?
- What is the amount of time spent doing this function?
- Have past employees performed this function?
- What are the terms of collective bargaining?
- What are the contents of the position description?
- What are the consequences of an employee in this position not performing this function?

Job Duties - Employee

As an employee with a disability, you have rights.

- You have the right to a reasonable accommodation so that you can complete the essential functions of the job unless the accommodation results in an undue hardship.
- You have a right to the elimination or reassignment of marginal functions of the job as a reasonable accommodation.

As an employee with a disability, you have responsibilities.

- You must request a reasonable accommodation, if you need it to carry out the essential functions of the job.
- You must provide specific, relevant medical documentation of your need for a reasonable accommodation, if the employer requests it.
- You must be able to do the essential functions of the job, with or without reasonable accommodation.

About Position Descriptions

The ADA does not require that an employer have a written position description. However written job descriptions are considered evidence of essential functions.

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Recruitment - Employer

As an employer, you have rights.

- You can recruit employees for any job as long as recruitment does not screen out or tend to screen out persons with disabilities.
- You are not required to undertake special activities to recruit persons with disabilities.

As an employer, you have responsibilities.

- You must provide persons with disabilities equal opportunity to participate in the recruitment process.
- You have the responsibility to ensure that recruitment information is accessible to persons with disabilities.

Recruitment - Applicant

As an applicant with a disability, you have rights.

- You must be afforded an equal opportunity to participate in the recruitment process.
- You have the right to access to recruitment information.

As an applicant with a disability, you have responsibilities.

- You have the responsibility to seek recruitment information.

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Applications - Employer

As an employer, you have rights.

- You can inquire about specific experience, skills and job requirements.
- You can ask for medical documentation, if a person with a disability requests a reasonable accommodation to apply for a job.

As an employer, you have responsibilities.

- You must not request pre-employment medical inquiries on application forms.
- You must make applications accessible to persons with disabilities.
- You must provide reasonable accommodation to enable a person with a disability to apply for a job.

Applications - Employee

As an employee with a disability, you have rights.

- You can request that the applications are available in an accessible format.
- You can request a reasonable accommodation to apply for the job.
- Be aware that this request allows the employer to ask for additional medical information.

As an employee with a disability, you have responsibilities.

- You must provide specific, relevant medical documentation for a reasonable accommodation, if this is requested by an employer.
- You must request the reasonable accommodation you need in order to apply for a job.

About Personnel Files

Medical information must be kept confidential and in separate personnel files. This includes reference to requests for accommodation and medical documentation provided in that regard.

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Job Interviews - Employer

As an employer, you have rights.

- You may ask if a person can perform the essential functions of the job.
- You may ask how a person will perform the essential job functions.
- You can ask a person to describe or demonstrate how they will perform the essential job functions, if you ask this uniformly of all applicants.
- You may ask about specific experience.
- You may ask about job requirements.
- You may identify attendance needs and ask if an applicant can fulfill attendance requirements.
- You have the right to request specific, relevant medical documentation when a person indicates a need for a reasonable accommodation.
- You can ask about marginal job functions.

As an employer, you have responsibilities.

- You must focus on the ability of the applicant to do the job and not on the disability of the applicant.
- You must not make medical inquiries regarding a person's disability.
- You must make job application and interview facilities accessible to persons with disabilities.
- You must provide a person with reasonable accommodation in a job interview, when a person with a disability requests this. You can require medical documentation.

Job Interviews - Applicant

As an applicant with a disability, you have rights.

- You have the right to a reasonable accommodation in the interview.
- You have the right to discuss your job qualifications and abilities.
- You have the right to ask for a reasonable accommodation to enable you to perform the essential functions of the job.
- An employer cannot ask you information about your disability during a job interview.

As an applicant with a disability, you have responsibilities.

- You have the responsibility to request a reasonable accommodation, if you need it to apply for a job. Be aware that this request allows the employer to ask for further medical information.
- You have the responsibility to request a reasonable accommodation, if you need it during a job interview.
- You have the responsibility to request a reasonable accommodation, if you need it to carry out the essential functions of the job.
- You have the responsibility to provide specific, relevant medical documentation to an employer, if you are requesting a reasonable accommodation and if the information is requested by the employer.

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Medical Inquiries - Employer

As an employer, you have rights.

- You may require physical agility testing, as long as it is job-related.
- You may require a post-offer medical exam, as long as this is applied uniformly to all employees and the exam is job-related and consistent with business necessity.
- You may offer a job, subject to the results of a post-offer medical exam.
- You may require drug testing.
- You may refuse to assign or hire an individual with specific communicable diseases in a food handling operation.
- You may refuse to hire a person with a disability who poses a direct threat to the health or safety of themselves or others.
- You may prohibit illegal use of drugs in the workplace.
- You may prohibit use of alcohol in the workplace.
- You may require periodic medical exams to determine if employees meet standards required by law. Exams must be job-related and consistent with business necessity.
- You may conduct voluntary medical exams as part of an employee health plan.
- You can require a current employee to submit to a medical exam, as long as the exam is job-related and necessary for business purposes.
- You may make medical inquiries regarding workers' compensation history, after making a conditional job offer.
- You may refuse to hire, or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or workers' compensation history.

As an employer, you have responsibilities.

- You cannot ask an applicant about the disability, the nature or severity of a disability, or the duration of the disability or illness.
- You cannot require a medical exam before making a job offer.
- You must insure that medical exams are job-related and necessary for business purposes.
- You cannot retract a job offer based upon the results of a medical exam, unless the results indicate that the individual cannot do the job, with or without reasonable accommodation.
- You must prove that a reasonable accommodation was not possible or available, if you refuse to hire a person with a disability as the result of a post-offer medical exam.
- You cannot refuse to hire or retain a qualified person with a disability on the basis of stereotypes rooted in fear.
- You cannot refuse to hire or retain a qualified person on the basis of a situation that may happen in the distant future, including an increase in workers' compensation costs.
- You must keep all medical information confidential.
- You must keep medical information in a separate file.
- Only the designated individual can have access to medical files.
- You cannot refuse to hire a person with a disability on the basis of previous workers' compensation claims.
- You can request medication documentation for reasonable accommodation. The request for information should be specific and relevant to the need for an accommodation.

Direct Threat to Health and Safety

- A significant risk of substantial harm.
- A specific risk: identify the duration, nature and severity of the risk and the likelihood of harm.
- Risk documented by medical and/or factual evidence.
- Risk is not reduced or eliminated by reasonable accommodation.
- Risk is not speculative or remote.

Medical Inquiries - Employee

As an employee with a disabilitiy, you have rights.

- An employer cannot ask about your disability before offering you a job.
- An employer cannot ask you about workers' compensation history before offering you a job.
- You have the right to medical information remaining confidential.
- You have the right to medical information stored in a separate file.
- You are not required to take a medical exam before a job offer is made. The post-offer medical exam must be job-related and consistent with the needs of the business.
- You cannot be rejected for a job on the basis of a post-offer medical exam, unless the exam indicates that you cannot do the essential functions, with or without reasonable accommodation, or you pose a direct threat to the health and safety of others or yourself.
- You have the right to a reasonable accommodation, if a post-offer medical exam determines you cannot do the essential functions of the job without accommodation, as long as the accommodation does not pose an undue hardship to the employer.
- You cannot be rejected from a job solely on the basis of a previous workers' compensation claim.

As an employee with a disability, you have responsibilities.

- An employer may require you to have periodic medical exams to determine if you meet specific job standards required by law.
- You must submit to a post-offer medical exam, if this is required by the employer of all employees in that job category and it is job-related.
- You must provide accurate information in the post-offer medical exam.
- An employer can require you to take a physical agility test, as long as the test is job related.
- An employer can require drug testing.
- An employer can refuse to hire you if a post-offer medical exam shows that you pose a direct threat to the health and safety of others or a direct threat to yourself, and no reasonable accommodation will reduce or eliminate that threat.

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Reference Checks - Employer

As an employer, you have rights.

- You may inquire about job functions and tasks performed.
- You may ask about the quality and quantity of work the applicant is able to complete.
- You may ask about the applicant's attendance records and other job related issues.

As an employer, you have responsibilities.

- You cannot ask about illness, sick leave, medical issues or disability.
- You may not ask about prior reasonable accommodations.
- You may not ask about prior workers' compensation claims.

Reference Checks - Applicant

As an applicant with a disability, you have rights.

- You have the right that only job-related questions be asked of your references.

As an applicant with a disability, you have responsibilities.

- You have the responsibility to provide references upon request.

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Testing - Employer

As an employer, you have rights.

- You have the right to test the applicant to determine job qualifications.
- You are not required to offer a reasonable accommodation in testing, unless requested by a person with a disability.

As an employer, you have responsibilities.

- You have the responsibility to make testing accessible to persons with disabilities.
- You have the responsibility to use testing that reflects skills and aptitudes rather than impaired skills.
- You have the responsibility to provide reasonable accommodation in testing when requested by a persons with a disability, as long as the accommodation does not result in an undue hardship.
- You must ensure that testing which screens out or tends to screen out persons with disabilities is job-related and consistent with business necessity.

Testing - Applicant

As an applicant with a disability, you have rights.

- You have the right to accessible testing.
- You have the right to request a reasonable accommodation in order to participate in employment testing.
- You have the right to testing which focuses on abilities rather than impaired skills.

As an applicant with a disability, you have responsibilities.

- You have the responsibility to request a reasonable accommodation, if you need it to take employment testing.
- You have the responsibility to provide specific, relevant medical documentation specifying need for reasonable accommodation in testing, if the employer requests this information.

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Hiring - Employer

As an employer, you have rights.

- You have the right to select the most qualified person for the job.
- You do not have to give preference to a person with a disability over a more qualified individual.
- If a person with a disability cannot perform the essential functions of the job, with or without reasonable accommodation, that person is not qualified for the job.

As an employer, you have responsibilities.

- You have the responsibility to consider a person with a disability when that person is qualified for the job.
- You cannot consider the relative cost of a reasonable accommodation as a factor in the hiring decision.
- You cannot eliminate a qualified person with a disability solely on the basis of disability.
- You cannot eliminate a qualified person with a disability on the basis of the cost of an accommodation, unless it poses an undue hardship.
- You cannot base a hiring decision on the elimination of marginal functions of the job to accommodate a qualified person with a disability.
- You cannot use another agency to avoid your ADA hiring responsibilities.

Tips for Managers and Supervisors

- Ask the same questions of everyone.
- Concentrate on ability not disability.
- Make hiring decisions based on the applicant's ability to do the essential functions of the job.
- Be open and flexible.
- Ask yourself if you are making a decision based on the disability. Do not discriminate.

Hiring - Applicant

As a person with a disability, you have rights.

- You have the right to be considered for any job for which you are qualified.
- You have the right to a reasonable accommodation to enable you to carry out the essential functions of the job as long as the accommodation does not pose an undue hardship to the employer.
- An employer cannot consider the cost of the reasonable accommodation in the final hiring decision.
- An employer cannot eliminate you from hiring consideration because you ask for a reasonable accommodation.
- An employer cannot eliminate you from hiring consideration because you cannot perform marginal functions of the job.

As a person with a disability, you have responsibilities.

- You must be qualified for the job.
- You must be able to carry out the essential functions of the job, with or without reasonable accommodation.
- An employer does not have to hire you over a person who is more qualified.

Tips for Applicants

- Be prepared.
- Be honest.
- Know your abilities and qualifications.
- Ask for information

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Reasonable Accommodation - Employer

As an employer, you have rights.

- You do not have to provide an accommodation for a person with a disability if it poses an undue hardship.
- You do not have to provide an accommodation to a person with a disability if the person does not request one.
- You do not have to eliminate essential functions of the job in order to accommodate a person with a disability.
- You can ask for specific and relevant medical proof to justify the need for an accommodation for a person with a disability.
- You do not have to lower production standards as a reasonable accommodation.
- You may choose any accommodation, as long as it is effective. You do not have to choose the first or most expensive accommodation.
- You do not have to provide an accommodation to an individual with a disability who is not otherwise qualified.
- You do not have to supply personal use items as an accommodation.
- You do not have to provide accommodation if no disability is known.
- You do not have to ban fragrances as an accommodation.

Undue Hardship

An employer is not required to make a reasonable accommodation for a person with a disability if it poses an undue hardship. Undue hardship is defined as an accommodation which is unduly costly, extensive, substantial, disruptive or fundamentally alters the nature or operation of the business.

As an employer, you have responsibilities.

- You must consider a reasonable accommodation for a person with a disability when that person has informed you of a disability, and the need for the accommodation to enable the person to carry out the essential functions of the job.
- You must provide reasonable accommodation when requested to enable a person with a disability to participate in the application process.
- You must provide a reasonable accommodation to enable a person with a disability to participate in an interview.
- You must provide a reasonable accommodation to enable a person with a disability to participate in employer-sponsored activities.
- You may not force an individual with a disability to accept an accommodation.
- You must be able to document an accommodation that causes you undue hardship, if you choose not to provide the accommodation.
- You can permit an individual to share the cost of an accommodation, if the accommodation poses an undue hardship. You cannot ask the person to pay for the accommodation.

Examples of Reasonable Accommodation

- Making facilities accessible.
- Making written or oral communication accessible.
- Changing how or when an essential function is done.
- Eliminating marginal functions.
- Restructuring a job.
- Modifying work schedules.
- Reassigning the applicant to a vacant position.
- Modifying equipment and devices.
- Using assertive technology.

- Modifying exams, policies, and training materials.
- Providing qualified readers or sign language interpreters.

Reasonable Accommodation - Employee

As an employee with a disability, you have rights.

- You have the right to a reasonable accommodation that will enable you to apply for a job.
- You have the right to a reasonable accommodation in a job interview.
- You have the right to a reasonable accommodation to help you complete the essential functions of the job as long as the accommodation does not cause an undue hardship to the employer.
- You have a right to a reasonable accommodation that will enable you to participate in employer-sponsored activities.
- You have the right to a reasonable accommodation in testing processes.

As an employee with a disability, you have responsibilities.

- You must request the accommodation if you need one.
- You must provide specific, relevant medical documentation to your employer about the need for an accommodation, if your employer requests this information.
- The employer does not have to provide an accommodation, if it poses an undue hardship.
- You have the responsibility to identify the accommodation you need.
- You have the responsibility to maintain production standards determined by the employer.
- You have the responsibility to carry out all essential functions of the job, with or without reasonable accommodation.

About Reasonable Accommodation

An employer and employee should work together to determine an effective accommodation. The employee should provide information that is helpful to the employer in determining the accommodation. As a person with a disability should be aware, the request for a reasonable accommodation allows the employer to ask further questions about the disability.

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Attendance and Leave - Employer

As an employer, you have rights.

- You have the right to expect regular attendance.
- You have the right to uniformly request medical proof for employee absences.
- You have the right to set works schedules.
- You have the right to apply your leave and attendance policies consistently to similar situations and employees.
- You have the right to deny an accommodation in scheduling or attendance requested by an employee with a disability, if it poses an undue hardship for you.

As an employer, you have responsibilities.

- You must consider a modified work schedule as a reasonable accommodation when requested by a person with a disability and when it is not an undue hardship.
- You must consider a change in scheduling, attendance or leave as a reasonable accommodation, when requested by an employee with a disability, and if the changes does not pose an undue hardship.
- You must treat each employee with a disability on an individual basis when determining reasonable accommodation.
- You must be able to document that the accommodation denied to a person with a disability poses an undue hardship.

ADA and FMLA

Employee attendance and leave may also be covered by the Family and Medical Leave Act of 1993. As an employer, you need to be aware of your responsibilities under FMLA as well as ADA.

Attendance and Leave - Employee

As an employee with a disability, you have rights.

- You have the right to request a modification of attendance or leave, if this is a reasonable accommodation and it does not pose an undue hardship for your employer.
- You have the right to request a change in scheduling, if that will enable you to carry out the essential functions of your job and that does not pose an undue hardship for your employer.

As an employee with a disability, you have responsibilities.

- You must meet the attendance requirements of your job.
- If you need a change in attendance or leave requirements as a reasonable accommodation, you must request this of your employer.
- You must provide specific, relevant medical documentation to your employer, if the employer requests it, regarding a need for change in attendance, leave or scheduling.

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Performance - Employer

As an employer, you have rights.

- You have the right to set performance standards for a job.
- You have the right to require employees to meet production standards.
- You have the right to require employees to meet performance standards.
- You have the right to require employees to meet standards of conduct.
- You have the right to review and evaluate the performance of your employees.
- You do not have to lower production standards as an accommodation.
- You can hold alcoholics and illegal users of drugs to the same standards of performance and conduct as other employees.

As an employer, you have responsibilities.

- You must convey production and performance standards clearly to all employees.
- You must provide a reasonable accommodation to an employee with a disability to enable them to meet performance and production standards when requested by your employee, and when the accommodation does not pose an undue hardship.
- You cannot have separate or higher performance standards for persons with disabilities.

Performance - Employee

As an employee with a disability, you have rights.

- You have the right to a reasonable accommodation to enable you to meet performance and production standards of your employer as long as the accommodation does not pose an undue hardship.
- You have the right to be reviewed and evaluated on performance.

As an employee with a disability, you have responsibilities.

- You must meet the performance and production standards established by your employer.
- You must meet the standards of conduct required by your employer.
- If you need a reasonable accommodation to meet performance and/or production standards, you must request the accommodation from your employer.
- You must provide specific, relevant medical documentation expressing the need for an accommodation, if your employer requests it.

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Compensation - Employer

As an employer, you have rights.

- You can establish the compensation for jobs within your organization.
- If an employee with a disability is reassigned to a part-time position as a reasonable accommodation, you can pay the employee the rate for the part-time job.
- If an employee with a disability is reassigned to a lower paying position as a reasonable accommodation, you can pay the employee the lower rate for that job.

As an employer, you have responsibilities.

- You cannot reduce the pay of an employee with a disability because you had to eliminate marginal job functions as a reasonable accommodation.
- You cannot reduce the pay of an employee with a disability because of the cost of an accommodation.
- You must provide your employees with disabilities with equal compensation to any other employee in similar job classifications.

Compensation - Employee

As an employee with a disability, you have rights.

- You have the right to equal compensation similar to that of any other employee in your job classification.
- You cannot have your pay reduced because marginal job functions were eliminated.
- You cannot have your pay reduced because of the cost of a reasonable accommodation.

As an employee with a disability, you have responsibilities.

- You have the responsibility to fulfill the job expectations.
- You are not required to, but you can choose to, pay for an accommodation or share the cost of an accommodation.
- If you are reassigned to a part-time position as a reasonable accommodation, your employer can pay you the rate for the part-time job.
- If you are reassigned to a lower paying position as a reasonable accommodation, your employer can pay you the lower rate for that job.

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Employee Evaluations - Employer

As an employer, you have rights.

- You can set the standards for evaluation and review of employees.

As an employer, you have responsibilities.

- You must evaluate employees uniformly. Evaluations must not be based on stereotypes.
- You must not harass an employee with a disability.
- You cannot retaliate against an employee, because of a request for reasonable accommodation or because of the disability.
- You cannot evaluate an employee with a disability on the failure to perform marginal job functions.
- You must provide the employee with a reasonable accommodation to allow the employee to participate in the evaluation process.
- You must evaluate an employee on his/her performance without regard to the request or need for a reasonable accommodation.

Employee Evaluations - Employee

As an employee with a disability, you have rights.

- You have the right to be evaluated based upon your ability and not upon your disability.
- You have the right to a reasonable accommodation to enable you to participate in the evaluation.
- You have the right to review your evaluation and any other relevant materials in your personnel file.

As an employee with a disability, you have responsibilities.

- You must request a reasonable accommodation, if you need this to participate in the evaluation process.
- You must provide your employer specific and relevant medical documentation if requested by the employer.

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Promotion - Employer

As an employer, you have rights.

- You have the right to promote employees.
- You have the right to develop promotional standards for employees.
- You have the right to establish a career advancement track for employees.

As an employer, you have responsibilities.

- You must not limit, segregate or classify an individual employee with a disability in such a way that negatively affects promotion.
- You must not limit access to promotional opportunities to persons with disabilities.
- You must not institute a separate progression of promotion for persons with disabilities.
- If you post promotional information, you must insure that employees with disabilities have access to that information.
- You must provide a reasonable accommodation to enable an employee with a disability to carry out the essential functions of the job to which the employee is promoted, unless to do so would result in an undue hardship.

Promotion - Employee

As an employee with a disability, you have rights.

- You have the right to be considered for promotions for which you are otherwise qualified, without regard to your disability.
- You have the right to participate in advancement programs to enable you to achieve promotion.
- You have the right to a reasonable accommodation to enable you to carry out the essential functions of a job to which you are promoted unless the accommodation would cause an undue hardship.
- You have the right to access promotional opportunities, without regard to your disability.
- You have the right to information pertaining to promotions to be provided in an accessible format.

As an employee with a disability, you have responsibilities.

- You must meet the qualifications of the job for which you seek promotion.
- You must be able to carry out the essential functions of the job, with or without a reasonable accommodation.
- You must request a reasonable accommodation, if it is needed to achieve promotion. Be aware that a request for a reasonable accommodation allows the employer to seek further specific, relevant medical information from you.
- You must provide specific and relevant medical documentation of the need for a reasonable accommodation, if your employer requests it.

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Training - Employer

As an employer, you have rights.

- You can decide the training programs you offer employees.
- You can decide the training requirements of the job.

As an employer, you have responsibilities.

- You must insure that training is accessible to your employees with disabilities to enable them to participate.
- You must provide equal opportunity to employees with disabilities to participate in training.

Training - Employee

As an employee with a disability, you have rights.

- You have the right to equal opportunity to participate in training.
- You have the right to training in an accessible format.
- You have the right to a reasonable accommodation in order to participate in training.

As an employee with a disability, you have responsibilities.

- You must request a reasonable accommodation, if you need it, so that you can participate in training.
- You must provide specific and relevant medical documentation of the need for a reasonable accommodation, if your employer requests it.

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Assignments - Employer

As an employer, you have rights.

- You assign employees.
- You do not have to reassign essential functions of the job to accommodate an individual with a disability.

As an employer, you have responsibilities.

- You must consider an employee with a disability for assignments that the employee is qualified to perform.
- You must provide reasonable accommodation to an employee with a disability to enable the employee to do the assignments, if this is requested by the employee and does not cause an undue hardship.

Assignments - Employee

As an employee with a disability, you have rights.

- You have the right to be considered for any assignment for which you are qualified.
- You have the right to a reasonable accommodation so that you can carry out an assignment unless the accommodation results in an undue hardship for the employer.

As an employee with a disability, you have responsibilities.

- You must request a reasonable accommodation, if you need it.
- You must provide specific, relevant medical documentation to an employer of your need for an accommodation, if it is requested.

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Discipline - Employer

As an employer, you have rights.

- You have the right to discipline employees.

As an employer, you have responsibilities.

- You must treat all equivalently situated employees similarly.
- You cannot discipline an employee with a disability because of the elimination of a marginal job function.
- You cannot discipline an employee with a disability because the employee requests a reasonable accommodation.
- You cannot retaliate against an employee because that employee files an ADA complaint against you.

Discipline - Employee

As an employee with a disability, you have rights.

- You cannot be disciplined because you request a reasonable accommodation.
- An employer cannot discipline you because a marginal function is eliminated from your job as a reasonable accommodation.
- You cannot be disciplined because you file an ADA complaint.
- You must be treated similarly to other persons in your job category.

As an employee with a disability, you have responsibilities.

- You must meet the expectations of the job and expect discipline for violation of those expectations.

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Termination - Employer

As an employer, you have rights.

- You can terminate an employee.

As an employer, you have responsibilities.

- You cannot terminate an otherwise qualified employee with a disability on the sole basis of his/her disability.
- You cannot terminate an employee with a disability because that employee needs or requests a reasonable accommodation.
- You cannot terminate an employee with a disability because that employee files an ADA complaint against you.

Termination - Employee

As an employee with a disability, you have rights.

- You have the right to be treated with uniform standards.
- You cannot be terminated solely on the basis of your disability.
- You cannot be terminated because you request an accommodation.
- You cannot be terminated because a marginal job function is eliminated.
- You cannot be terminated because you file an ADA complaint.

As an employee with a disability, you have responsibilities.

- You must meet the job standards, qualifications and conduct set by the employer. If you do not or cannot meet expectations for the job with or without reasonable accommodation, you can be terminated.

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Work Environment and Activities - Employer

As an employer, you have rights.

- You have the right to establish the employee activities of your choice.
- You have the right to establish the work environment for your employees.
- You have the right to ask for specific and relevant medical documentation, if an employee requests an accommodation to participate in employer-sponsored activities.
- You do not have to provide transportation for your employees with disabilities, unless you provide similar transportation to other employees.
- You do not have to ban fragrances in the work environment as a reasonable accommodation.
- You do not have to provide a reasonable accommodation to an employee with a disability to participate in employee activities, unless the employee with a disability requests an accommodation.

As an employer, you have responsibilities.

- You must assure employee activities and facilities are accessible to and useable by your employees with disabilities.
- You must assure that you provide equal opportunities to your employees with disabilities to participate in employer-sponsored social and recreational activities.
- You must provide a reasonable accommodation to employees with disabilities to enable them to participate in employee activities.
- You must not segregate persons with disabilities into separate facilities, offices or common areas, such as break or lunch facilities.

Work Environment and Activities - Employee

As an employee with a disability, you have rights.

- You have the right to participate in employer-sponsored activities.
- You have the right to a reasonable accommodation if you need this to participate in employee activities, and the accommodation does not cause an undue hardship.
- You have the right to information about employee activities in an accessible format.
- You have the right to inclusion in the facilities provided to similarly situated employees.
- You have the right to equal opportunities to participate in social and recreational activities related to your job.
- You have the right to use transportation, if the transportation is offered to other employees in your job category.
- You have the right to be free of harassment because of your disability.

As an employee with a disability, you have responsibilities.

- You must inform your employer if you need a reasonable accommodation to participate in employee activities.
- You must provide specific and relevant medical documentation of the need for an accommodation to participate in employee activities, if your employer requests this.
- You have the responsibility to follow accepted procedures to report harassment.

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This material is available in alternative formats upon request to the Office of Diversity and Equal Opportunity (651)297-8849/V and Minnesota Relay at 800-627-3529.

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The Americans with Disabilities Act (ADA) of 1990 contains several provisions which pertain specifically to agencies, institutions and organizations that provide or have provided examinations leading to employment, licensure, or certification. Both Title I and Title II of the ADA prohibit discrimination in the offering of benefits, programs or services by state and local governments, whether administered directly or by a contractor.

Thus, any examination process carried out by state or local government entities must be offered with appropriate auxiliary aids and services to preclude discrimination on the basis of disability.

The purpose of this text is to provide technical assistance to those individuals involved in the testing and examination process through public entities covered by the ADA. This document draws on extensive experience in making accommodations in the testing process under Section 504 of the 1973 Rehabilitation Act.

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Overview of Legal Obligations

- A public entity must provide an equal opportunity for an individual with a disability to participate in the application process and to be considered for licensure/certification.
- A public entity may not make any pre-employment inquiries regarding disability.
- Tests that screen out or tend to screen out persons with a disability on the basis of disability must be job-related and consistent with business necessity.
- Tests must reflect the skills and aptitudes of the individual rather than impaired sensory, manual, or speaking skills, unless those skills are job-related skills that the test is designed to measure.

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The Law and Its Implications for Testing

The ADA requires that examinations (and the application process leading to examination) must be accessible to persons with disabilities, regardless of who is doing the actual testing. If the test is being given by a state or local government, discrimination on the basis of disability is prohibited under Title II. If the test is being administered by a private entity contracted with state or local government, the subcontractor is also required to adhere to the provisions of Title II for the provision of the test.

In preparing the final rules for implementation of the ADA, the government reviewed thousands of comments voiced by concerned parties regarding various aspects of the new law. Of special note is the following review presented by the Department of Justice, the enforcement authority for Title II of the ADA:

> "Some comments by those who provide examinations for licensing or certification for particular occupations or professions urged that they be permitted to refuse to provide modifications or aids for persons seeking to take the examinations if those individuals, because of their disabilities, would be unable to perform the essential functions of the profession or occupation for which the examination is given, or unless the disability is reasonably determined in advance as not being an obstacle to certification.
>
> The Department of Justice has not changed its rule based on this comment. An examination is one stage of licensing or certification process. An individual should not be barred from attempting to pass that stage of the process merely because he/she might be unable to meet other requirements of the process. (emphasis added) If the examination is not the first stage of the qualification process, an applicant may be required to complete the earlier stages prior to being admitted to the examination. On the other hand, the applicant may not be denied admission to the examination on the basis of doubts about his/her abilities to meet requirements that the examination is not designed to test."

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Types of Tests

A public entity may use any kind of test to determine qualifications for employment, licensure, certification, or credentials. The ADA has two major requirements in relation to tests:

1. If a test screens out or tends to screen out an individual with a disability or a class of such individuals on the basis of disability, it must be job-related and consistent with business necessity. This requirement applies to all kinds of tests.
2. The ADA requires that tests be given to people who have impaired sensory, speaking or manual skills in a format and manner that does not require use of the impaired skill, unless the test is designed to measure that skill. (Sensory skills include the abilities to hear, see and to process information.)

The purpose of these requirements is to insure that tests accurately reflect a person's relevant skills, aptitudes, or pertinent information that the test is designed to measure, rather than the person's impaired skills.

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Responsibilities of Boards of Licensure, Certification and Employers

Typically, government entities and employers are involved in the testing process in one of two ways:

- They directly administer some test of knowledge/skills/achievement to applicants; or
- They use the scores reported by some private agency who administers a similar examination.

The guidelines for compliance outlined below are pertinent to those who administer examinations. However, it is important to remember that any state or local government agency is prohibited from discrimination on the basis of disability. Thus, you have the responsibility of ensuring examinations that are appropriately accessible, even if you are not directly administering the test. You must assure that the entity that administers the test is in compliance with the ADA standards.

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Application Inquiries

No application for employment, licensure, or certification can contain prohibited questions about disability status. Numerous employers and licensing/certification boards across the country violated the ADA because of questions about past history of a disability, particularly psychiatric disabilities. Application forms should be carefully reviewed to ensure that such questions are eliminated.

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Applications for Testing

The ADA requires agencies/entities administering examinations to offer them in an accessible location and to provide auxiliary aids and services for the test-taker with a disability. The application form developed for requesting testing accommodations should provide ample opportunity for the applicant with a disability to clearly state disability-related needs in the application process. While the ADA does not require the agency to recruit and seek qualified persons with disabilities to be involved in the testing process, there is a responsibility to be proactive in meeting the needs of persons with disabilities who choose to access the examination process. *In other words, the administering agency is required to establish a process for making auxiliary aids and services available to persons with disabilities.*

In order to protect the integrity of the testing process and to avoid unnecessary preparation for disability-related needs, the law allows the administering agency to request documentation of eligibility and advance notification of disability-related needs. However, the process involved in documenting disability and requesting accommodation may not impose discriminatory timelines on the individual with the disability.

Applicants with disabilities are entitled to, and have the responsibility to meet, the same deadlines for application and submission of documentation established for pre-registration of non-disabled individuals.

The following wording is suggested for inclusion on the standard application for testing:

> If you have a disability and may require some accommodation in taking this examination, be sure to fill out and submit the 'Request for Accommodation' form along with this application. If an accommodation is not requested in advance, we cannot guarantee the availability of such accommodations on-site.
>
> Such 'Request for Accommodation' forms should be available in all locations where the application forms are available. If the individual is requesting an application to be sent, he/she should be asked if the accommodation form is needed. If the question is NOT asked, a copy of the form should be mailed along with the application.

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Documentation of Disability

The purpose of documentation is to establish the validity of the request for accommodation and to provide information as to what accommodations are required. The testing entity is not allowed to request disability-related information beyond this.

> ***For example***: Requesting test scores for a diagnosis of a learning disability is not appropriate. If the person has already been diagnosed and accommodated as an individual with a learning disability, then that person is disabled under the law and entitled to accommodation.

For persons who have observable disabilities (for example, those who use a wheelchair, who are blind, or who are deaf) the testing agency needs no further documentation of the existence of the disability.

For those with hidden disabilities (for example, a learning disability or a chronic health impairment that affects energy levels or concentration) it is appropriate to request documentation of the need for accommodation.

The applicant may be required to bear the cost of providing the requested documentation. However, the agency or entity administering the examination is required to bear the cost for any modifications or auxiliary aids provided for the examination. A sample form for requesting accommodation and providing documentation is found in Appendix A.

When documentation is necessary, it should be completed and signed by a professional familiar with the applicant's disability and, if possible, the appropriate accommodation. The professional could be a physician, psychologist, rehabilitation counselor, educator or other professional. Unless the individual has been recently diagnosed or has been recently disabled, there is likely to be a history of accommodation in an employment or academic setting. Persons involved in providing the previous academic accommodations, such as a disability access provider, can provide the necessary documentation.

If the applicant already has documentation of previously receiving the same or similar accommodation in a test situation, it should be sufficient to provide that documentation instead of requiring the preparation of new documentation.

If there is not history of accommodation within an employment or academic setting, it is hoped that the applicant knows a professional who is knowledgeable of both the disabilities and the appropriate accommodations. The professional should discuss possible accommodations with the individual in order to make recommendations to the testing entity.

> ***For example***: Even though a computer with word processing software may be an appropriate accommodation for persons with a given disability, if the applicant has never used a computer, this would not be an appropriate accommodation for that individual.

Although is sounds obvious, a permanent disability is a permanent disability! Therefore, even if the diagnosis is old, that does not alter the fact that the individual has a disability. Do not assume that documentation of a disability based on testing results older than three years is not valid. Don't be concerned about the recency of diagnostic testing. It is more pertinent to ask about the testing accommodation(s) provided in the most recent testing setting. If the applicant is requesting accommodation that was not provided in a recent testing setting, then the applicant would be responsible for providing more current documentation supporting this request.

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Confidentially of Disability-Related Information

Any disability-related information is confidential. When you receive documentation of a disability from an applicant, you assume responsibility for maintaining confidentiality. Access to disability-related information within the testing agency should be on a need-to-know basis; it should be made available only for purposes of assuring the appropriate accommodation. It is legally prohibited for the agency to release to any outside entity any information or documentation provided by the applicant in requesting accommodation. Verification of disability-related accommodations provided by the testing agency can be released only upon express written request of the individual.

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If the Requested Accommodation is Not Available

If the requested accommodation is not available, such as an architecturally accessible site, the law requires that it be provided but will allow the use of an alternate testing site. Such alternate sites must be reasonably convenient for the applicant in order to comply with the equal access requirement.

There may be times when the requested accommodation is not available and cannot be provided at an alternate site. It may be necessary to offer an equal effective, alternative accommodation. The law does not require that the preferred accommodation necessarily be provided. It does require that an effective, appropriate accommodation be provided.

The accommodation is provided to allow the individual to demonstrate his/her level of understanding or mastery of the subject.

> ***For example**:* If a computer with requested word processing software is not available, it might be appropriate to substitute a scribe to record the test-taker's answers. Both options do enable the individual with disability-related difficulty in composing handwritten answers to be accommodated. However, if the person has never used a scribe, the unfamiliarity with the accommodation may inhibit him/her from performing at a level representative of the level of skill/competence.

If the availability or appropriateness of the requested accommodation is in doubt, the testing entity should discuss options with the test-taker and may confer with the State ADA Coordinator.

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Is Accommodation Always Required?

In order to be valid, the examination must be shown to accurately test the skill, aptitude, or whatever abilities it purports to measure, rather than the person's disability. Appropriate accommodations must be provided if the test is measuring knowledge or expertise. In typical pencil-and-paper testing, it is very difficult to establish speed as an essential element of the test. However, the decision is not quite so clear if the test is measuring a skill.

> ***For example***: If a test for a beautician's license involves having someone demonstrate his/her ability to give a permanent or hair color treatment within a given amount of time, it would not be expected nor required that extended time be provided to a test-taker with a disability, since speed of performance is an integral part of the skill being measured. However, other accommodations might be required.

In the performance of a job, certain accommodations may be viewed as reasonable. If these same accommodations would affect the performance on the exam, then it would be expected that these accommodations would be provided.

> ***For example***: For a test-taker in a wheelchair, the practical section of the test would need to be administered in a setting that provides architectural access to both the site and the equipment/facilities to be used in demonstrating competency.

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Cost of Accommodations

The law requires that the agency or entity administering the examination must provide any necessary modifications and/or auxiliary aids and services at no cost to the test-taker unless they would result in an undue hardship to the employer.

An undue burden refers to provision of an auxiliary aid or service which requires significant difficulty or expense.

The obligation to provide auxiliary aids or services to ensure equal access and enjoyment is not meant to place an undue burden upon the entity. The determination of whether the provision of an auxiliary aid or service is an undue burden is to be made on a case-by-case basis, based upon the facts of the specific situation.

The following four factors should be considered:

1. The nature and cost of the auxiliary aid or service;
2. The overall financial resources of the facility involved;
3. The overall financial resources of the covered entity;
4. The type of operation(s) of the entity, including composition, structure and functions, the geographic separateness, administrative or fiscal relations of the facility to the covered entity.

The determination of a fundamental alteration or undue burden must be made by the state agency head who has budgetary and spending authority or his/her designee. All agency resources available for use in funding the service, program or activity must be considered and the agency must provide a written statement of reasons as to why the modification, auxiliary aid or service would create an undue burden or fundamental alteration.

Just because one way of meeting the obligation to provide an auxiliary aid or service may be unduly burdensome, however, does not automatically relieve the entity of its obligation to seek out other ways to try and meet its obligation. Only if there are no effective auxiliary aids or services that are not unduly burdensome would the entity be relieved of its obligation. In other words, the ADA requires entities to make a "good faith effort" to provide an effective auxiliary aid or service.

It should be noted that for most of the common testing accommodations requested, the costs are negligible.

Significant cost saving and peace of mind can be achieved with prior planning. Sometimes, it may be possible to obtain a service or borrow equipment from an office or agency that works with individuals with disabilities. This would include disability access offices at the colleges and universities, agencies that train individuals with disabilities to use adaptive equipment, and organizations that prepare alternate media for blind individuals. A list of resources is included at the end of this document.

If adapted or specialized equipment would result in an undue burden if purchased for one individual, and it is not possible to borrow the equipment, there are other options. The person taking the test may be willing to provide his/her own equipment, however, that cannot be mandated as a requirement.

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The purpose of providing accommodations in a testing situation is to enable the individual to demonstrate his/her mastery of the subject being tested. The same accommodation may be used by individuals with different disabilities, and individuals with the same disability may use different accommodations. The emphasis should not be on the consistency of an accommodation, but rather on meeting the needs of each individual.

Test Accommodations

Most test accommodations fall into one of four categories:

- changes to the test *site* (e.g., assuring that the test location is accessible by mass transit, providing nearby accessible parking, ensuring wheelchair accessibility to the testing room and rest room, etc.);
- changes to the test *time limit* (e.g., giving the candidate additional time to complete the test);
- changes to the test *medium* (e.g., use of a large print format, audiotape, videotape, reader, Braille, etc., or use of an answer sheet marker); and
- changes to the test *content* (e.g., changing an item, item type, or changing or deleting a test content area).

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Architecturally Accessible Testing Site

The testing entity shall ensure that testing sites, rooms and restrooms are physically accessible to those who use wheelchairs, canes, crutches, or other mobility aids. Others may have limited strength or flexibility requiring a physically accessible site.

If some sites have less than complete architectural accessibility, it is incumbent on the testing agency to enable an applicant for testing to alert the agency to the need for architectural access and to provide an alternative test site upon request.

Alternative Location

There may be instances when better accommodations can be provided at a different testing site. Perhaps a specific piece of adaptive equipment is available at some sites and not at others. Arrangements for an alternative location for taking an examination and providing proctoring of performance are considered appropriate accommodations under the law. However, the alternative location should provide a comparable degree of geographic convenience for the test-taker as do other sites.

Distraction-Free Space

Some individuals with disabilities may require a testing environment that minimizes distraction as much as possible. This is necessary in order to maintain the level of concentration necessary for them to perform well on the test. Depending upon the disability, distraction may result from noise, movement, or both. Normally, the best way to provide a distraction-free testing space is to place the individual alone in a (proctored) room without phones, street noise, or other distractions. If this is not possible, visual distraction may be minimized by positioning the individual facing away from windows, other test-takers, and other sources of movement or distraction.

Noise distraction sometimes can be minimized through the use of sound-suppression earphones or earplugs, although some individuals may find this as distracting as the noise.

There are individuals who may require a private testing environment in order to perform at their best and not disturb others taking the test. Some, because of the way they process information, perform best if they are able to talk aloud. Others, when channeling their energies to the test, may have verbal outbursts or body tics. Even if these manifestations can be eliminated, the effort required can result in a loss of concentration that may affect their performance.

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Test Schedule Variation

For individuals with health-related disabilities, time of day and test schedule can be critical. Functioning level may vary during the day because of the effects of medications or flagging energy levels. For some, blood sugar levels must be maintained by eating several times a day at prescribed time. In these situations, the individual could be accommodated by scheduling testing around the eating schedule, or by allowing food to be taken into the testing setting.

Extended Time

This is probably the most common accommodation. It is used to accommodate a variety of disabilities. Extended time is often appropriate for candidates whose disabilities reduces available test time (e.g., because of a visual, print, or manipulative/writing impairment or because of a need for a frequent change of position, use of the restroom, etc.).

With respect to test time limits, tests fall into *two* categories:

1. "power" tests, and
2. "speeded" tests.

- **"*Power*" tests**

  A "power" test is one in which speed is not a major consideration, and all or nearly all candidates are expected to be able to complete the test within the normal time allowance.

  When a test needs to be presented via a different medium (e.g., via a reader, audiotape, Braille, or sign language interpreter) or involves the use of an answer sheet marker (person or device), requests to extend the normal time allowance on power test components of an examination *should* be approved. Due to different and varying degrees of disability, one is often unable to establish the amount of additional time necessary. Experience has shown that applicants with approved unlimited extended time typically require 30 minutes to 2 hours additional time. In most instances, providing the applicant with *double* the regular time allowance will prove sufficient.

  Appropriate accommodations on *power*

  - breaks for rest or use of toilet facilities (such periods not to count toward total test time allowance);
  - extra time; and
  - individual monitor.

- **"*Speeded*" tests**

  A "speeded" test is one in which most candidates are expected to correctly answer all items which they attempt, but not all candidates are expected to attempt all items because of the time allowed.

  Requests to extend the normal time allowance on speeded test components of an examination should not be approved because they would compromise the validity of the test.

  Anytime an auxiliary aids such as a scribe or adaptive equipment is used, extended time should be provided.

The real question is how much extra time is appropriate. For most test-takers, the standard extension is time-and-a-half. However, this should not be regarded as a firm ceiling. Decisions should be reviewed on a case-by-case basis, keeping in mind the type of accommodations provided, the disability involved, and the type of test administered.

If a reader or scribe is used, double-time usually is appropriate. When providing accommodations, a request for unlimited time is not considered reasonable. The applicant should be able to complete the test within a finite amount of time. It is the responsibility of the professional who completes the supporting documentation to provide the time frame that should be utilized. In those few instances, in which the ability to complete the test in a specific period of time is a critical factor in the examination (as discussed earlier for skill testing), extended time may not be an appropriate accommodation.

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Scribed Exams

The use of a scribe may be an appropriate accommodation for someone who has difficulty writing independently. An individual who will serve as scribe should be carefully prepared prior to testing to assure that he/she knows the vocabulary involved in the testing process and understands the boundaries of the assistance to be provided. There are not hard-and-fast rules - it may vary with the disability as to how far the scribe can and should go. In general, the roles of the scribe is to write what is dictated, no more and no less. An option to use a scribe may be to allow the use of a word processor or other technology.

Sign Language Interpreters

Some individuals who are deaf may request the use of a sign language interpreter during testing. The use of a qualified interpreter for interpreting test instructions and to assist in communication between the test-taker and the proctor is appropriate. Recognize that qualified sign language interpreters function under a strict code of ethics regarding their role and their participation does not pose a threat to test integrity.

Readers

One option in the provision of testing accommodation is to provide a qualified reader for the individual whose disability precludes independent reading of the test material. Readers should read with even inflection throughout, so that the test-taker does not receive any cues by the way the information is read. The role of the reader is simply to read, not interpret, what is presented; interpretation of test questions is inappropriate.

While the provision of reader services is a traditional means of providing accommodations for individuals with print disabilities, this may not be the best alternative in today's high tech world. There are other options available that may require less time and/or human resources on the part of the testing agency while still providing appropriate accommodation for the test-taker. One option is to have the test read onto audio tape in advance. Test-takers then use the tape in a private setting and can listen, and listen again, if necessary. Another option is to allow the use of adaptive equipment that substitutes for a live reader.

Adaptive Equipment

If the test if available on computer disk, test-takers with reading disabilities may be able to take the test independently, given access to a talking terminal to assist with reading of test questions and responses. For others, use of a computer system that includes word processing software may eliminate the need for a scribe.

The use of calculators (with and without voice output) is becoming an increasingly frequent accommodation for individuals with certain disabilities. The major questions here is whether the use of a calculator is a matter of convenience or accommodation. In the past, many believed philosophically that knowledge of basic mathematical facts and concepts was necessary; the use of a calculator allowed the individual with a disability to avoid an area in which other test-takers must demonstrate competence. Today, use of a standard four-function calculator is so prevalent in our society that knowledge of how to use and manipulate mathematical symbols and notations has replaced knowledge of times tables and square root calculation as the rudiments of knowledge for success. The Educational Testing Service, the largest private testing agency in the U.S., with its administration of the SAT, GRE, LSAT, and GMAT is exploring the use of four-function calculators for everyone during testing.

Modification of Test Presentation/Response Format

For some individuals who read Braille, converting a test to Braille may be an appropriate accommodation. There is now technology available that will allow a fairly direct conversion of information from print to Braille. While the testing agency may not wish to purchase this technology, it is appropriate to determine where such technology can be accessed when the need arises.

Not all individuals who are blind read Braille fluently or will find Braille to be their input mechanism of choice. For some individuals, the difference between being able to take a test independently or needing a reader/scribe is a question of the size of the print and the size of the space allowed for the response. Enlarging the test may provide an effective test accommodation that promotes independence for the test-taker. Large print is generally considered to be 14 to 18 point size, the recommended font is Universal.

For some individuals with disabilities, computer score sheets may be difficult or impossible to complete accurately and neatly. An accommodation in such instances might involve having the test-taker indicate the appropriate answer directly on the test paper and having someone from the testing agency transfer those answers to the computer score sheet when the test-taker has completed the exam.

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Common Disabilities and Appropriate Accommodations

Visual-Impairments

For testing purposes, these candidates fall into *three* categories:

- blind - must receive all written material by an aural or tactile route;
- partially sighted -- may be legally blind but have sufficient residual vision to read printed material with the aid of enlarging devices or if printed in large type, or to see the pattern or layout of charts, graphs, and diagrams (possibly drawn on an enlarged scale with dark lines). Their vision may be limited in such a way that they can use it only for parts of the test and will need a reader or other aural means for the rest of the test.
- limited vision and specialized visual problems -- typically handle reading tasks without accommodation but may encounter problems with certain types of printed material (e.g., very small or closely-spaced type). Included in this group are those who are "color blind," or those who have sudden periods of vision loss or unusual eye problems.

Appropriate accommodations may include:

- delivery of the test in a large print format, via a reader or audiotape, in Braille, under special lighting, or use of a magnifier;
- use of a manual Brailler, tape recorder, or marker for note taking and/or recording answers;
- providing an amanuensis (person who handwrites dictation);
- use of a calculating device, such as an abacus or "talking" calculator;
- providing extra time (see section on "Time Limits");
- individual monitor to ensure candidate encounters no unforeseen problems;
- test center accessible by mass transit.

Deaf or Hard-of-Hearing

For testing purposes, these candidates fall into two categories:

- prelingually deaf (i.e., loss of hearing prior to development of normal language facility) -- these candidates may have limited English language concepts that substantially limit their ability to comprehend some materials in standard English. They usually receive instructions in print or through American Sign Language (ASL) or English Sign Language.
- hard-of-hearing (i.e., loss of hearing after development of normal language facility) -- these candidates function in the same way as non-disabled candidates with respect to written material but must receive some accommodation with respect to oral instructions. They should be routinely seated where they are close to and have a clear view of the monitor giving instructions. Monitors for hard-of-hearing candidates should be screened and briefed on their

responsibilities.

Appropriate accommodations may include:

- seating near and in the direct line-of-sight of the test monitor;
- providing written instructions for all test instructions normally delivered orally;
- providing an interpreter;
- individual monitor to ensure the candidate has grasped all instructions;
- extra time.

Print-disabilities (other than visually-impaired)

May include persons with learning disabilities and developmental disabilities.

These candidates are impaired in processing information from the printed page. They vary in the degree of their impairment and its consistency from day-to-day.

Appropriate accommodations include:

- reader or audiotape test booklet;
- individual monitor;
- recording device for recording answers;
- tape recorder for taking notes;
- amanuensis; and
- extra time.

Manipulative/writing-impairments

May include persons with learning and developmental disabilities.

For testing purposes, these candidates require accommodation only in the recording of their responses and in the operation of any necessary test equipment, such as calculators.

Appropriate accommodations include:

- recording device for recording answers;
- typewriter or personal computer;
- individual monitor;
- marker for note taking;
- amanuensis; and
- extra time.

Mobility-Disabilities

This group includes candidates whose disabilities limit ambulation and/or ability to drive a car. Some candidates will drive and need special parking arrangements, others who are unable to drive may use mass transit/paratransit, while others must be transported to the test center.

Appropriate accommodations include:

- assuring test location is accessible by mass transit;
- providing parking for candidates with mobility impairments;
- ensuring wheelchair accessibility to testing room and restroom;
- table or desk with sufficient clearance and at appropriate height to permit comfortable work for a person in a wheelchair or the use of a wheelchair desk board; (Table/desk must be a minimum

of 28" high no higher that 34," knee clearance at 27" high, 30" wide and 19" deep, and a toe space of 9"high.); and
- testing room as close as possible to entrances and elevators.

Debilitating Conditions

This group includes persons with conditions which tend to impair their strength, stamina or other faculties, either chronically or on a recurrent basis. Examples of such conditions are weakness or fatigue, loss of vision found in some persons with AIDS, cerebral palsy, muscular dystrophy and related illnesses. While most persons with debilitating conditions will not require test accommodation, some will require conditions similar to those discussed above (including vision-related disabilities affecting the use of time), and should be treated accordingly.

Changes to Test Content

In the case of a candidate with a disability for whom accommodation on the job is reasonable, equivalent modification of test material is appropriate. Modifying test content, (e.g., changing an item, item type, or changing or deleting a test content area) which would be an essential change in what would be reasonable on the job, would not be appropriate.

Accommodation of Non-Written Tests:

Although most requests for test accommodations involve written tests, other test modes may present serious difficulties for certain candidates. These include:

Oral Exams
Oral exams are likely to pose problems for the deaf, hard-of-hearing and those with certain kinds of speech impairments. Any of the accommodations listed in the section on the deaf and hard-of-hearing should be considered. In addition, oral exam questions should be provided to deaf and hard-of-hearing candidates in hard-copy form. In the case of candidates with speech-impairments, special care should be taken to ensure that oral examiners are understanding of the disabling condition and, therefore, will fairly evaluate the candidate's responses.

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Title 1: Testing Compliance

Testing Accommodation Request Form

The information requested below and any documentation regarding your disability and your need for an accommodation in testing will be considered strictly confidential and will not be shared with any outside source without your express written permission.

Name: _____

Address: _____

Phone #_____ SS#_____

Accommodation(s) requested for the_____ examination.

(Check all that apply)

- Accessible testing site
- Braille
- Large Print
- Audio Tape
- Reader
- Scribe
- Sign Language Interpreter
- Extended Time
- Time-and-a-half
- Double time
- More than double time (specify): _____

Separate testing area

Use of computer or other adaptive equipment (specify): _____

Comments:

Signed: _____ Date: _____

Some accommodation requests may require additional documentation

Title 1: Testing Compliance

Testing Accommodation
Documentation of Disability-Related Need

If you have a learning disability, a psychological disability, or other hidden disability that requires an accommodation in testing, please have this section completed by an appropriate professional (education professional, doctor, psychologist, psychiatrist) to certify that your disability requires the requested test accommodation.

If you have existing documentation of having the same or similar accommodation provided to you in another test situation, you may submit such documentation instead of having this portion of the form completed.

I have known _____ since _____

in my capacity as a _____

The applicant has discussed with me the nature of the test to be administered. It is my opinion that because of this applicant's disability he/she should be accommodated by providing the following: (check all that apply)

Accessible testing site

Braille

Large Print

Audio Tape

Reader

Scribe

Sign Language Interpreter

Extended Time

Time-and-a-half

Double time

More than double time (specify): _____

Separate testing area

Use of computer or other adaptive equipment (specify): _____

Comments:

Signed: _____ Date: _____

Title: _____ License # (if applicable): _____

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Confidentiality Requirements

An employer must keep any medical information on applicants or employees confidential, with the following limited exceptions:

- Supervisors and managers may be told about necessary restrictions on the work or duties of the employee and necessary accommodations.
- First aid and safety personnel may be told if the disability may require emergency treatment.
- Government officials investigating compliance with the ADA must be given relevant information upon request.
- Employers may give information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws.
- Employers may use the information for insurance purposes. An employer may submit medical information to the company's health insurance carrier if the information is needed to administer a health insurance plan in accordance with Section 501(c) of the ADA.

Commonly asked questions about the ADA's confidentiality requirements:

May medical information be given to decision-makers involved in the hiring process?

Yes. Medical information may be given to, and used by, appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the ADA. In addition, the employer may use the information to determine reasonable accommodations for the individual.

For example: The employer may share the information with a third party, such as a health care professional, to determine whether a reasonable accommodation is possible for a particular individual. The information must be kept confidential.

The employer may only share the medical information with individuals involved in the hiring process or in the process of implementing an affirmative action program. It is important to question who needs to know this information.

For example: In some cases, a number of people may be involved in evaluating an applicant. Some individuals may simply be responsible for evaluating an applicant's references; these individuals may have no need to know an applicant's medical condition, and therefore, should not have access to the medical information.

Can an individual voluntarily disclose his/her own medical information to persons beyond those to whom an employer can disclose such information?

Yes, as long as it's really voluntary. The employer cannot request, persuade, coerce, or otherwise pressure the individual to get him/her to disclose medical information.

Does the employer's confidentiality obligation extend to medical information that an individual voluntarily tells the employer?

Yes. For example, if an applicant voluntarily discloses bipolar disorder and the need for reasonable accommodation, the employer may not disclose the condition or the applicant's need for accommodation to the applicant's references.

Can medical information be kept in an employee's regular personnel file?

No. Medical information must be collected and maintained on separate forms and in separate medical files.

An employer should not place any medical-related material in an employee's non-medical personnel file. If an employer wants to put a document in a personnel file, and that document happens to contain some medical information, the employer must remove the medical information from the document before putting it in the personnel file. A notation that an individual has taken sick leave or had a doctor's appointment is not confidential medical information.

Does the confidentiality obligation end when the person is no longer an applicant or employee?

No. An employer must keep medical information confidential even if it is someone who is no longer an applicant or an employee.

Is an employer required to remove medical information from its personnel files obtained before the ADA's effective date?

No.

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Medical Examinations

Definition: A medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health.

Pre-Offer Stage

An employer cannot require medical examinations. The following factors are helpful in determining whether a procedure or test is medical:

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment; physical or mental health?
- Is the employer trying to determine the applicant's physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?
- Is it normally given in a medical setting?
- Is medical equipment used?

In many cases, a combination of factors will be relevant in determining whether a procedure or test is a medical examination. In some cases, one factor may be enough to determine that a procedure or test is medical.

Allowable:
An employer requires applicants to lift a thirty pound box and carry it twenty feet. This is not a medical examination, it is just a test of whether the applicant can perform this task.

Not Allowable:
An employer requires applicants to lift a thirty pound box and carry it twenty feet and takes the applicant's blood pressure or heart rate after the lifting and carrying. This would be a medical examination because it is measuring the applicant's physiological response to lifting and carrying, as opposed to the applicant's ability to lift and carry.

Not Allowable:
A psychological test designed to disclose tastes and habits but interpreted by a psychologist, and routinely used in a clinical setting to provide evidence that would lead to a diagnosis of a mental disorder or impairment is a medical examination.

Commonly asked questions about the ADA's restrictions on pre-offer medical examinations.

May an employer require applicants to take physical agility tests?

Yes. A physical agility test, in which an applicant demonstrates the ability to perform actual or simulated job tasks, is not a medical examination under the ADA.

Example: A police department tests police offer applicants' ability to run through an obstacle course designed to simulate a suspect chase in an urban setting. This is not a medical examination.

May an employer require applicants to take physical fitness tests?

Yes. A physical fitness test, in which an applicant's performance of a physical task - such as running or lifting - is measured, is not a medical examination.

However, if an employer measures an applicant's physiological or biological responses to performance, the test would be medical and not allowed at the pre-offer stage.

Note: Although physical agility tests and physical fitness tests are not "medical" examinations, these tests are still subject to other parts of the ADA. For example, if a physical fitness test screens out an applicant on the basis of disability, the employer must be prepared to demonstrate that the test is "job-related and consistent with business necessity."

May an employer ask an applicant to provide medical certification that s/he can safely perform a physical agility or physical fitness test?

Yes. Although an employer cannot ask disability-related questions, it may give the applicant a description of the agility or fitness test and ask the applicant to have a private physician simply state whether s/he can safely perform the test.

May an employer ask an applicant to assume liability for injuries incurred in performing a physical agility or physical fitness test?

Yes. An employer may ask an applicant to assume responsibility and release the employer of liability for injuries incurred in performing a physical agility or fitness test.

May an employer give psychological examinations to applicants?

Yes, unless the particular examination is medical. Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment.

Example: An employer gives applicants the RUOK Test (Hypothetical), a test which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression and other disorders. **This test is medical.**

If a test is designed and used to measure only things such as honesty, tastes, and habits, it is not medical.

Example: An employer gives the IFIB Personality Test (hypothetical), an examination designed and used to reflect only whether an applicant is likely to lie. This test, as used by the employer is **not a medical examination.**

May an employer give vision tests to applicants?

Yes, unless the particular test is medical.

- *Medical:*
  An ophthalmologist's or optometrist's analysis of someone's vision is medical. Requiring an individual to read an eye chart would be a medical examination.
- *Nonmedical:*
  Evaluating someone's ability to read labels or distinguish objects as part of a demonstration of the person's ability to do the job is **not a medical examination.**

May an employer give applicants tests to determine illegal use of controlled substances?

Yes. The ADA specifically states that, for purposes of the ADA, tests to determine the current illegal use of controlled substances are not considered medical examinations.

May an employer give alcohol tests to applicants?

No. Tests to determine whether and/or how much alcohol an individual has consumed are medical, and there is no statutory exception.

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Pre-Offer Inquiry Restrictions

Prohibition: No disability-related questions.

At the pre-offer stage, and employer cannot ask questions that are likely to elicit information about a disability. This includes:

- directly asking whether an applicant has a particular disability.
- asking questions that are closely related to disability.

If there are many possible answers to a question and only some of those answers would contain disability-related information, that questions is not "disability-related." Sometimes, applicants disclose disability-related information in responding to an otherwise lawful pre-offer question. Although the employer has not asked an unlawful question, it still cannot refuse to hire an applicant based on disability unless the reason is "job-related and consistent with business necessity."

Commonly asked questions about this area of the law.

May an employer ask whether an applicant can perform the job?

Yes. An employer may ask applicants whether they can perform any or all of the job functions "with or without reasonable accommodation." However, an employer cannot ask a question in a manner that requires the individual to disclose the need for reasonable accommodation.

May an employer ask applicants to describe or demonstrate how they would perform the job?

Yes. An employer may ask applicants to describe how they would perform any or all job functions, as long as all applicants in the job category are asked to do this.

Employers should remember that, if an applicant says that s/he will need a reasonable accommodation to do a job demonstration, the employer must either:

- provide a reasonable accommodation that does not create an undue hardship; or
- allow the applicant to simply describe how s/he would perform the job functions.

May an employer ask a particular applicant to describe or demonstrate how s/he would perform the job, if other applicants aren't asked to do this?

When an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how s/he would perform the function. An applicant's disability would be a "known disability" either because it is obvious (for example, the applicant uses a wheelchair), or because the applicant has voluntarily disclosed the s/he has a hidden disability.

May an employer ask the applicant whether they will need reasonable accommodation for the hiring process?

Yes. An employer may tell applicants what the hiring process involves (for example, an interview, timed written test, or job demonstration), and may ask applicants whether they

will need a reasonable accommodation for this process.

May an employer ask an applicant for documentation of his/her disability when the applicant requests reasonable accommodation for the hiring process?

Yes. If the need for accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability if the applicant requests reasonable accommodation for the hiring process. The employer is entitled to know that the applicant has a covered disability and that s/he needs an accommodation.

The applicant may be required to provide documentation from an appropriate professional, such as a doctor or a rehabilitation counselor, concerning the applicant's disability and functional limitations.

May an employer ask applicants whether they will need reasonable accommodation to perform the functions of the job?

In general, an employer may not ask questions on an application or in an interview about whether an applicant will need a reasonable accommodation for the job. This is because these questions are likely to elicit whether the applicant has a disability (generally, only people who have disabilities will need reasonable accommodations).

- *Example:* An employment applicant may not ask, "Do you need reasonable accommodation to perform this job?
- *Example:* An employment applicant may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"
- *Example:* An applicant with no known disability is being interviewed for a job. He has not asked for any reasonable accommodation, either for the application process or for the job. The employer may not ask him, "Will you need reasonable accommodation to perform this job?"

When an employer could reasonably believe that an applicant will need a reasonable accommodation to perform the functions of the job, the employer may ask that applicant certain limited questions. Specifically, the employer may ask whether s/he needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the essential functions of the job. The employer could ask these questions if:

- the employer reasonably believes the applicant will need a reasonable accommodation because of an obvious disability;
- the employer reasonably believes the applicant will need a reasonable accommodation because of a hidden disability that has been voluntarily disclosed; or
- an applicant has voluntarily disclosed to the employer that s/he needs a reasonable accommodation to perform the job.

An employer may only ask about a reasonable accommodation that is needed now or in the near future. An applicant is not required to disclose reasonable accommodations that may be needed in the more distant future.

May an employer ask whether an applicant can meet the employer's attendance requirements?

Yes. An employer **may** state its attendance requirements and ask whether an applicant can meet them. An employer may also ask about an applicant's prior attendance record. For example: "How many days were you absent from your last job?"

An employer **may also ask** questions designed to detect whether an applicant abused his/her leave because these questions are not likely to elicit information about a disability.

- *Example:* An employer may ask, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?"

An employer **may not ask** how many days an applicant was sick, because these questions relate directly to the severity of an individual's impairments. Therefore, these questions are likely to elicit information about a disability.

May an employer ask applicants about their certifications and licenses?

Yes. An employer may ask an applicant whether s/he has certifications or licenses required for any job duties. An employer may also ask an applicant whether s/he intends to get a particular job-related certification or license, or why s/he does not have the certification or license.

May an employer ask applicants about their arrest or conviction records?

Yes. Questions about an applicant's arrest or conviction records are not likely to elicit information about disabilities.

May an employer ask questions about an applicant's impairments?

Only if the particular questions is not likely to elicit information about whether the applicant has a disability. It is important to remember that not all impairments will be disabilities; an impairment is a disability only if it substantially limits a major life activity.

An employer **may ask** an applicant with a broken leg how she broke her leg, since normally a broken leg normally is a temporary condition which does not rise to the level of a disability. However, such questions as "Do you expect the leg to heal normally?;" or "Do you break bones easily?" would obviously be disability-related.

An employer **may not** ask broad questions about impairments that are likely to elicit information about disability, such as, "What impairments do you have?"

May an employer ask whether applicants can perform major life activities, such as standing, lifting, walking, etc.?

No, because questions about the ability to perform major life activities are almost always disability-related since they are likely to elicit information about a disability.

May an employer ask applicants about their workers' compensation history?

No. An employer may not ask applicants about job-related injuries or workers' compensation history. These questions directly relate to the severity of an applicant's impairments, therefore, these questions are likely to elicit information about disability.

May an employer ask applicants about their current illegal use of drugs?

Yes. An employer may ask applicants about current illegal use of drugs, because an individual who currently illegally uses drugs is not protected under the ADA when the employer acts on the basis of the drug use.

May an employer ask applicants about their lawful drug use?

No. Many questions about current or prior lawful drug usage are likely to elicit information about a disability, and are, therefore, impermissible at the pre-offer stage.

May an employer ask applicants about their lawful drug use if the employer is administering a test for illegal use of drugs?

Yes, an employer may ask applicants about lawful drug use if the employer is administering a test for illegal use of drugs, and if an applicant tests positive. In that case the employer may validate the test results by asking about lawful drug use or possible explanation for the positive result other than the illegal use of drugs.

- *Example:* If an applicant tests positive for use of a controlled substance, the employer may lawfully ask questions such as, "What medications have you taken that might have resulted in this positive test result?; Are you taking this medication under a lawful prescription?"

May an employer ask applicants about their prior illegal drug use?

Yes, provided that the particular questions are not likely to elicit information about a disability. It is important to remember that past addiction to illegal drugs or controlled substances is a covered disability under the ADA as long as the person is not a current illegal drug user. Past casual use is not a covered disability. Therefore, the question is fine as long as it does not refer to previous drug addiction.

- *Example:* An employer **may ask**, "Have you ever used illegal drugs?;" "When is the last time you used illegal drugs?;" or "Have you used illegal drugs in the last six months?"
- *Example:* An employer **may not ask** an applicant, "How often did you use illegal drugs in the past?;" "Have you ever been addicted to drugs?;" "Have you ever been treated for drug addiction?;" or "Have you ever been treated for drug abuse?"

May an employer ask applicants about their drinking habits?

Yes, unless the particular question is likely to elicit information about alcoholism, which is a disability under the ADA.

- *Example:* An employer **may ask** an applicant whether s/he drinks alcohol or whether s/he has been arrested for driving under the influence, because these questions do not reveal whether or not someone has alcoholism.
- *Example:* An employer **may not ask** how much alcohol applicants drinks or whether s/he has participated in an alcohol rehabilitation program, because these questions are likely to elicit information about whether an applicant has alcoholism.

May an employer ask applicants to "self-identify" as individuals with disabilities for purposes of the employer's affirmative action program?

Yes. An employer may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program if:

- the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities; or

- the employer is voluntarily using the information to benefit individuals with disabilities.

Are there any special steps an employer should take if he/she asks applicants to "self-identify" for purposes of an affirmative action program?

Yes. The employer must do the following:

- clearly state on any written questionnaire, or clearly state verbally if no written questionnaire is used, that the information requested is used solely in connection with its affirmative action obligations or efforts; and
- clearly state that the purpose for the request for information is voluntary, and that it will be kept confidential in accordance with the ADA. Refusal to provide the requested information will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

In order to ensure that the self-identification information is kept confidential, the information must be on a form that is kept separately from the application.

May an employer ask third parties questions that he/she could not ask the applicant directly?

No. An employer may not ask a third party (such as a service that provides information about worker's compensation claims, a state agency, or an applicant's friends, family, or former employers) any questions that he/she could not directly ask the applicant.

Also see Medical Examinations for Pre-Offer Restrictions

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Post-Offer Inquiry Restrictions

After extending a job offer to an applicant, an employer may ask disability-related questions and conduct medical examinations. The job offer may be conditional based upon the results of the post-offer disability-related questions or medical examinations.

At the post-offer stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illnesses/diseases, impairments, and general physical and mental health. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job. However, if an individual is screened out because of disability, the employer must prove that the exclusionary criterion is job-related and consistent with business necessity.

Commonly asked questions about the post-offer stage:

What is considered a real job offer?

A job offer is real if the employer has evaluated all relevant non-medical information which he/she reasonably could have obtained and analyzed prior to extending the offer.

Example: An applicant may state that his current employer should not be contacted for a reference check until the potential employer makes a conditional job offer. In this case, the potential employer could not reasonably obtain and evaluate the non-medical information from the reference at the pre-offer stage.

Do offers have to be limited to current vacancies?

No. An employer may extend offers to fill current vacancies or reasonably anticipated openings.

May an employer extend offers that exceed the number of vacancies or reasonably anticipated openings?

Yes. The offers will still be considered real if the employer can demonstrate that he/she needs to present more offers in order to actually fill vacancies or reasonably anticipated openings. For example, an employer may demonstrate that a certain percentage of the offeres will likely be disqualified or will withdraw from the pool.

An employer must comply with the ADA when removing people from the pool to fill actual vacancies. The employer must notify an individual (orally or in writing) if his/her placement into an actual vacancy is in anyway adversely affected by the results of a post-offer medical examination or disability-related questions.

If an individual alleges that a disability has affected his/her placement into an actual vacancy, the EEOC will carefully scrutinize whether a disability was a reason for any adverse action. If a disability was a reason, the EEOC will determine whether the action was job-related and consistent with business necessity.

After an employer has obtained basic medical information from all individuals who have been given conditional job offers in a job category, may it ask specific individuals for additional medical information?

Yes, if the follow-up examinations or questions are medically-related to the previously

obtained medical information.

If an examination or inquiry screens out someone because of disability, the exclusionary criteria must be "job-related and consistent with business necessity."

Where safety considerations are the reason, the individual can only be screened out because s/he poses a "direct threat."

At the post-offer stage, may an employer ask all individuals whether they need a reasonable accommodation to perform the job?

Yes.

If, at the post-offer stage, someone requests a reasonable accommodation to perform the job, may the employer ask him/her for documentation of his/her disability?

Yes. If someone requests a reasonable accommodation so that s/he will be able to perform a job, and the need for the accommodation is not obvious, the employer may require reasonable documentation of the individual's entitlement to reasonable accommodation. So, the employer may require documentation showing that the individual has a covered disability, and stating his/her functional limitations.

Example: An entering employee states that she will need a 15-minute break every two hours to eat a snack in order to maintain her blood sugar level. The employer may ask her to provide documentation from her doctor proving that: (1) she has an impairment that substantially limits a major life activity; and (2) she actually needs the requested breaks because of the impairment.

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ADA - FMLA Interface - Title I

The ADA provides protection from discrimination for qualified persons with disabilities in all areas of employment.

The ADA uses a three-prong definition that defines a disability as:

- *Prong 1:* A physical or mental impairment that substantially [materially] limits one or more of the major life activities of the individual
- *Prong 2:* A record of such an impairment
- *Prong 3:* Regarded as having such an impairment.

For the ADA's coverage to apply in an employment situation, a factor other than the existence of a disability must be applicable. The individual also must be "qualified" for the job they desire or hold at the time of the job action in question.

Who is a Qualified Individual with a Disability?

An individual with a disability is "qualified" if he/she:

- satisfies the requisite skills, experience, education and other job-related requirements of the position the individual holds or desires;
  AND
- who, with or without reasonable accommodation, can perform the essential functions of the position.

Reasonable Accommodation Duty

An employer must provide a reasonable accommodation to a qualified employee with a disability unless to do so would result in an undue hardship. A leave of absence or an extension of leave is included in the examples of reasonable accommodation contained in the EEOC Technical Assistance Manual as an example of a possible accommodation. It is at this point that the ADA and FMLA converge.

Covered employers must comply with both the FMLA and the ADA. An employer's obligations under the ADA are separate and distinct from an employer's obligations under the FMLA. Although both may apply to any given situation, the applicability of one statute does not necessarily imply the applicability of the other.

The first step is to:

A. **Distinguish between a person with a *"Serious Health Condition"* and a *"Person With a Disability"***

   Employees who are eligible to receive FMLA leave to care for their own "serious health condition" are not necessarily entitled to protection as an "individual with a disability" under the ADA because the FMLA defines "serious health condition" differently than the ADA defines "individual with disability."

   Given these respective definitions, an employee may have a **"serious health condition"** for purposes of FMLA, but not be considered an "individual with a disability" for purposes of the ADA.

- *Example:* An employee who has an illness that requires an overnight stay in the hospital has a "serious health condition," but may not be considered an 'individual with a disability" if the employee's illness does not substantially limit a major life activity for more than a temporary period.

Similarly, a **"person with a disability"** may not be considered to have a "serious health condition."

- *Example:* A person who has a significant hearing impairment, but who is not incapacitated and is not receiving continuing treatment likely will qualify as an "individual with a disability." This person probably does not have a "serious health condition."

The determination of whether an employee is entitled to FMLA leave or is protected under the ADA must be resolved on a case-by-case basis.

Once you determine that an employee is protected by both the ADA and FMLA, you need to consider your obligation to provide reasonable accommodation.

B. **FMLA and the Employer's ADA Duty of Reasonable Accommodation**

Under the ADA, an individual with a disability who wants to continue working, but needs an accommodation to do so, is entitled to a reasonable accommodation unless it creates an undue hardship to the employer.

Under the FMLA, an employee with a serious health condition who needs to take FMLA leave is entitled to do so even if the employer is willing to alter the job so that the employee can perform the job functions despite his/her serious health condition.

When an employee is protected by both the ADA and the FMLA, an employee may request an FMLA leave as a reasonable accommodation, but the employer may not force leave upon the employee. *Remember: FMLA is an entitlement and cannot be refused by the employer if the employee is qualified for FMLA.*

Length of Leave: The interplay of the ADA and FMLA may also affect the length of leave available to an employee. The FMLA allows only 12 weeks of unpaid leave during any 12 month period; an employee who is unable to return to work without restrictions after the 12 week period has no right to more FMLA leave. However, if the employee is also protected by the ADA, the employee may be entitled to additional leave as a reasonable accommodation, provided that grating additional leave would not be unduly burdensome to the employer and that the employer can offer no other reasonable accommodation.

- *Example:* An employee is injured while mountain climbing and loses the use of his legs. He requires a 16-week leave for intensive rehabilitative therapy. Earlier in the year, the employee took 9 weeks of FMLA leave to care for his ailing parent, exhausting his vacation time. The employee is eligible for 3 additional weeks of unpaid FMLA leave. However, the employee may be eligible for the remaining 13 weeks of leave that are necessary for his recovery because he is arguably a person with a disability under the ADA and the leave would be a reasonable accommodation, as long as it is not an undue hardship on the employer.

C. **Employer's Duty of Confidentiality**

The ADA requires that the employer maintain employee medical records and information is kept confidential. Documents containing medical information must be kept in medical files by

the ADA Coordinator or designee, which are maintained separately from an employee's personnel file.

In addition, confidential medical information may be disclosed only to limited number of persons. Managers and supervisors should only have access to the specific limitations and potential reasonable accommodations.

To ensure consistency in internal procedures and to avoid a potential violation of the ADA, employers should also keep all FMLA documentation in separately-maintained medical files and disclose information regarding the specific reasons for an employee's FMLA leave only to those supervisory and management personnel with a need to know such information.

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October 10, 1995

ADA and Workers' Compensation Guidance

This enforcement guidance concerns the interaction between Title I of the Americans with Disabilities Act of 1990 (ADA) and state workers' compensation laws. The purpose of Title I of the ADA is to prohibit employers from discriminating against qualified individuals because of disability in all aspects of employment. The purpose of a workers' compensation law is to provide a system for securing prompt and fair settlement of employees' claims against employers for occupational injuries and illnesses.

While the purposes of the two laws are not conflicting, the simultaneous application of the laws has raised questions for EEOC investigators, employers, and individuals with disabilities in a number of areas. In this document, the Commission provides guidance concerning the following issues:

1. whether a person with an occupational injury has a disability as defined by the ADA;
2. disability-related questions and medical examinations pertaining to occupational injury and workers' compensation claims;
3. hiring persons with a history of occupational injury, return to work of persons with occupational injury, and application of the direct threat standard;
4. reasonable accommodation for persons with disability-related occupational injuries;
5. light duty issues; and
6. exclusive remedy provisions in workers' compensation laws.

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1. Disability

The Commission has provided general guidance on the definition of the term 'disability' under the ADA in "EEOC: Definition of the Term Disability." This section applies to that guidance in the context of occupational injury and workers' compensation. The definition of "disability" under the ADA is no different in the workers' compensation context than in any other context.

Does everyone with an occupational injury have a disability within the meaning of the ADA?

No. Even if an employee with an occupational injury has a "disability" as defined by a workers' compensation statute, s/he may not have a "disability" according to the ADA.

The ADA defines disability as: (1) a physical or mental impairment that substantially limits a major life activity, (2) a record of such an impairment, or (3) being regarded as having such an impairment. Impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity, or they may be only temporary, non-chronic, and have little or no long term impact.

Does every person who has filed a workers' compensation claim have a disability under the "record of" portion of the ADA definition?

No. A person has a disability under the "record of" portion of the ADA definition only if s/he has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

When does a person with an occupational injury have a disability under the "regarded as" portion of the ADA definition?

If s/he: (1) has an impairment that does not substantially limit a major life activity, but is treated by an employer as if it were substantially limiting; (2) has an impairment that substantially limits a major life activity because of the attitude of others towards the impairment; or (3) has no impairment but is treated as having a substantially limiting impairment.

- ***Example A:*** An employee has an occupational injury that has resulted in a temporary back impairment that does not substantially limit a major life activity. However, the employer views her as being unable to lift more than a few pounds and refuses to return her to her position. The employer regards the employee as having an impairment that substantially limits the major life activity of lifting. The employee has a disability as defined by the ADA.
- ***Example B:*** An employer refuses to allow an employee whose occupational injury results in a facial disfigurement to return to his position because the employer fears negative reactions by co-workers and customers. The employer regards him as having an impairment that substantially limits the major life activities of interacting and working with others. The employee has a disability as defined by the ADA.
- ***Example C:*** An employee if fully recovered from an occupational injury that resulted in a temporary back impairment. The employer fires the employee because he/she believes that, if he returns to his heavy labor job, he will severely injure his back and become totally incapacitated. The employer regards the employee as having an impairment that disqualifies him from a class of jobs (heavy labor) and, therefore, as substantially limited in the major life activity of working. The employee has a disability as defined by the ADA.

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2. Questions and Examinations

The Commission has provided general guidance on disability-related questions and medical examinations in ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations. The guidance provided here pertains particularly to disability related questions and medical examinations related to workers' compensation and occupational injuries.

When may an employer ask questions about an applicant's prior workers' compensation claims or occupational injuries?

An employer may ask questions about an applicant's prior workers' compensation claims or occupational injuring after he/she has made a conditional offer of employment, but before employment has begun, as long as he/she asks the same questions of all entering employees in the same job category.

When may an employer require a medical examination of an applicant to obtain information about the existence of nature of prior occupational injuries?

After he/she has made a conditional offer of employment, but before employment has begun, as long as he/she requires all entering employees in the same job category to have a medical examination. Where an employer has already obtained basic medical information from all entering employees in a job category, he/she may require specific individuals to have follow-up medical examinations only if they are medically related to the previously obtained medical information.

Before making a conditional offer of employment, may an employer obtain information about an applicant's prior workers' compensation claims or occupational injuries from third parties, such as former employers, state workers' compensation offices or a service that provides workers' compensation information?

No. At the pre-offer stage, as at any other time, an employer may not obtain any information from third parties that it could not lawfully obtain directly from the applicant.

May an employer ask disability-related questions or require a medical examination of an employee either at the time s/he experiences an occupational injury or when s/he seeks to return to the job following such an injury?

Yes, in both instances, provided that the disability-related questions or medical examinations are job-related and consistent with business necessity. This requirement is met when the employer reasonably believes that the occupational injury will impair the employee's ability to perform essential job functions or raises legitimate concerns about direct threat. However, the questions and examinations must not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

May an employer ask disability-related questions or require a medical examination of an employee with an occupational injury in order to ascertain the extent of its workers' compensation liability?

Yes. The ADA does not prohibit an employer or its agent from asking disability-related questions or requiring medical examinations that are necessary to ascertain the extent of its workers' compensation liability.

However, the questions and examinations must be consistent with the state law's intended purpose of determining an employee's eligibility for workers' compensation benefits. An employer may not use an employee's occupational injury as an opportunity to ask far-ranging disability-related questions or to require unrelated medical examinations. Examinations and questions must be limited in scope to the specific occupational injury and its impact on the individual, and may not be required more often than is necessary to determine an individual's initial or continued eligibility for workers' compensation benefits. Excessive questioning or imposition of medical examinations may constitute disability-based harassment which is prohibited by the ADA.

If an employee with a disability-related occupational injury requests a reasonable accommodation, may the employer ask for documentation of his/her disability?

Yes, if the need for accommodation is not obvious. While the employer may require documentation confirming that the employee has a covered disability and stating his/her functional limitations, he/she is not entitled to medical records that are unnecessary to the request for reasonable accommodation.

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3. Confidentiality of Medical Information

Do the ADA's confidentiality requirements apply to medical information regarding an applicant's or employee's occupational injury or workers' compensation claim?

Yes. Medical information regarding an applicant's or employee's occupational injury or workers' compensation claim must be collected and maintained on separate forms and kept in a separate medical file along with other information required to be kept confidential under the ADA. An employer must keep medical information confidential even if someone is no longer an applicant or an employee.

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4. Hiring Decisions

May an employer refuse to hire a person with a disability simply because he/she assumes, correctly or incorrectly, that the employee poses some increased risk of occupational injury and increased workers' compensation costs?

No, an employer may not refuse to hire a person with a disability unless the employer can verify that employment of the person in the position poses a "direct threat." In enacting the ADA, Congress sought to address stereotypes regarding disability, including workers' compensation costs. Where an employer refuses to hire a person because he/she assumes, correctly or incorrectly, that, because of a disability, the employee poses merely some increased risk of occupational injury, the employer discriminates against that person on the basis of disability. The employer can refuse to hire the person only if he/she can show that the employee's employment in the position poses a "direct threat." This means that an employer may not "err on the side of safety" simply because of a potential health or safety risk. Rather, the employer must demonstrate that the risk rises to the level of a "direct threat".

"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 a "direct threat" exists must be the result of a fact-based, individualized inquiry that takes into account the specific circumstances of the individuals with a disability.

In determining whether employment of a person in a particular position poses a "direct threat," the factors to be considered are:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that potential harm will occur; and
4. the imminence of the potential harm.

May an employer refuse to hire a person with a disability simply because s/he sustained a prior occupational injury?

No. The mere fact that a person with a disability experienced an occupational injury in the past does not, by itself, establish that his/her current employment in the position in question poses a direct threat (i.e. a significant risk of substantial harm that cannot be lowered or eliminated by a reasonable accommodation). However, evidence about a person's prior occupational injury, in some circumstances, may be relevant to the "direct threat" analysis discussed above.

The following factors regarding a prior occupational injury should be considered in applying the "direct threat" analysis set forth above.

1. Whether the prior injury is related to the person's disability (e.g. if employees without disabilities in the person's prior job had similar injuries, this may indicate the injury is not related to the disability and, thus, is irrelevant to the direct threat inquiry);
2. The circumstances surround the prior injury (e.g., the actions of others in the workplace of the lack of appropriate safety devices or procedures may have caused or contributed to the injury);
3. The similarities and differences between the position in question and the question in which the prior injury occurred (e.g., the prior position may have involved hazards not present in the position under consideration);

4. Whether the current condition of the person with a disability is similar to his/her condition at the time of the prior injury (e.g., if the person's condition has improved, the prior injury may have little significance);
5. The number and frequency of prior occupational injuries;
6. The nature and severity of the prior injury (e.g., if the injury was minor, it may have little or no significance);
7. The amount of time the person has worked in the same or a similar position since the prior injury without subsequent injury; and
8. Whether the risk of harm can be lowered or eliminated by a reasonable accommodation.

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5. Return to Work Decisions

May an employer require that an employee with a disability-related occupational injury be able to return to "full duty" before allowing him/her to return to work?

No. The term "full duty" may include marginal as well as essential job functions or may mean performing job functions without any accommodation. An employer may not require that an employee with a disability-related occupational injury, who can perform the essential functions be able to return to "full duty" if, because of the disability, s/he is unable to perform marginal functions or the position or requires a reasonable accommodation that would not impose an undue hardship.

May an employer refuse to allow an employee with a disability-related occupational injury to return to work simply because he/she assumes, correctly or incorrectly, that the employee poses some increased risk of re-injury and increased workers' compensation costs?

No, unless the employer can show that the employment of that person in the position poses a "direct threat." Where an employer refuses to allow an employee to return to work because he/she assumes, correctly or incorrectly, that the employee's disability-related occupational injury creates merely some increased risk of further occupational injury and increased workers' compensation costs, he/she discriminates on the basis of disability. The employer may not refuse to allow an employee to return to work who is able to perform the essential functions of the job, with or without a reasonable accommodation, unless he/she can prove that returning the person to the position poses a "direct threat" to the safety and well-being of the employee and others.

May an employer refuse to allow an employee with a disability-related occupational injury to return to work simply because of a workers' compensation determination that/he has a "permanent disability" or is "totally disabled?"

No. Workers' compensation laws are different in purpose from the ADA and may utilize different standards for evaluating whether an individual has a "disability," or whether s/he is capable of working. For example, under a workers' compensation statute, a person who loses vision in both eyes or has loss of the use of both arms or both legs may have a "permanent total disability," although s/he may be able to work. A workers' compensation determination also may relate to a different time period. Such a determination is never dispositive regarding an individual's ability to return to work, although it may provide relevant evidence regarding an employee's ability to perform the essential functions of the position in question or to return to work without posing a "direct threat."

Under the ADA, is a rehabilitation counselor, physician, or other specialist responsible for deciding whether an employee with a disability-related occupational injury is ready to return to work?

No. The employer bears the ultimate responsibility for deciding whether an employee with a disability-related occupational injury is ready to return to work. Therefore, the employer, rather than a rehabilitation counselor, physician, or other specialist, must determine whether the employee can perform the essential functions of the job, with or without reasonable accommodation, or can work without posing a "direct threat".

On the other hand, the employer may find it helpful to seek advice from the rehabilitation counselor, physician, or other specialist in making a return to work decision. An employer may wish to provide him/her with specific information about the following:

1. the essential functions of the employee's position and nature of the work to be performed;
2. the work environment and the employer's operations, including any unavoidable health or safety hazards which may exist; and
3. possible reasonable accommodations.

An employer also may obtain useful information from others who are not experts but who are knowledgeable about the employee's current abilities, limitations and possible reasonable accommodations. Such information will enable the employer to make an independent and accurate determination about the employee's ability to return to work.

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6. Reasonable Accommodation

The ADA requires that an employer make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship.

Does the ADA require an employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a disability as defined by the ADA?

No. The ADA does not require an employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a disability as defined by the ADA.

May an employer discharge an employee who is temporarily unable to work because of a disability-related occupational injury?

No. An employer may not discharge an employee who is temporarily unable to work because of a disability-related occupational injury where it would not impose an undue hardship to provide leave as a reasonable accommodation.

What are the reinstatement rights of an employee with a disability-related occupational injury?

An employee with a disability-related occupational injury is entitled to return to his/her same position unless the employer demonstrates that holding the position open would impose an undue hardship.

In some instances, an employee may request more leave even after the employer has communicated that it would impose an undue hardship to hold open the employee's position any longer. In this situation, the employer must consider whether he/she has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship to continue the employee's leave for a specific period of time. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

Must an employer, as a reasonable accommodation, reallocate job duties of an employee with a disability-related occupational injury?

Yes, if the duties to be reallocated are marginal functions of the position that the employee cannot perform because of the disability. However, an employer need not eliminate essential functions of the position.

May an employer unilaterally reassign an employee with a disability-related occupational injury to a different position instead of first trying to accommodate the employee in the position s/he held at the time the injury occurred?

No. An employer must first assess whether the employee can perform the essential functions of his/her original position, with or without a reasonable accommodation. Reassignment should be considered only when an accommodation within the employee's original position is not possible or would impose an undue hardship.

Must an employer reassign an employee who is no longer able to perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability-related occupational injury?

Yes. Where an employee can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability-related occupational injury, an employer must reassign him/her to an equivalent vacant position for which s/he is qualified, providing that there is no undue hardship. If no equivalent vacant position (in terms of pay status, etc.) exists, then the employee must be reassigned to a vacant position for which s/he is qualified providing that there is no undue hardship.

If there is no vacancy for an employee who can no longer perform his/her original position because of a disability-related occupational injury, must an employer create a new position or "bump" another employee from his/her position?

No. The ADA does not require an employer to create a new position or to bump another employee in order to reassign an employee, who can no longer perform the essential functions of his/her original position, with or without reasonable accommodation.

When an employee requests leave as a reasonable accommodation under the ADA because of a disability-related occupational injury, may an employer provide an accommodation that requires him/her to remain on the job instead?

Yes. An employer need not provide an employee's preferred accommodation, as long as the employer provides an effective accommodation, which is sufficient to meet the employee's job-related needs. Accordingly, an employer may provide a reasonable accommodation that requires an employee to remain on the job, in lieu of providing leave.

The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he has recovered sufficiently to perform the essential functions of the job, with or without a reasonable accommodation.

However, if an employee with a disability-related occupational injury does not request a reasonable accommodation, but simply requests leave that is routinely granted to other employees, an employer may not require him/her to remain on the job with some types of adjustment, unless it also requires employees without disabilities who request such leave to remain on the job with some type of adjustment.

(Note that, if an employee qualified for leave under the Family and Medical Leave Act, an employer may not require him/her to remain on the job with an adjustment in lieu of taking a leave of absence.)

May an employer satisfy its ADA obligation to provide reasonable accommodation for an employee with a disability-related occupational injury by placing him/her in a workers' compensation vocational rehabilitation program?

No. An employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury. An employee's rights under the ADA are separate from his/her entitlements under a workers' compensation law. The ADA requires employers to accommodate an employee in his/her current position through job restructuring or some other modification, providing that there is no absent undue hardship. If it would impose an undue hardship to accommodate an employee in his/her current position, then the ADA requires that an employer reassign the employee to a vacant position that s/he can perform, absent undue hardship.

May an employer make a workplace modification that is not a required form of reasonable accommodation under the ADA in order to offset workers' compensation costs?

Yes. Nothing in the ADA prohibits an employer from making a workplace modification that is not a required form of reasonable accommodation under the ADA.

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7. Light Duty

The term "light duty" has a number of different meanings in the employment setting. Generally, "light duty" refers to temporary or permanent work that is physically or mentally less demanding than normal job duties. Some employers use the term "light duty" to mean simply excusing an employee from performing those job functions that s/he is unable to perform because of an impairment. "Light duty" also may consist of particular positions with duties that are less physically or mentally demanding. These positions are created specifically for the purpose of providing alternative work for employees who are unable to perform some or all of their normal duties.

In the following questions and answers, the term 'light' duty refers only to particular positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties.

Does the ADA prohibit an employer from creating a light duty position for an employee when s/he is injured on the job?

No, in most instances. An employer may recognize a special obligation arising out of the employment relationship to create a light duty position for an employee when s/he has been injured while performing work for the employer and, as a consequence, is unable to perform his/her regular job duties. Such a policy, on its face, does not treat an individual with a disability less favorably than an individual without a disability; nor does it screen out an individual on the basis of disability.

Of course, an employer must apply its policy of creating a light duty position for an employee when s/he is occupationally injured on a nondiscriminatory basis. In other words, an employer may not use disability as a reason to refuse to create a light duty position when an employee is occupationally injured.

An employee need not create a light duty position for a nonoccupationally injured employee with a disability as a reasonable accommodation. The principle that the ADA does not require employers to create positions as a form of reasonable accommodation applies equally to the creation of a light duty position. However, an employer must provide other forms of reasonable accommodation required under the ADA.

In some cases, the only effective reasonable accommodation available for an individual with a disability may be similar or equivalent to a light duty position. The employer would have to provide that reasonable accommodation unless the employer can demonstrate that doing so would impose an undue hardship.

- *Example:* R creates light duty positions for employees when they are occupationally injured if they are unable to perform one or more of their regular job duties. CP can no longer perform functions of her position because of a disability caused by an off-the-job accident. She requests that R create a light duty position for her as a reasonable accommodation. R denies CP's request because she has not been injured on the job. R has not violated the ADA. However, R must provide another reasonable accommodation, providing there is no undue hardship. If it is determined that the only effective accommodation is to restructure CP's position by redistributing the marginal functions, and the restructured position resembles a light duty position, R must provide the accommodation unless it imposes an undue hardship.

If an employer reserves a light duty position for employees with occupational injuries, does the ADA require it to consider reassigning an employee with a disability who is not occupationally injured to such positions as reasonable accommodation?

Yes. If an employee with a disability who is not occupationally injured because he/she is unable to perform the essential functions of his/her job, and there is no other effective accommodation available, the employer must reassign him/her to a vacant reserved light duty position as a reasonable accommodation if (1) s/he can perform the essential functions, with or without a reasonable accommodation; and (2) the reassignment would not impose an undue hardship. This is because reassignment to a vacant position, and appropriate modification of an employer's policy, are forms of reasonable accommodation required by the ADA, providing there is no undue hardship. An employer cannot establish that the reassignment to a vacant reserved light duty position imposes an undue hardship simply by showing that he/she would have no other vacant light duty positions available if an employee injured on the job didn't need light duty.

If an employer has only temporary light duty positions, must he/she still provide a permanent light duty position for an employee with a disability-related occupational injury?

No. The ADA typically does not limit an employer's ability to establish or change the content, nature or functions of its positions. So, for example, an employer is free to determine that a light duty position will be temporary rather than permanent. Thus, if an employer provides light duty positions only on a temporary basis, he/she need only provide a temporary light duty position for an employee with a disability-related occupational injury.

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8. Exclusive Remedy Provisions

Do exclusive remedy provisions in workers' compensation laws bar employees from pursuing ADA claims?

No. The purpose of workers' compensation exclusivity clauses is to protect employers from being sued under common law theories of personal injury for occupational injury. Courts have generally held that the exclusive remedy provisions of state workers' compensation laws cannot bar claims arising under federal civil rights laws, even where a state workers' compensation law provides some relief from disability discrimination. Applying a state workers' compensation law's exclusivity provision to bar an individual's ADA claim would violate the Supremacy Clause of the U.S. Constitution and would seriously diminish the civil rights protection Congress has granted to persons with disabilities.

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This material can be made available in alternative formats upon request to the State ADA Coordinator at (651) 297-8849/V or Minnesota Relay at 800-627-3529.

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Topic 1: Reason for the ADA

On July 26, 1990, President George Bush signed into law the Americans With Disabilities Act (ADA). Congress' goals in passing the ADA were to provide a clear and comprehensive mandate to end discrimination against individuals with disabilities and to integrate them into the economic and social mainstream of American life. The purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."

There are over 49 million Americans with one or more physical or mental disabilities. As the nation's population increases, so does the number of disabled persons. Historically, our society has isolated and segregated persons with disabilities. Census data, national polls, and studies have all shown that people with disabilities, as a whole, occupy an inferior status in our society and are severely disadvantaged socially, vocationally, economically, and educationally.

In considering the ADA, Congress found that discrimination against the disabled is a "serious and pervasive social problem." Disabled individuals encounter both outright intentional discrimination and unintentional discrimination arising from architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

Scope of the ADA

The ADA provides protection and benefits to persons with disabilities in the areas of employment, public services, and services provided by private entities. Every state and the District of Columbia has a law addressing the issue of discrimination against people with disabilities. In Minnesota it is the Minnesota Human Rights Act.

- Where a state law provides greater protection to the person with a disability, the state law prevails.
- Where the ADA provides greater protection, the ADA prevails.

Legal Prohibitions and Duties

Both the Minnesota Human Rights Act (MHRA) and the Americans with Disabilities Act (ADA) prohibit discrimination against persons with disabilities. Essentially, both laws prohibit discrimination:

1. In the terms, conditions or privileges of employment;
2. Against a person with a disability or someone associated with another person with a disability;
3. Who can perform the essential function(s) of the job with or without reasonable accommodation.

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Topic 2: What is a Disability?

The determination of whether a person has a "disability" depends on whether he/she meets the ADA definition of that term.

A person has a "disability" for purposes of the ADA if she or he:

1. has a physical or mental impairment that substantially limits a major life activity;
2. has a record of such an impairment; or
3. is regarded as having such an impairment.

A person must satisfy at least one of these three components of the definition to be considered an individual with a "disability."

The determination of whether an individual has a disability is based upon the effect of such an impairment on the life on the individual and not on the name or diagnosis of the impairment.

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Topic 2: What is a Disability?

Impairment

The person claiming to be an individual with a disability as defined by the first part of the definition must *have* an actual impairment. If the person does not have an impairment, (s)he does not meet the requirements of the first part of the definition of disability.

A person has a disability only if his/her limitations are, were, or are regarded as being the result of an impairment. It is essential, therefore, to distinguish between conditions that are impairments and those that are not impairments.

Not everything that restricts a person's major life activities is an impairment. For example, a person may be having financial problems that significantly restrict that person's activities. Financial problems or other economic disadvantages, however, are not impairments under the ADA. Accordingly, the person in that situation does not have a "disability" as that term is defined by the ADA. On the other hand, an individual may be unable to cope with everyday stress because (s)he has bipolar disorder, which is an impairment.

A diagnosis may be relevant to determining whether a person has an impairment. It is important to remember, however, that a diagnosis may be insufficient to determine if the individual has a disability. An impairment rises to the level of a disability when it substantially limits one or more major life activities.

The employer, therefore, should obtain documentation that describes the extent to which the impairment limits the individual's major life activities. (Refer to Medical Documentation, Page 41.)

Duration and Impact of Impairment

The length of time that an impairment affects major life activities may help to determine whether the impairment substantially limits those activities. As with all other matters, the determination must be made on a case-by-case basis.

There are no set time limits for determining whether an impairment is of sufficient duration to be considered substantially limiting. There are, however, a few basic guidelines.

Temporary Conditions

Generally, conditions that last for only a few days or weeks and have no permanent or long-term effects on an individual's health are not substantially limiting impairments.

The mere fact that an individual may have required absolute bed rest or hospitalization for such a condition does not alter the transitory nature of the condition. Even the necessity of surgery, without more, is not sufficient to raise a short-term condition to the level of a disability.

> ***Example 1*** -- CP has laryngitis. It is very painful for her to speak, and she cannot talk above a whisper when she does speak. Her physician has prescribed medication for her, instructed her to drink plenty of fluids, and advised her to stay home from work. She should be fully recovered within seven to ten days. CP does not have a disability. Although the laryngitis significantly restricts her ability to speak, it does so only on a very short-term basis and has no long-lasting or permanent effects.
>
> ***Example 2*** -- CP sustains a compound fracture of her arm and must undergo surgery to

set the bone. She is hospitalized for one week and will have a cast on her arm for five additional weeks. During these six weeks, CP must wear a sling and keep her arm immobilized. She will have full use of her arm once the cast is removed. CP's broken arm is not a disability. Instead, it is a short-term, temporary impairment with no long-lasting or permanent effects.

Although short-term, temporary restrictions generally are not substantially limiting, *an impairment does not necessarily have to be permanent to rise to the level of a disability*. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.

A person who has been blinded or paralyzed but is expected to recover fully "eventually" is an individual with a disability, despite the prognosis for full recovery at some indeterminable time in the future.

Example 1 -- CP recently was released from the hospital following a ten-month stay for treatment for a mood disorder. The disorder significantly restricted CP's ability to interact with people and to care for herself. She will require two months of daily treatment, on an out-patient basis, to ensure that she can deal with people on a day-to-day basis and then four to six months of less intensive out-patient treatment. Her doctor anticipates that CP will be fully recovered when she completes her treatment. CP has a disability. Although her impairment (a mood disorder) is not permanent, it is long lasting and has significantly restricted her major life activities for an extended period (at least ten months during her hospitalization and possibly for the two months of intensive out-patient treatment).

Example 2 -- CP fractured her left ankle as the result of a skiing accident. Immediately after the accident, she underwent surgery on her ankle. She was hospitalized for one week and has been using crutches for two weeks. Her physician has directed her to use crutches for another two weeks, after which time she should be able to walk unaided. Her prognosis for a full recovery is excellent. CP does not have an impairment that substantially limits her major life activities. Although her ankle injury has restricted her ability to walk, it has done so for only a relatively short time (five weeks). The injury is a transitory impairment that has no long-term effects on CP.

Longer Healing Period

Sometimes a temporary impairment that usually is not substantially limiting because it generally heals within a few weeks will take longer than the normal healing period to heal. In that case, the impairment may be substantially limiting if it goes on for a long period and significantly restricts the performance of a major life activity during that time.

An impairment that takes significantly longer than the normal healing period to heal and prevents or significantly restricts the performance of a major life activity for an extended time during the healing process is a disability.

Example -- CP sustains a broken leg. Although broken legs generally heal within a few months, CP's leg will require eleven months to heal. CP will be unable to walk without the use of crutches during the eleven-month healing period. CP, whose impairment will take significantly longer than the normal period to heal and will significantly restrict CP's ability to perform a major life activity to perform (walking) during the healing period, has a disability.

Residual Effects

In some cases, an impairment that appears to be temporary may have residual effects. That is, the

impairment may have a long-term impact on an individual's ability to perform one or more major life activities.

> ***Example 1*** -- CP sustained a head injury in an automobile accident. He felt dizzy and disoriented immediately after the accident and was hospitalized overnight for observation. His doctor told him that x-rays revealed a slight concussion but no permanent injury. He was released from the hospital the next day, and he has experienced no side effects from the injury. CP's head injury was not substantially limiting. The impairment lasted for only a brief time and had no permanent or long-term impact on CP's major life activities. CP, therefore, does not have a disability.
>
> ***Example 2*** -- Same as Example 1, above, except CP sustained a serious concussion that resulted in permanent brain damage. Because of this, CP has a short-term memory deficit, has trouble processing information, cannot concentrate, and has great difficulty learning. CP's concussion resulted in long-term, significant restrictions on his major life activities. CP, therefore, has a disability.

Chronic Conditions

Some chronic conditions may constitute substantially limiting impairments. Such conditions maybe substantially limiting when active or may have a high likelihood of recurrence in substantially limiting forms. In addition, such conditions may require a substantial limitation of a major life activity to prevent or to lessen the likelihood or severity of recurrence. Some severe back problems and most forms of heart disease and cancer fall into this category. This category also includes illnesses, such as tuberculosis, that may lay dormant for long periods but can re-emerge at any time in a substantially limiting manner. Similarly, episodic disorders, such as bipolar disorder, which remit and then intensify also fall into this category.

Duration

The duration of an impairment does not, by itself, determine whether the impairment substantially limits an individual's major life activities. It is just one factor to be considered with all of the other relevant information. When determining whether an impairment substantially limits a major life activity, one must consider the severity of the limitation caused by the impairment, as well as the duration of the limitation. An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity.

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Topic 2: What is a Disability?

Conditions That Are Not Impairments

The statute and the legislative history specifically state that certain conditions are not impairments under the ADA.

> ***Example 1*** -- CP has been unemployed for two years. Although she has actively sought work, CP has not been able to find a job. CP asserts that employers will not hire her because she is a convicted felon who served three years in prison for armed robbery. CP argues that her prison record is a disability because it prevents her from getting a job. CP, however, does not have a disability because she does not have a physical or mental impairment as defined by the ADA. A prison record is not an impairment for ADA purposes.
>
> ***Example 2*** -- CP applies for a job as a cashier at his neighborhood supermarket. The store manager speaks with CP briefly and then asks CP to fill out a written job application form. CP does not complete the form because he cannot read it. CP, who has the equivalent of a second-grade education, was never taught to read. CP does not have a physical or mental impairment as defined by the ADA. A lack of education is not an impairment for ADA purposes.

Physical Characteristics

Simple physical characteristics are not impairments under the ADA. For example, a person cannot claim to be impaired because of blue eyes or black hair. Similarly, a person does not have an impairment simply because (s)he is left-handed.

Further, a characteristic predisposition to illness or disease is not an impairment. A person may be predisposed to developing an illness or a disease because of factors such as environmental, economic, cultural, or social conditions. This predisposition does not amount to an impairment.

Pregnancy

Because pregnancy is not the result of a physiological disorder, it is not an impairment. Complications resulting from pregnancy, however, are impairments.

> ***Example 1*** -- CP is in the third trimester of her pregnancy. Her pregnancy has proceeded well, and she has developed no complications. CP does not have an impairment. Pregnancy, by itself, is not an impairment.
>
> ***Example 2*** -- Same as Example 1, above, except CP has developed hypertension CP has an impairment, hypertension. (Remember that the mere presence of an impairment does not automatically mean that CP has a disability. Whether, the hypertension rises to the level of a disability will depend on whether the impairment substantially limits, or is regarded as substantially limiting, a major life activity.)

Common Personality Traits

Like physical characteristics, common personality traits also are not impairments. A psychological profile of an applicant for a police officer position determined that the applicant showed 'poor judgment, irresponsible behavior and poor impulse control' but did not have "any particular psychological disease or disorder." The court ruled that the applicant's personality traits did not

constitute an impairment.

> ***Example 1*** -- CP is a lawyer who is impatient with her co-workers and her boss. She often loses her temper, frequently shouts at her subordinates, and publicly questions her boss's directions. Her colleagues think that she is rude and arrogant, and they find it difficult to get along with her. CP does not have an impairment. Personality traits, such as impatience, a quick temper, and arrogance, in and of themselves are not impairments.

> ***Example 2*** -- CP is an account manager who is in charge of developing a major advertising campaign for his firm's biggest client. Although he used to be easygoing and relaxed in the office, CP has become very irritable at work. He has twice lost his temper with his assistant, and he recently engaged in a shouting match with one of his superiors. CP has consulted a psychiatrist, who diagnosed a recurrence of the post-traumatic stress disorder for which CP was treated several years ago. CP has an impairment. CP's post-traumatic stress disorder, a mental disorder, is a mental impairment.

> **Note:** CP's employer does not have to excuse CP's misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees. Employers may hold all employees, disabled and nondisabled, to the same performance and conduct standards.

Normal Deviations in Height, Weight, or Strength

Similarly, normal deviations in height, weight, or strength that are not the result of a physiological disorder are not impairments. At extremes, however, such deviations may constitute impairments. Further, some individuals may have underlying physical disorders that affect their height, weight, or strength.

> ***Example****:* a four feet, five inches tall man with achondroplastic dwarfism does have an impairment. Achondroplastic dwarfism is a growth disorder that affects all four extremities and results in short limbs and short stature. The man's stature was the result of an underlying disorder, achondroplastic dwarfism, which is an impairment.

Being overweight, in and of itself, generally is not an impairment. Thus, for example, a flight attendant who, because of avid body building (which resulted in a low percentage of body fat and a high percentage of muscle), exceeds the airline's weight guidelines does not have an impairment. Similarly, a mildly overweight flight attendant who has not been clinically diagnosed as having any medical anomaly does not have an impairment.

On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm is clearly an impairment. In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment.

Whether severe obesity rises to the level of a disability will depend on whether the obesity substantially limits, has substantially limited, or is regarded as substantially limiting, a major life activity. "Except in rare circumstances, obesity is not considered a disabling impairment."

Persons with One of These Conditions and an Impairment

A person who has one or more of these characteristics or traits also may have other conditions that are physical or mental impairments. Thus, a left-handed individual who has a heart condition has an impairment. Although left-handedness is not an impairment, heart disease is an impairment.

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Topic 2: What is a Disability?

Illegal Drug Use Exception to the Definition of "Disability"

The term 'individual with a disability' does not include an individual who is *currently engaging* in the illegal use of drugs, when the covered entity acts on the basis of such use."

The term "illegal use of drugs" refers to drugs whose possession or distribution is unlawful under the Controlled Substances Act, 21 U.S.C. It "does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal Law." The term does not include, however, the unlawful use of prescription controlled substances.

The reference to a person "currently engaging" in the illegal use of drugs does not mean that this exclusion is limited to a person who illegally used drugs "on the day of, or within a matter of days or weeks before, the employment action in question." Rather, the exclusion applies to any individual whose "illegal use of drugs . . . has occurred *recently enough* to indicate that the individual is actively engaged in such conduct."

If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test correctly indicates that the individual is engaging in the current illegal use of a controlled substance.

The ADA does not exclude individuals who have a record of such use or who are erroneously regarded as engaging in such use.

It is important to remember, however, that an individual who has a record of the illegal use of drugs or who is erroneously regarded as engaging in such use is not automatically an individual with a disability. One still must evaluate whether the record or erroneous perception pertains to a substantially limiting impairment. *Only addiction or perceived addiction to a controlled substance meets this standard*. Occasional, casual illegal use of drugs does not constitute a disability. Similarly, a record or perception of such casual use does not constitute a disability.

> ***Example 1*** -- Several years ago, CP was hospitalized for treatment for a cocaine addiction. He has been rehabilitated successfully and has not engaged in the illegal use of drugs since receiving treatment. CP, who has a record of an impairment that substantially limited his major life activities, is covered by the ADA.
>
> ***Example 2*** -- Three years ago, CP was arrested and convicted of the possession of cocaine. He had used the substance occasionally, perhaps three or four times over a sixteen-month period. CP has not used cocaine or any other illegal drug since his arrest. CP is not covered by the ADA. Although CP has a record of cocaine use, the use was not an addiction and did not substantially limit any of CP's major life activities.

A person who alleges disability based on one of the excluded conditions is not an individual with a disability under the ADA. However, that a person who has one of these conditions is an individual with a disability if (s)he has another condition that rises to the level of a disability. Thus, a compulsive gambler who has a heart impairment that substantially limits his/her major life activities is an individual with a disability. Although compulsive gambling is not a disability, the individual's heart impairment is a disability.

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Topic 3: Substantially Limits Major Life Activities

Merely having an impairment is not sufficient for protection under the ADA. The impairment must be to such a degree that it substantially limits a major life activity. An impairment substantially limits a major life activity if:

- The individual is unable to perform one or more major life activities than the average person in general.

  OR

- The individual is significantly restricted as to the condition, manner or duration under which the individual can perform major life activities as related to that of the average person.

*** A person does not have to be unable to perform the major life activity to be "substantially limited."

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Topic 3: Substantially Limits Major Life Activities

What are Major Life Activities?

Those basic activities that the average person in the general population can perform with little or no difficulty.

Multiple impairments that combine to substantially limit one or more life activities also constitute a disability.

Factors to be considered in determining whether an individual is substantially limited in a major life activity include:

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.

"Duration" refers to the length of time an impairment persists, while "impact" refers to the residual effects of an impairment.

> ***Example**:* A broken leg that takes 8 weeks to heal normally is an impairment of fairly brief duration and would not constitute a disability. However, if the broken leg heals improperly, the "impact" of the impairment may be a resulting permanent limp and would constitute a disability.

***The reduction or elimination of the impact of the impairment by medication or mechanical aid cannot be considered when assessing the impact of an impairment.

For an impairment to rise to the level of a disability, it must substantially limit, have previously substantially limited, or be perceived as substantially limiting, one or more of a person's major life activities.

Note: An individual is not substantially limited in a major life activity unless (s)he is *unable to perform* the activity or is *significantly restricted* in performing the activity as compared to the average person in the general population.

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Topic 3: Substantially Limits Major Life Activities

Substantially Limits

Unlike the term "major life activities," the term "substantially limits" frequently requires extensive analysis. The term "substantially limits" is a comparative term that implies a degree of severity and duration. The primary focus here is on the extent to which an impairment restricts one or more of an individual's major life activities. A secondary factor that may affect the analysis is the duration of the impairment.

When analyzing the degree of limitation, remember that the determination of whether an impairment substantially limits a major life activity can be made only with reference to a specific individual. The issue is whether an impairment substantially limits any of the major life activities of the person in question, not whether the impairment is substantially limiting in general. Thus, the employer must consider the extent to which an impairment restricts a specific individual's activities and the duration of that individual's impairment. The determination of whether an impairment is substantially limiting should be made without regard to mitigating measures.

Extent to Which an Impairment Restricts a Major Life Activity

An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner, or duration under which an individual can perform a major life activity. The individual's ability to perform the major life activity must be restricted as compared to the ability of the average person in the general population to perform the activity.

> ***Example 1*** -- CP has a permanent knee impairment that causes him pain when he walks for extended periods. He can walk for ten miles at a time without discomfort, but he experiences pain on the eleventh mile. CP's knee impairment does not substantially limit his ability to walk. The average person in the general population would not be able to walk for eleven miles without experiencing some discomfort.
>
> ***Example 2*** -- CP, who has sickle cell anemia, frequently experiences severe back and joint pain. As a result of the sickle cell disease, CP often cannot walk for more than very short distances. CP's impairment (sickle cell anemia) substantially limits his ability to walk. The average person in the general population can walk more than very short distances.

Further, the limitation must be substantial, rather than minor. Not every impairment affects an individual's life to the extent that it is a substantially limiting impairment. A minor impairment, such as an infected finger, is not a disability.

Substantial Limitation of Major Life Activities Generally

In most cases, a careful, case-by-case analysis is necessary to determine whether an impairment substantially limits any of a person's major life activities. This analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting for that individual.

The key here is the extent to which the impairment restricts a major life activity.

If there is no evidence that the impairment significantly restricts a major life activity, then the impairment is not a disability. An individual who alleged that he had asthma but did not even assert that the asthma substantially limited a major life activity did not establish that he was an individual with a disability.

The employer, therefore, should conduct a careful analysis of whether a person's impairment substantially limits one or more major life activities. The employer should conduct this analysis even if the person does not make a specific allegation that his/her impairment is substantially limiting.

> ***Example*** -- CP alleges that her employer discriminated against her on the basis of disability. She defines her disability as a "knee injury." When the employer asks how the injury affects her, CP responds, "I don't know." She provides no information in response to the inquiries about the extent to which the injury restricts her ability to walk or to perform any other activities. There is no evidence that the knee injury limits CP in any way. As a result, there is no evidence that CP's knee injury substantially limits one or more of her major life activities.

To rise to the level of a disability, an impairment must significantly restrict an individual's major life activities. Impairments that result in only mild limitations are not disabilities. Thus, a mild case of varicose veins that moderately affect an individual's ability to stand and to sit is not a disability. Similarly, a "borderline" case of cerebral palsy that only slightly interferes with an individual's ability to read (because of poor control over ocular muscles) and to speak also is not a disability. In both instances, impairments may affect major life activities, but they do not substantially restrict those activities.

Substantial Limitation in Major Life Activity of Working

The employer need not determine whether an impairment substantially limits an individual's ability to work if the impairment substantially limits another major life activity. If the individual is not substantially limited with respect to any other major life activity, then the employer should consider whether the individual is substantially limited in working.

The EEOC has provided regulatory guidance for determining whether an impairment substantially limits an individual in the major life activity of working. The regulation states,

With respect to the major life activity of working--

1. The term *substantially 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.
2. In addition, 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 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).

A person is not substantially limited in the ability to work simply because (s)he cannot perform one particular job for one particular employer.

Rather, an individual is substantially limited in working if (s)he is prevented or significantly restricted (when compared to the average person having similar qualifications) from performing a class of jobs or a wide range of various jobs.

These criteria, when read together, indicate that an impairment is a substantial limitation to working if it disqualifies an individual from a class of jobs or a broad range of jobs in various classes jobs.

> ***Example 1*** -- CP is a computer programmer. She develops a vision impairment that does not substantially limit her ability to see but does prevent her from distinguishing characters on computer screens (without reasonable accommodation). As a result, she cannot perform any work that requires her to read characters on computer screens. Her vision impairment prevents her from working as a computer programmer, a systems analyst, a computer instructor, and a computer operator. CP is substantially limited in working because her impairment prevents her from working in the class of jobs requiring use of a computer.
>
> ***Example 2*** -- Same as Example 1, above, except CP's vision impairment does not interfere with her ability to distinguish characters on most computer screens. It does prevent her, however, from distinguishing characters on the peculiar type of computer screens that R uses. Although CP cannot work with the unique screens that R uses, she can work with other computer screens. CP, therefore, is not substantially limited in working. Her impairment prevents her from being a computer programmer for one particular employer (R), but it does not prevent her from performing similar jobs for other employers.

An assessment of whether an impairment substantially limits an individual's ability to work focuses on whether the individual is significantly restricted in the ability to perform 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.

For example, suppose that an individual has an impairment that interferes with his/her ability to work in the class of clerical jobs. The individual is substantially limited in working if (s)he is significantly restricted in performing clerical work as compared to the average person having comparable clerical skills.

Thus, if the individual has clerical skills and training and the impairment prevents him/her from performing many of the clerical jobs that the average person with comparable clerical skills can perform, then the individual is substantially limited in working. On the other hand, if the individual wants to work as a clerk but has no clerical skills or training, then (s)he is substantially limited in working only if the impairment significantly restricts his/her ability to work in the clerical class as compared to the ability of the average person with a similar lack of clerical skills.

The employer often can begin to obtain information relevant to a determination of whether the person's impairment significantly restricts his/her ability to perform either a class of jobs or a broad range of jobs in various classes from:

1. a position description of the job at issue,
2. the employee's explanation of the requirements of the job, and
3. their description of his/her qualifications and his/her experience in similar positions.

This information, which helps to identify the skills relevant to the job, may be useful in identifying other jobs using similar or dissimilar skills. In addition, the employer should attempt to determine the number and types of jobs in the geographical area from which the employee is disqualified because of the impairment. Information about other jobs where the employee has worked, or for which the employee has or has not applied, may be relevant to this inquiry.

For example, other employers may have refused to employ the individual because of his/her impairment, or the employee may not have applied for certain jobs because the impairment disqualified him/her from those jobs. Similarly, an employment agency or an employment counselor may have told the employee that the impairment prevents him/her from working in certain jobs. On the other hand,

the fact that the employee performed certain jobs successfully may indicate that the impairment -- if it existed at the time that the employee performed those jobs -- does not disqualify him/her from that type of work.

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Topic 3: Substantially Limits Major Life Activities

Prong 2
Record of an Impairment that Substantially Limits Major Life Activities

The second part of the statutory definition of the term "disability" applies to persons who have a record of a substantially limiting impairment. This section covers persons who have a history of, or have been classified or misclassified as having, a physical or mental impairment that substantially limits one or more major life activities. This category includes persons who have had a disabling impairment but have recovered in whole or in part and are not now substantially limited. It also includes persons who have been incorrectly classified as having a disability.

The legislative history of the ADA emphasizes that this part of the definition is intended to prevent discrimination against individuals who have been classified or labeled, correctly or incorrectly, as having a disability.

When determining whether an individual is covered by this part of the definition of the term "disability," one must remember that the record at issue must be a record of an impairment that substantially limited a major life activity. A record of a condition that is not an impairment, or of an impairment that was not substantially limiting, does not satisfy this part of the definition.

Further, a record of a condition, such as transvestism or compulsive gambling, that is specifically excluded from ADA coverage also does not satisfy this part of the definition.

> ***Example 1*** -- For several years, CP was twenty-to-thirty pounds beyond the target weight for men of his height and bone structure. His condition did not rise to the level of morbid obesity and did not cause or result from a physiological disorder. Further, his condition did not restrict any of his activities. CP recently completed a weight-loss program and is now at his target weight. CP does not have a record of a disability. He has a history of obesity, but his obesity was not an impairment and did not substantially limit any of his major life activities.
>
> ***Example 2*** -- CP was recently hospitalized for appendicitis. She underwent a routine appendectomy, was hospitalized for one week, and recovered fully within the normal healing period. Although CP has a hospital record of treatment for appendicitis, she does not have a record of a disability. The appendicitis restricted CP's activities for only a brief period and had no long-term or permanent effects on CP. The impairment, therefore, did not substantially limit any of CP's major life activities. As a result, CP does not have a history of a disability and the hospital record does not constitute a record of a disability.
>
> ***Example 3*** -- CP was convicted several times of shoplifting. He received treatment for kleptomania and has recovered from the condition. CP has a record of kleptomania, but he does not have a record of a disability. Kleptomania is specifically excluded from the statutory definition of the term "disability."

An individual who has a record of a disability under other laws or regulations does not necessarily have a record of a disability for purposes of the ADA. Other laws may define the term "disability" differently from the way the ADA defines the term.

The employer, therefore, should not assume that an individual who has been certified as having a disability or a handicap for other purposes, such as veterans programs, state vocational rehabilitation programs, or disability retirement programs, also has a disability under the ADA. The employer, however, should obtain a copy of the certification and other similar available documents. Such

certification may provide relevant information.

History of Such an Impairment

The term "disability" covers persons who have recovered from substantially limiting physical or mental impairments. Examples of persons who would fall under this part of the definition of the term "disability" include individuals who have histories of substantially limiting forms of heart disease or mental or emotional illness.

Example -- CP, who is thirty, had a severe form of depression when he was in his early twenties. He lost his appetite, could not sleep, was always tired, and rarely left his home. The depression became so serious that he could not function in day-to-day life. CP was hospitalized for four months and then received therapy on an out-patient basis for six months. The treatment was successful, and CP has had no recurrence of the depression. Although CP does not currently have an impairment that substantially limits a major life activity, he has a history of such an impairment. CP, therefore, falls under the second part of the definition of the term "disability."

Misclassified as Having Such an Impairment

The term "disability" covers persons who are not, and may have never actually been, impaired but nonetheless have been misclassified as having a disability. Thus, school or other institutional documents labeling or classifying an individual as having a substantially limiting impairment would establish a "record" of a disability. Individuals who have been misclassified by a school or a hospital as having mental retardation or a substantially limiting learning disability would be covered by this part of the definition of the term "disability."

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Topic 3: Substantially Limits Major Life Activities

Prong 3
Regarded as Having a Substantially Limiting Impairment

The third part of the statutory definition of the term "disability" applies to individuals who are regarded as having impairments that substantially limit one or more major life activities. This part covers persons who have impairments that do not substantially limit major life activities but are treated by covered entities as constituting substantially limiting impairments. It also covers persons whose impairments are substantially limiting only as the result of the attitudes of others toward the impairment and persons who have no impairments but nonetheless are treated as having substantially limiting impairments.

This aspect of the definition of the term "disability," is designed to protect against myths, fears, stereotypes, and other attitudinal barriers about disability. Common attitudinal barriers include, but are not limited to, "concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers." Quite often, employers will assume, without any objective evidence, that a person's physical or mental condition will cause problems in these areas. The ADA is designed to prevent employment discrimination based on mere speculation and unfounded fears about disability.

In contrast to the first two parts of the statutory definition of the term "disability," this part of the definition is directed at the employer rather than at the individual alleging discrimination. The issue is whether the employer treats the individual as having an impairment that substantially limits major life activities. Thus, as the legislative history to the ADA notes, "the perception of the covered entity is a key element of this test." Because it is the employer's perception that is at issue, it is not necessary that the individual alleging discrimination actually have a disability or an impairment. It also is not necessary that the employer's perception of the individual be shared by other employers.

The individual is covered by this part of the definition if (s)he can show that the employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype' . . . . 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."

The legislative history to the Act clarifies that the individual does not have to demonstrate that the employer's perception is wrong.

Persons with Impairments Regarded as Substantially Limiting

This section of the regulatory definition covers individuals who have impairments that do not substantially limit major life activities, but who are perceived as being substantially limited.

> ***Example*** -- CP has a mild form of strabismus (crossed eyes). The impairment only slightly affects CP's ability to see. CP's employer, however, thinks that the impairment prevents CP from seeing all printed material. As a result, the employer refuses to promote CP to a supervisory position requiring CP to review the written work of others. Although CP does not actually have a disability, she is regarded as having an impairment that substantially limits her ability to see. CP, therefore, is covered by the third part of the definition of "disability."

Persons Who Are Substantially Limited as a Result of Others' Attitudes

This section covers individuals who have stigmatic conditions that constitute physical or mental impairments but that do not by themselves substantially limit a major life activity. The impairments

become substantially limiting only because of the negative reactions of others toward the impairments.

> ***Example*** -- CP, who has a facial scar that runs from the base of his left ear to his chin, applies for a job as a sales representative in a home appliance store. The sales manager of the store refuses to consider CP for the position because she fears that CP's presence on the showroom floor will dissuade customers from shopping at the store. CP is covered by the third part of the definition of the term "disability." He has an impairment, a facial scar, that is substantially limiting only as a result of the negative attitudes of others.

Unimpaired Persons Regarded as Having Substantially Limiting Impairments

This section covers persons who have no actual physical or mental impairments but nonetheless are treated as having substantially limiting impairments.

> ***Example 1*** -- CP and her spouse have recently completed couples counseling by a clinical psychologist in an effort to remedy problems in their marriage. Neither CP nor her spouse has any psychological disabilities. CP's employer, however, believes that anyone who sees or has seen a psychologist "must be crazy." He finds a pretext under which to fire her. CP, therefore, is covered by the third part of the definition of "disability," because she is being treated by her employer as though she has a substantially limiting impairment when, in fact, she does not.

> ***Example 2*** -- CP had abdominal surgery a few years ago to treat a hernia. The hernia was fully corrected, and CP has no residual effects. R, however, thinks that this means that CP cannot lift anything weighing more than a few pounds and refuses to hire CP. R regards CP as having an impairment that substantially limits the major life activity of lifting. CP, therefore, is covered by this part of the definition of "disability."

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Topic 4: Qualified Individual with a Disability

An individual with a disability is "qualified" if he/she:

- Satisfies the requisite skills, experience, education and other job-related requirements of the position the individual holds or desires;

  AND

- Who, with or without reasonable accommodation, can perform the essential functions of the position.

The determination of whether an individual with a disability is qualified is made at the time of the employment decision, and may not be based on speculation about future abilities or speculation of increased health insurance premiums or workers' compensation costs.

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Topic 5: Reasonable Accommodation

The MHRA and ADA both differ from most civil rights laws because they not only impose prohibitions but also impose affirmative obligations. The employer has the duty to provide reasonable accommodation to the employee with a disability to enable him/her to perform the essential functions of the job unless such accommodation would impose an undue hardship.

A reasonable accommodation is any change or adjustment to a job, the work environment, or in the manner things are customarily done.

A reasonable accommodation provides the individual with a disability the same level of benefits and privileges of employment that are available to the average similarly-situated employee without a disability.

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Topic 5: Reasonable Accommodation

Examples of Possible Accommodations

1. Make existing facilities more accessible to and usable by the disabled person. Actions may include providing a reserved parking spot, adding a ramp or elevator for wheel chair access, or permitting the employee to use a seeing-eye dog.
2. Job restructuring.
3. Part-time, flexible or modified work schedules.
4. Acquisition of modification of equipment or devices.
5. Adjustments or modifications to examinations, training materials, or other procedures or policies.
6. Permitting the use of accrued paid leave or a leave under the FMLA or providing additional unpaid leave.
7. Providing personal assistants, such as a reader for a person who is blind, an interpreter for a deaf or hard of hearing person, a page turner for an employee with no hands, or a temporary job coach for a person with a learning disability.
8. Reassignment to a vacant position.

Note: If the proposed accommodation is something that the employer would not be required to provide because it is unreasonable, the individual with the disability requesting the accommodation must be given the option of providing the accommodation.

Note: Reassignment to a vacant position is only considered if all efforts to accommodate the employee have proved ineffective and the employee is qualified for the vacant position.

The Accommodation Need Not Be the Best Available.

The accommodation is sufficient as long as it gives the person with a disability an equal opportunity to perform the essential functions of the job, or to enjoy equal benefits and privileges of the job. In other words, the reasonable accommodation must be effective.

The Accommodation Must be Effective.

It must provide an opportunity for the person with a disability to achieve the same level of performance or to enjoy benefits or privileges equal to those of an average, similarly situated employee without a disability.

Accommodations Are Not Required for Primarily Personal Use.

Reasonable accommodations apply to modifications that specifically assist an individual in performing the duties of a particular job. Equipment or devices that assist the person in daily living activities on and off the job are considered personal items that an employer is not required to provide.

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Topic 5: Reasonable Accommodation

When Does the Responsibility of Providing Reasonable Accommodation Arise?

An employer's duty to make reasonable accommodations arises when:

1. A person has a ***disability*** as defined by the law;
2. The employer ***knows*** of the disability;
3. The person ***seeks*** an accommodation;
4. The accommodation is ***necessary*** to enable the person to perform the essential functions of the job or to enjoy job-related benefits or privileges; and
5. The accommodation is ***reasonable***, does not create ***undue hardship***, and does not pose a genuine, ***direct threat***.

Note: An employee does not have to use the words "reasonable accommodation" for the employer's duty to begin.

> *For Example*: If an employee informs you that he/she is having difficulty getting to work on time because of chemotherapy treatment, you are obligated to consider reasonable accommodation.

What is Required to Meet the Duty of Reasonable Accommodation?

In many cases, the appropriate accommodation will be so obvious that neither the employer nor employee will be aware of engaging in any sort of accommodation process. However, if it is not clear what the accommodation should be, then the employer should conduct an informal, interactive process with the employee.

> Considerations should include:
>
> 1. It is essential that you keep the employee with the disability involved during all phases of reasonable accommodation analysis and provision.
> 2. Review the essential functions of the job and the extent to which such functions will be affected by the proposed accommodation.
> 3. Actions taken by the employer previously or in other facilities.
> 4. Actions taken by other employers in the same or similar businesses.
> 5. The nature of the accommodation.
> 6. Effectiveness of the accommodation in removing the individual's job limitations.
> 7. Nature and effectiveness of alternative means of accommodation, if any.
> 8. Impact of the accommodation upon the operation and the ability to conduct the business of the facility.
> 9. Impact on other employees' ability to perform their duties.
> 10. Health or safety risks to the affected person or others and the extent to which such risks can be reduced or eliminated.
> 11. Evidence of good faith efforts to explore less restrictive or less expensive alternatives.

In situations where there are two accommodations that would be effective, the employer may choose the least expensive or the accommodation more easily implemented, provided that the alternate accommodation is expected to be effective. The expressed choice of the applicant or employee must be given primary consideration, unless another effective accommodation exists that would provide meaningful equal opportunity, or the accommodation requested by the employee would be an undue hardship.

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Topic 5: Reasonable Accommodation

Reasonable Accommodation Process

1. Determine the job's purpose and its essential functions.
2. Consult with the individual with a disability to determine the specific abilities and limitations as they relate to the essential job functions.
3. Identify the barriers to job performance and explore/examine how these barriers could be overcome with an accommodation.
4. In consultation with the individual, identify potential accommodations and assess how effective each would be.
5. Select the accommodation that best serves the needs of the individual and the employer.

A Practical, Problem-Solving Approach to Reasonable Accommodations

If an employee requires an accommodation and the need for the accommodation is not *obvious,* or if the employer has *reason to disbelieve* that the accommodation is needed, the employer may request reasonable medical documentation of the individuals' functional limitations from the treating professional(s) to support the request. (See the template letter to the treating physician.)

1. ***Get Information***: talk to the individual and find out:
    - what is the claimed disability;
    - what is the source of the claimed disability; and
    - what limitations does the claimed disability create for the person's ability to perform the essential job functions?
2. ***Affirm the Agency's Equal Employment Opportunity Commitment.*** Clearly indicate that the agency does not discriminate on the basis of disability and that it is fully committed to making reasonable accommodations for persons with disabilities as required by law. Do not make any commitments to the person. Indicate that it is necessary to consult with the treating physician, and request that the employee sign a Release of Information Form to go to the treating physician.
3. ***Consult with Others and Analyze the Situation.*** Consult with the ADA Coordinator, Human Resource Department, or other agency resources who have experience with such matters.
    a. Obtain the necessary information from the treating physician to determine whether the claimed disability is in fact a disability as defined under the law.
    b. Analyze the particular job involved, review the essential job functions.
    c. Identify possible means of accommodation. Analyze the costs and benefits of each, assessing the reasonableness and effectiveness of each proposal.
    d. Determine which possible accommodation would be feasible.
4. ***Confer with the Individual.*** It is advisable to have two agency representatives meet with the individual and it is important to inform the individual of their right to union representation. Listen to the individual's preferences, comments, and suggestions for a means of accommodations. Try to reach an agreement on the most appropriate means of accommodation. Agreement may not be possible, in which case the agency should clearly communicate its proposal to the individual and give them a fair opportunity to consider it and then accept or reject it. If reasonable accommodation is not possible, the agency nonetheless has met its obligation under the law to make good faith efforts to accommodate. There is no absolute obligation under the statute to accommodate, only to make reasonable accommodation.
5. ***Keep a Record.*** Maintain a record of the communications with the individual, the actions taken and those proposed but not taken, including the reason(s) for each. This is essential if a dispute arises with the individual, or if other similar circumstances arise. It also will help ensure that the agency treats all individuals equally.

Other Considerations

An employer may not coerce a qualified individual with a disability to accept an accommodation. However, if a necessary reasonable accommodation is refused, the individual with a disability may not be qualified to perform the essential functions of the job.

The reasonable accommodation obligation applies only to modifications or adjustments that reduce barriers to employment related to a person's disability; it does not apply to modifications or adjustments that a person with a disability may request for some other reason.

The employer may not discriminate against a person with a disability in the guise of an accommodation. For example, an employer could not reassign an employee infected with HIV to a job requiring no client contact for the purported purpose of providing reasonable accommodation.

See the ADA Tool Box for applicable forms and the State Policy on Reasonable Accommodations.

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Topic 6: Essential Job Functions

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 marginal functions of the position.

Factors Suggesting That a Function is Essential

The EEOC explained that the determination of whether a function is essential should be made as follows:

1. **Are Employees in the Position Actually Required to Perform the Function?** A preliminary consideration is whether the employer actually requires employees to perform the function. If in fact the employer has never required any employee in the particular position to perform the function, this would be evidence that the function is not essential.

   For example: A job announcement or a 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 this job *does* perform a function, the next consideration is: ***"Would removing that function fundamentally change the position?"***

2. **Does the Position Exist to Perform the Function?** Under the EEOC's approach, if the position exists to perform the particular function, the function is an essential function.

   For example: The EEOC attempted to illustrate this factor with a somewhat circular example involving an individual hired to proofread documents. The ability to proofread would be an essential function since this is the primary reason the position exists. If the employer were to remove the job task of proofreading, the job would be "fundamentally changed" because the reason this position exists is to do proofreading.

   A small state agency has a single receptionist to answer and route all incoming telephone calls and greet and direct visitors. To remove the function of answering the telephone *would* fundamentally change the job because this position exists to perform that function.

3. **Are There a Limited Number of Employees Who Could Share the Function?** According to EEOC guidelines, a function may be essential if there are a limited number of employees among whom the employer can distribute performance of the function.

   For example: Consider a large mailroom whose mail clerks are responsible for processing incoming and outgoing mail, couriering mail within the office building and going to the post office once each week to update the postage meter. Each mail clerk is hired to perform all of these functions. One current employee requests a reasonable accommodation to eliminate his post office rotation eliminated because of a documented anxiety disorder. Would eliminating this task "fundamentally change" the position? Following the EEOC guidelines, the answer would be no, since there are enough other mail clerks who could share the function and the position does not exist solely to perform this function, this would not be an essential function.

4. **Is the Function Central to a Highly Specialized Position?** The third factor listed by the EEOC states that a position may be highly specialized so that the individual is hired or retained because of his or her expertise or ability to perform the particular function. It may be difficult to distinguish this factor from the EEOC's first factor without an illustration.

For example: A fire protection agency may use this factor to support its position that the ability to rescue an unconscious individual from a burning building is an essential function. The agency would assert that working as a fire fighter is a highly specialized position and that it hires applicants and retains employees because of their expertise and ability to perform such rescues. While any one firefighter may seldom need to use this ability, the consequences of removing this function *would* fundamentally change the position.

Considering All Three Elements

When assessing whether removing a function "fundamentally changes" a position, it is important to consider these three elements together.

For example: Consider a medium sized treatment center where the staff must be able to respond to potential client crises which require administration of CPR. It is essential that there are enough staff qualified to administer CPR to ensure client safety on all shifts. Even though this function is highly specialized, it does not necessarily mean that removing the ability to administer CPR from one employee's position would fundamentally change that position. The employer must consider whether there are enough other qualified staff to share this function. If so, removing this function as a reasonable accommodation for one employee *would not* fundamentally change the position. If, on the other hand, an additional staff member has requested the same reasonable accommodation and this would jeopardize the required number of qualified staff needed to cover every shift, removing the function *would* fundamentally change the position.

Additional Factors to Be Considered in Identifying Essential Functions

"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;
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."

Do I Have to Change Essential Job Functions as an Accommodation?

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 the definition of a job and what functions are required to perform it effectively. The ADA simply requires that an individual with a disability's qualifications for a job are evaluated in relation to its essential functions.

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. Therefore, the ADA requires an employer to focus on the essential functions of a job to determine whether a person with a disability is qualified. ***The employer is not obligated to remove essential functions from a job as a reasonable accommodation.***

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Topic 7: Undue Hardship

An accommodation is not considered *"reasonable"* if it results in undue hardship. An undue hardship is an action that requires "***significant difficulty or expense***" in relation to the overall size of the employer, the resources available, and the nature of the operation.

The concept of undue hardship includes any action that is:

- unduly costly;
- extensive;
- substantial;
- disruptive; or
- that would fundamentally alter the nature or operation of the business.

It should be noted that the state is one employer. Therefore, the argument of financial undue hardship will not be defensible as reason for failing to provide a reasonable accommodation. As such, the State of Minnesota is expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.

Whether a particular accommodation would impose an undue hardship must always be determined on a case-by-case basis. 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 the same employer, at another time.

An employer may not claim undue hardship simply because the cost of an accommodation is high in relation to an employee's wage or salary. When enacting the ADA factors for determining undue hardship, Congress rejected a proposed amendment that would have establish an undue hardship if an accommodation exceeded 10% of an individual's salary. This approach was rejected because it would unjustifiably harm lower-paid workers who need an accommodation. Instead, Congress clearly established that the focus for determining undue hardship should be the resources available to the employer.

If an employer finds that the cost of an accommodation would impose an undue hardship and no funding is available from another source, an applicant or employee with a disability must be offered the option of paying for the portion of the costs that constitutes an undue hardship, or of providing the accommodation.

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Topic 8: Direct Threat Provision

The direct threat provision imposes very strict requirements for use. A direct threat is defined as a *"significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."*

The employer must:

- Demonstrate that there is a *significant risk* of *substantial harm*;
- Identify the *specific* risk;
- Demonstrate that the risk is *current*, as opposed to speculative or a future risk; and
- Support the risk assessment with *objective* medical or other *factual* evidence related to the particular employee in question.

If these conditions are met, the employer has the obligation to consider whether a reasonable accommodation can reduce or eliminate the risk before taking adverse employment action.

The ADA provides that qualification standards may include requirements that an individual shall not pose a direct threat to the health or safety of others in the workplace.

Employers must make individualized determinations of an individual's current ability to safely perform a job's essential functions; and that these determinations cannot be based on myths or stereotypes about a given disability.

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Topic 9: Individualized Approach

One of the reasons an individualized approach is necessary is because the same types of impairments often vary in severity and restrict different people to varying degrees or in different ways.

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.

> ***Example 1*** -- CP has a mild form of Type II, non-insulin-dependent diabetes. She does not need to take insulin or other medication, and her physician has placed no significant restrictions on her activities. Instead, her physician simply has advised CP to maintain a well balanced diet and to reduce her consumption of foods that are high in sugar or starch. Although diabetes often substantially limits an individual's major life activities, CP's diabetes does not substantially limit any of her major life activities. It has only a moderate effect on what she eats, and it does not restrict her in any other way.
>
> ***Example 2*** -- Same as Example 1, above, except CP's condition requires CP to follow a strict regimen. She must adhere to a stringent diet, eat meals on a regular schedule, and ensure a proper balance between her caloric intake and her level of physical activity. A change of routine, such as a high-calorie meal or unexpected strenuous exercise, could result in blood-sugar levels that are dangerously high or low. CP's condition significantly restricts how she functions in her day-to-day life. CP, therefore, has an impairment (diabetes) that substantially limits one or more of her major life activities.

In very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the employee is an individual with a disability. Thus, courts have accepted without discussion that a person was an individual with a disability when the impairment is insulin-dependent diabetes, legal blindness, deafness, manic depressive disorder, and alcoholism. Furthermore, according to the legislative history, an individual who has HIV infection (including asymptomatic HIV infection) is defined as an individual with a disability.

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Topic 10: Medical Documentation

While medical documentation is not always necessary, the ADA does not prevent employers from obtaining *reasonable* medical and related information *necessary* to evaluate a request for reasonable accommodation and to assess the ability of employees to perform the essential job functions, or to promote health and safety on the job. However, all such medical inquiries must be job-related and consistent with business necessity.

Under the ADA, medical information may be required:

1. when an employee suffers an injury on the job;
2. when an employee wishes to return to work after an injury or illness, if it is job-related and consistent with business necessity;
3. to determine if the individual meets the ADA definition of an "individual with a disability," after a request for accommodation has been made.

Just as medical documentation submitted by an employee is relevant to determining whether the individual has an impairment, it also may be a good starting point for determining the extent to which a physical or mental impairment limits any of the individual's major life activities. Such documentation should describe the restrictions that the impairment places on the individual.

The doctor who conducts medical examinations for an employer is not responsible for making employment decisions or deciding whether or not it is possible to make reasonable accommodation for the employee. That responsibility lies with the employer.

The doctor's role is limited to advising the employer about an individual's functional abilities and limitations in relation to the job functions, and whether the individual meets the employer's health and safety requirements. To fulfill this role, the employer must provide doctors who conduct such examinations with specific information about the job, including a description of essential and non-essential functions.

The employer should inform the doctor that any recommendations or conclusions related to the employee should focus on only two concerns:

1. Whether the employee is able to perform this specific job, with or without accommodation.
2. Whether the employee can perform this job without posing a direct threat to the health or safety of the employee or others.

The employer should ask the employee's physician for copies of medical statements that describe the individual's restrictions. The employer must obtain a signed medical release from the employee and should submit a photocopy of the release with the request for medical documentation.

Although medical documentation can provide important information about the restrictions that an impairment places on an individual, the employer should not rely solely on this information. The employer should obtain other available relevant information that describes the restrictions resulting from the impairment.

It is essential that the employer obtain a statement in which the employee describes the nature of his/her condition and explains how the condition limits his/her performance of major life activities.

The information that the employer obtains from the employee should be specific.

> ***For example***: It is insufficient for the employee merely to state that his/her condition interferes with his/her ability to walk. The employee should explain the extent of the

interference; such information as to whether the condition prevents him/her from walking at all, whether (s)he can walk under certain conditions, and whether (s)he can walk for short or long distances and periods.

Where the doctor's report indicates that the employee has a disability that may prevent performance of essential job functions, or that may pose a direct threat, the employer may seek his/her advice on possible accommodations.

See the ADA Tool Box for sample forms for use when obtaining medical documentation.

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Topic 11: Confidentiality

The ADA has very strict requirements regarding the confidentiality of medical information received to substantiate a request for reasonable accommodation.

An employer must keep any medical information on applicants or employees confidential with the following limited exceptions:

- Supervisors and managers may be told about necessary *restrictions* on the work or duties of the employee and about necessary *accommodations*. Supervisors and managers should *not* be told or have access to medical information itself.
- First aid and safety personnel may be told *if* the disability may require emergency treatment;
- Government officials investigating compliance with the ADA must be given relevant information upon request.
- Employers may give information to state workers' compensation offices or workers' compensation insurance carriers in accordance with state workers' compensation laws, and
- Employers may use the information for insurance purposes.

The ADA Coordinator, *not* the supervisor or manager, must obtain and secure any medical information required to substantiate and consider a request for reasonable accommodation.

Record Storage

Medical information must be collected and maintained on separate forms and in separate files. No medical-related material is to be placed in an employee's non-medical personnel file. If an employer wants to put a document in a personnel file, and that document happens to contain some medical information, the employer must remove the medical information from the document before putting it in the personnel file.

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Topic 12: Drug and Alcohol

The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other Federal laws and regulations regarding alcohol and drug use. An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.

The ADA does provide protection from discrimination for recovering drug addicts and alcoholics.

It is not a violation of the ADA for an employer to give tests for the illegal use of drugs when such tests are required in all similar situations. Also, an employer may discharge or deny employment to persons who currently engage in the illegal use of drugs or alcohol. An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" when the employer acts on the basis of such use.

An employer may discipline, discharge or deny employment to an alcoholic whose current use of alcohol impairs job performance or conduct to the extent that he/she is not a "qualified individual with a disability."

"Currently Engaging"

The term "currently engaging" is not intended to be limited to the use of drugs on the day, or within a matter of days or weeks before the employment action in question. Rather, the exact 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. Their own admissions of drug involvement during the two weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct.

Alcoholism

While a current illegal user of drugs has no protection under the ADA if the employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection simply because of alcohol use.

An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if he/she is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that he/she is not qualified to perform the essential functions of the job.

Illegal Drug Users

Current illegal users of drugs are not individuals with disabilities under the ADA. The illegal use of drugs includes the use, possession, or distribution of drugs which are unlawful under the Controlled Substances Act. It also includes the use of illegal drugs and the illegal use of prescriptions drugs that are "controlled substances."

> ***For example***: Amphetamines can be legally prescribed drugs. However, amphetamines, by law, are "controlled substances" because they have been abused and have the potential to be abused. If a person takes amphetamines without a prescription, that person is using drugs illegally, even though they could be prescribed by a physician.

An employer may discharge or deny employment to current illegal users of drugs on the basis of such drug use, without fear of being held liable for disability discrimination.

Recovering Drug Addicts

Persons addicted to drugs, who are no longer using drugs illegally, are receiving treatment for drug

addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction.

> ***For example***: An addict who is currently in a drug rehabilitation program and has not used drugs illegally for some time is not excluded from the protection of the ADA. This person will be protected by the ADA because he/she has a history of addiction, or if he/she is regarded as being addicted. Similarly, an addict who is in rehabilitation, or who has successfully completed a supervised rehabilitation program, and is no longer illegally using drugs is protected by the ADA.

A "rehabilitation program" may include in-patient, out-patient, employee assistance programs, or recognized self-help programs such as Narcotics Anonymous.

An individual who illegally uses drugs, but also has a disability, such as epilepsy, is only protected by the ADA from discrimination on the basis of the disability of epilepsy. An employer can discharge or deny employment to such an individual on the basis of his/her illegal use of drugs.

Persons "Regarded As" Addicts and Illegal Drug Users

Individuals who are not illegally using drugs, but who are erroneously perceived as being addicts and as currently using drugs illegally, are protected by the ADA.

> ***For example***: If an employer perceived someone to be addicted to illegal drugs or alcohol based upon rumor and the groggy appearance of the individual, but the rumor was false and the appearance was a side-effect of a lawfully prescribed medication, this individual would be "regarded as" an individual with a disability (a drug addict) and therefore, would be protected from discrimination based upon that false assumption.

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Topic 13: Evaluation, Discipline and Discharge

Employers are sometimes confused about the ADA's effect on their ability to enforce workplace conduct rules. For example, employers have asked questions such as:

- Do I have to allow an employee to violate conduct rules when the employee says his/her disability prevents him/her from complying with those rules?
- Is there a difference in how I can treat employees who violate drug/alcohol rules, and how I can treat employees who violate other conduct rules?
- If I've disciplined an employee for misconduct, do I have to withdraw the discipline if the employee later tells me the misconduct was due to a disability?

It is important to note that the EEOC has specifically stated that "employers may hold all employees, disabled ... and similarly situated nondisabled, to the same performance and conduct standards? (Preamble to EEOC Regulations on Title I at Section 1630.16.56).

An employer may not discipline or terminate an employee with a disability if the employer has refused to provide a requested reasonable accommodation that did not constitute an undue hardship, and the reason for unsatisfactory performance was the lack of accommodation.

Rules Concerning Illegal Use of Drugs

An individual who currently illegally uses drugs is *not* protected by the ADA when the employer acts on the basis of the illegal drug use. Therefore, an employee who illegally uses drugs, either because s/he is a casual user or because s/he is an addict, is not protected by the ADA if the employer acts on the basis of the illegal drug use. As a result, an employer would not violate the ADA by enforcing its rules prohibiting employees from illegally using drugs.

> ***For example**:* If an employer learns that one of its employees is illegally using cocaine, the employer may terminate that person because of the drug use without violating the ADA. The result would be the same even if the employee also had a covered disability (such as blindness), as long as the employer is acting on the basis of the illegal drug use.
>
> **Can a drug addict who breaks the rules, prior to discipline, enroll in a supervised drug rehabilitation program, and claim ADA protection as a former drug addict who no longer illegally uses drugs?**
> The argument that this person is protected by the ADA would probably fail. The ADA does not protect current illegal drug users when the employer acts on the basis of the drug use. The EEOC has defined "current" to mean that the illegal drug use occurred "recently enough" to justify the employer's reasonable belief that the drug use is an ongoing problem. "Current" is not limited to the day or week of the use, but is determined on a case-by-case basis. An employer could persuasively argue that an employee is a "current" user even if she/he had recently entered a drug rehabilitation program.

Rules on Workplace Use/Influence of Alcohol

The analysis regarding alcohol rules is a bit different, but the result is the same. An employer can enforce its rules prohibiting an employee from using or being under the influence of alcohol in the workplace. Although current illegal drug users do not have a protected ADA disability, current alcohol users who are alcoholics *do* have a protected ADA disability. Employers may, nonetheless, enforce rules concerning alcohol in the workplace. The ADA specifically states that employers may take the following actions:

- prohibit the use of alcohol in the workplace;
- require that employees not be under the influence of alcohol in the workplace; and

- hold an employee with alcoholism to the same standards for employment of job performance and behavior to which the employer holds other employees, *even if* unsatisfactory performance or behavior is related to the alcoholism.

  For example: Suppose an employee consistently comes in late on Mondays because of weekend alcohol abuse. An employer may enforce its tardiness policy, and discipline the employee in accordance with the policy. However, an employer may not disparately treat a qualified employee *because* of alcoholism. If the employer would not discipline a non-alcoholic for being tardy, the employer may not discipline the employee with alcoholism for being tardy.

Rules Concerning Other Workplace Conduct

Other workplace rules concerning conduct may take a number of forms, such as rules against violence, rules concerning professionalism, and rules concerning tardiness and/or attendance. An employer should remember that it may hold all employees (including those employees with disabilities) to the same conduct standards. Look at some examples.

> ***Example:*** Suppose an employee has a rare disorder which results in his/her punching a supervisor, or threatening to punch a co-worker. An employer never has to condone violence, or the threat of violence, in the workplace even if it is the result of an employee's disability. An employer can discipline that employee in the same manner that he/she would discipline an employee without a disability who engaged in the prohibited conduct.

An employer has several arguments justifying why he/she can discipline an employee who is violent or who threatens violence in the workplace, even if the violence (or the threat) is the result of a disability. First, an employer can argue that the individual is not "qualified" under the ADA because "qualified" should mean that someone can perform a job without interfering with other employees' ability to perform their jobs. An employer may also be able to argue that this particular employee poses a "direct threat" to others that cannot be reasonably accommodated.

> ***Example:*** Consider an employee whose duties involve interacting with the public and the employee's particular neurological impairment causes him/her to use obscenities when speaking with customers. The employer might again argue that the individual is not "qualified" because he/she cannot satisfactorily perform the essential functions of the job. Of course, the employer must consider reasonable accommodations so that the employee could properly perform the functions. For example, the employer might learn that the employee's condition becomes exacerbated during certain times of the day. A reasonable accommodation could involve rescheduling the employee to work hours when the condition would not cause inappropriate language. The employer must provide the reasonable accommodation if it does not create an undue hardship.

> ***Example:*** Tardiness rules are also sometimes violated because of an individual's disability. If an employee gets cancer treatments in the morning and, as a result, arrives late to work, the employer can presumably discipline the employee in the same way it would discipline any other employee who is tardy. However, if the employee requests a reasonable accommodation so that s/he can satisfy the rules, the employer must consider whether the reasonable accommodation can be provided without imposing an undue hardship. It should be noted that it would likely be considered a request for reasonable accommodation if the employee simply indicates to the employer that s/he is having difficulty getting to work on time because of cancer treatments.

Must an employer rescind discipline imposed for misconduct if the employee later requests accommodation?

Suppose an employee is given three written warnings for tardiness, and then is fired. Now assume that an employee has received two warnings prior to requesting the reasonable accommodation of a flexible

schedule. Does the employer have to rescind the warnings that were already imposed? Probably not, because the employer generally only has to provide reasonable accommodation after it is requested. Therefore, the employer can discipline the employee for tardiness violations that occurred before the request, but must provide reasonable accommodation for the future, to the extent that it does not create an undue hardship. If the employee requests reasonable accommodation only after having been disciplined or fired, the employer does not have to rescind the action.

Evaluations

An employee with a disability who needs an accommodation in order to perform a job function cannot be evaluated on his/her ability to perform the function without the accommodation, and cannot be downgraded because an accommodation is needed to successfully perform the functions.

An employer must provide an employee with a disability with a reasonable accommodation to enable the employee to participate in the evaluation process (i.e. interpreter).

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Topic 14: Leave

An employer may establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability unless to do so would result in an undue hardship.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification to such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

An employer is not required to give leave as a reasonable accommodation to an employee who has a relationship with an individual with a disability to enable the employee to care for that individual.

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Topic 15: Training

Employees with disabilities must be provided equal opportunities to participate in training to improve job performance and provide opportunities for advancement. Training opportunities cannot be denied because of the need to make a reasonable accommodation, unless the accommodation would be an undue hardship.

The employer must include the following ADA notice on all materials or e-mails used to inform employees of training opportunities:

> ***If you need an accommodation for a disability to enable you to fully participate in this event, (wheelchair access, auxiliary hearing devices, an interpreter... such an accommodation can be made available upon advance request.***
> ***Please contact _____ at _____/V or _____/TTY by _____.***

Accommodations that may be necessary, depending on the needs of particular individuals, may include:

- accessible locations and facilities
- interpreters and/or note-takers
- materials in accessible formats and/or readers
- closed or open-captioning for all audiovisual materials
- good general illumination
- clarification of concepts presented in training
- individualized instruction

If an employer contracts for training with a training company, or contracts for training facilities such as hotels or conference centers, the employer is responsible for ensuring accessibility and other needed accommodations.

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Topic 16: Nondiscrimination and Opportunities for Advancement

The nondiscrimination requirements that apply to initial selection apply to all aspects of employment, including opportunities for advancement.

> ***For example**:* An employer may not discriminate in promotion, job classification, evaluation, disciplinary action, opportunities for training, or participation in meetings and conferences.

In particular, an employer:

- may not assume that an individual with a disability is not interested in, or not qualified for advancement because of the disability;
- may not deny a promotion because of the need to make an accommodation, unless the accommodation would cause an undue hardship;
- may not place individuals with disabilities in separate lines of progression or in segregated units of locations that limit opportunity for advancement;
- must assure that supervisors and managers who make decisions regarding promotion and advancement are aware of ADA nondiscrimination requirements.

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Topic 17: Nondiscrimination in Other Benefits and Privileges of Employment

Nondiscrimination requirements, including the obligation to make reasonable accommodation, apply to all social or recreational activities provided or conducted by an employer, to any transportation provided by an employer for its employees or applicants, and to all other benefits and privileges of employment.

This means that:

- Employees with disabilities must have an equal opportunity to attend and participate in any social functions conducted or sponsored by an employer. Functions such as parties, picnics, shows, and award ceremonies must be held in accessible locations and accommodations must be provided when necessary.
- Employees with disabilities must have equal access to breakrooms, lounges, cafeterias, and any other non-work facilities that are provided by the employer for use by its employees.
- Employees with disabilities must have equal access to an exercise room, gymnasium, or health club provided by an employer for use by its employees. However, an employer would not have to eliminate facilities provided for employees because an employee's disability causes him/her to be unable to use certain equipment or amenities.
- Employees with disabilities must be given equal opportunity to participate in employer-sponsored events such as sports teams, leagues, recreational activities, and wellness activities. An employer does not have to discontinue such activities because a disabled employee cannot fully participate due to his/her disability.
- Any transportation provided by an employer for use by its employees must be accessible to employees with a disability. This includes transportation between employer facilities, transportation to and/or from mass transit and transportation provided on an occasional basis to employer-sponsored events.

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Topic 18: Pre-Employment Duties

Under the ADA, an employer has no obligation to prefer applicants with a disability over other applicants. Rather, the employer's duty is to consider applicants and make employment decisions without regard to an individual's disability or the employer's obligations to reasonably accommodate the applicant/employee.

Reasonable Accommodation Duty

The ADA requires reasonable accommodation to ensure equal opportunity in the application and selection process, unless to do so would result in an undue hardship.

This duty applies to all steps in the application/selection process, including:

- filling out the application;
- completing the testing process; and
- participating in the interview process.

As with other reasonable accommodations, the employer is required only when the applicant has informed the employer of a disability and requested an accommodation.

Testing

The EEOC's regulation on the administration of tests states:

> 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 the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of such an employee/applicant
>
> ***For example***: An employer can require that an applicant with dyslexia take a written test for a particular position if the ability to read is essential to the effective performance of the job (i.e. proofreader position) and there would be no reasonable accommodation that would allow the applicant to perform the job.
>
> ***For example***: An employer can require an applicant to complete a test within established time frames if speed were one of the skills being tested.

However, as with all such tests, the test results could not be used to exclude disabled individuals unless the skill was necessary to an essential function of the job and no reasonable accommodation was available that would not impose an undue hardship.

Refer to the section of this reference material on pre-employment inquiries and medical examinations.

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Topic 19: Enforcement Provisions

A job applicant or employee who believes he/she has been discriminated against on the basis of disability, or on the basis of association with a person with a disability, in employment can file a charge with the EEOC within 300 days of the alleged act of discrimination.

The entity charged with violating the ADA generally receives written notification of the charge within 30 days after it is filed and will be required to respond within 30 days.

The EEOC will investigate charges of discrimination. If the EEOC believes that discrimination occurred, it will attempt to resolve the charge through conciliation and obtain full relief for the aggrieved individual consistent with EEOC's standards.

If conciliation fails, EEOC will file suit or issue a "right to sue" letter to the person who filed the charge.

Remedies for violations of Title I of the ADA include hiring, reinstatement, promotion, backpay, front pay, restored benefits, reasonable accommodations, attorneys' fees, expert witness fees and court costs. Governmental entities are subject to a remedy cap of $300,000, however several courts have awarded remedies well in excess of this amount for actions believed to be deliberate and/or malicious.

Employers may not retaliate against any applicant or employee who files a charge, participates in an EEOC investigation or opposes an unlawful employment practice.

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Can an employer establish specific attendance and leave policies?

An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

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What is considered a direct threat?

The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations."

The requirements pertaining to direct threat are very strict and cannot be based on myths, stereotypes or misconceptions.

Direct threat factors include:

- A significant risk, the specific risk must be identified, and significance of risk means a high probability of occurrence.

  Risk must be current - not speculative or remote.

  Assessment based on an objective medical or other factual evidence.

Can an employer consider health and safety when deciding whether to hire an applicant or to retain an employee with a disability?

Employers are required to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes or stereotypes. The ADA 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 eliminated or reduced below the level of a "direct threat" 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 significant risk that substantial harm could occur in the workplace.

Does the ADA override Federal and State health and safety laws?

The ADA does not override health and safety requirements established under other Federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job-related and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another Federal law, then the employer must do so.

The ADA does not override State or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a State or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a State or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

How does the ADA affect workers' compensation programs?

Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments which heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to determine if a worker is protected by the ADA.

An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may inquire about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or worker's compensation history.

An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

How are the employment provisions enforced?

The employment provisions of the ADA are enforced under the same procedures now applicable to race, color, sex, national origin, and religious discrimination under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or 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, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorney's fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

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The State of Minnesota's application form asks whether applicants are disabled for affirmative action purposes. Is this legal under ADA?

It is permissible for the state to ask this voluntary question to conduct a bonafide Affirmative Action program.

What kind of personal responsibility does an employee have to disclose a disability (e.g. lifting restrictions)?

The ADA requires the employer to provide a reasonable accommodation for known physical or mental disabilities. The employee is under no obligation to disclose a disability. The employee, however, must be able to demonstrate that he or she can perform essential job functions with or without an accommodation.

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Is it legal for an employer to eliminate or restructure a position so that the employee can no longer perform the essential functions and must accept a transfer to a lower paying job or quit?

No. This scenario seems to be an obvious attempt to discriminate against a qualified individual with a disability. Title I, § 102 of the ADA prohibits employment practices which produce the effect of discrimination on the basis of disability. Even though the management decision may not be overtly discriminatory, it is still prohibited by the ADA.

Does the ADA require the employer to make a reasonable accommodation for a non-disabled person based upon an association with a person with a disability?

No. The obligation to make reasonable accommodations applies only to reducing barriers to employment related to a person's disability. However, the employer may not exclude, fail to hire, fire or refuse to insure an employee or applicant because that individual has a known relationship or association with an individual who has a disability.

What is discrimination based on "relationship or association" under the ADA?

The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based upon unfounded assumptions that their relationship to a person with a disability would affect their job performance, and resulting from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability 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.

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How does the ADA define "Substantially Limits?"

Unable to perform one or more major life activities that the "average" person in the general population can perform;

or

Significantly restricted as to the condition, manner or duration under which the individual can perform major life activities as related to that of the average person.

***A person does not have to be unable to perform the major life activity to be "substantially limited."

What are major life activities?

Basic activities that the average person in the general population can perform with little or no difficulty.

Why isn't pregnancy a disability?

To qualify as a disability under the ADA, the impairment must be the result of a physiological, mental or psychological disorder that affects a major body system. Pregnancy is not a "***disorder"*** but rather an illustration of a well functioning major body system.

If a mental illness may be a disability, why isn't pyromania considered a disability? Why isn't compulsive gambling a disability?

The following are specifically excluded from ADA protection:

- Homosexuality, bisexuality
- Tranvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identify disorders not resulting from physical impairment, or other sexual behavior disorders
- Compulsive gambling, kleptomania, pyromania
- Psychoactive substance use disorders resulting from current illegal use of drugs
- Current illegal drug users
- Pregnancy
- Temporary impairments
- Personality traits
- Minor physical characteristics
- Environmental, cultural or economic disadvantages
- Nicotine addiction
- Age

Is an illegal drug user who has been through treatment protected by the ADA?

An individual who has a record of the illegal use of drugs ***is not automatically*** an individual with a disability. The record must indicate a substantially limiting impairment. *Only addiction or perceived addiction to a controlled substance meets this standard*. Occasional, casual illegal use of drugs does not constitute a disability.

The same is true of alcoholism.

Can a problem employee use ADA as a shield?

No. An employer may hold an employee with a disability to the same conduct and performance standards as other similarly situated employees. An employer may also take the same disciplinary action against employees with disabilities as it takes against other similarly situated employees without disabilities.

Are applicants or employees who are currently illegally using drugs covered by the ADA?

No. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" and are not protected by the ADA when the employer takes action on the basis of their drug use.

Are alcoholics covered by the ADA?

Yes. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. A person with alcoholism is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation. However, an employer can discipline, discharge or deny employment to an employee with alcoholism whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol in the workplace.

Is stress covered under the ADA?

If the conditions stem from a documented physiological or mental disorder which substantially limits one or more major life activities, it is a disability and therefore covered under the ADA.

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Whose responsibility is it to determine essential jobs duties?

It is the employer's responsibility to establish what a job is and what functions are required to perform the job. The employer is also required to defend these determinations if challenged in a legal complaint. The ADA regulations provide guidance on how an employer is to go about identifying the essential functions of the job.

Is there a standardized way to determine essential job functions?

Yes.

1. ***Write an overview of the job, describing the purpose for which the job exists and the primary duties involved in accomplishing that purpose.***

   This step helps the manager or supervisor keep the total function of the job in mind. The accurate job analysis summary description gives a detailed description of the work performed.

2. ***Describe the action, purpose, and result of each task involved in carrying out job duties. Then identify the training mode and rate its relative importance.***

   This step will identify basic worker competencies, develop performance standards, defend personnel practices as job-related and identify the essential functions of the position.

3. ***Describe the context of the job; its scope, effect, and environment***.

   This step identifies the framework in which the job is performed. It includes the environmental and physical requirements as well as the accountability, responsibility and supervision of the position.

4. ***Identify basic worker competencies needed for minimum acceptable performance of job tasks.***

   This is a critical step in deciding what kind of workers to recruit, and what qualification requirements may be established for the job.

5. ***Identify the special worker competencies that make for successful job performance.***

   These are the factors that can be of most value in identifying the best candidate from among a group of basically qualified candidates, and in identifying overlooked training needs.

Does the ADA require employers to develop written job descriptions?

No. The ADA does not require employers to develop or maintain job descriptions. However, 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. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation. An employer may be required to reallocate marginal job functions as an accommodation if such an action would not impose an undue hardship.

Who decides what the essential functions of a job are?

The employer, using a job analysis process which may involve several other people, including the employee.

EEOC Guidelines for Determining Essential Functions:

- **Essential if the job exists to perform the function.** If the position is a proofreading position, it is essential that the employee/applicant be able to proofread.
- **Essential if there are a limited number of other employees to whom the task could be redistributed to**. If the position is a receptionist and there are only 2 other people in the office and they are engineers, answering the phone is an essential function because of the limited number of other employees who could perform the task.
- **Essential if the function is highly specialized**. If the position is for a sign language interpreter, an essential function would be the ability to communicate in sign language.
- **Essential if the consequences of not requiring the person to perform the function are substantial**. A corrections officer may only need to pursue and physically restrain an inmate with a weapon occasionally, but the function is essential because of the serious consequences if the officer could not perform this function.

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Does the employer have the right to require the employee to get a second medical opinion when the employee's doctor has verified the person's disability and the need for reasonable accommodation?

If the employer has significant reason to question the validity of the medical documentation provided, a second medical opinion may be *requested* if it is job-related and consistent with business necessity. The expense of the second opinion would be the responsibility of the employer.

If a person has epilepsy, can you tell one other person, in addition to the supervisor, in case one day the supervisor is gone when the person has a seizure?

Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations. Furthermore, first aid and safety personnel may be informed, when appropriate. It is always best that the employee be aware of who will be informed and the reason this information is appropriate to pass on.

Please clarify what a "fitness for duty exam" is as opposed to other types of medical exams.

A "fitness for duty exam" is a pre-employment/post-offer of employment exam that is required of all entering employees. The scope of this examination is broad. However, the employer cannot withdraw the offer of employment based upon the results of the exam if the criteria for withdrawal screens out or tends to screen out individuals with a disability, or if the withdrawal is not job-related or consistent with business necessity. A fitness for duty exam may be appropriate to require before an employee who has been absent due to a serious health condition or injury returns to work if it is job-related and consistent with business necessity. The other permissible medical examinations are: 1) medical exam of a current employee that is job related or consistent with job necessity, and 2) a voluntary medical examination that is part of an employee's health program available to employees at that worksite (ADA Title I § 102(c)).

On an application form, can an employer ask if applicants need special accommodations?

An employer cannot ask pre-employment questions, either on an application form or verbally, which are likely to elicit disability-related information.

An employer may provide a space on the application form for an applicant to voluntarily self-disclose disability status for affirmative action reporting, and a space for the applicant to indicate a need for a reasonable accommodation for the testing process.

See "Pre-employment inquiries" for more information.

How can co-workers react to incidents in the workplace (e.g. an epileptic seizure) if the co-workers don't even know there is a health problem?

If a disability, such as epilepsy, has been disclosed to the employer, the employer may inform supervisors, managers or first-aid staff in order to create reasonable accommodations and provide a safe working environment. General disability awareness training will assist co-workers to understand and respond appropriately.

Is it necessary to keep the medical information in separate cabinets or just separate files?

Yes, both. Medical information obtained must be collected and maintained on separate forms and in separate files (ADA Title I § 102(c)(3)(B). The EEOC's technical assistance manual recommends that the medical information be stored in a separate,

locked cabinet apart from the location of personnel files (EEOC technical assistance manual § 6.5).

The employer should designate a specific person or limited persons to have access to the medical files for the purposes of file maintenance. (EEOC technical assistance manual 6.5)

Is it ever appropriate for an employer to request that a disabled employee submit a doctor's statement?

The ADA prohibits any pre-employment inquiries about a disability. However, if an employee or applicant requests an accommodation and the need for the accommodation is not obvious, or the employer does not believe that the accommodation is needed, an employer may ask for written documentation from a doctor, psychologist, rehabilitation counselor, or other medical professional.

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Can an employer maintain existing production/performance standards for an employee with a disability?

An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring.

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The State of Minnesota's application form asks whether applicants are disabled for affirmative action purposes. Is this legal under ADA?

It is permissible for the state to ask this voluntary question to conduct a bonafide Affirmative Action program.

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EEOC Guidance on Pre-Employment Inquiries

1. **Direct Inquiries About Disabilities**. The ADA prohibits inquiries that directly seek information regarding disabilities.

   Example 1: An employer may not make inquiries such as "Are you an alcoholic?" or "Do you have AIDS?"

   Example 2: An employer may not ask an applicant "Do you have a disability that would prevent you from performing the essential functions of the job with or without reasonable accommodation?" The EEOC views this inquiry as disability related even though the employer may refuse to hire an applicant who cannot perform the essential functions of a job with or without reasonable accommodation.

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EEOC Guidance on Pre-Employment Inquiries

2. **Inquiries Concerning Performance of Job Functions**. An employer may inquire about an applicant's ability to perform job-related functions.

   Example 1: An employer may state to an applicant, "This job requires an employee to transport 20-pound bags of supplies from a loading dock, down two flights of steps, to a processing machine. Can you perform this function with or without reasonable accommodation?

   Example 2: An employer may state to an applicant. "This job requires an employee to prepare written reports containing detailed factual summaries and analysis. These reports must frequently be prepared within tight time frames. Can you perform this function with or without reasonable accommodation?"

   An employer may inquire about an applicant's abilities to perform both essential and marginal job functions, however, the hiring decision can be made only with regard to the applicant's ability to perform the essential functions of the job.

   Example 3: If a secretarial job involves typing as an essential function and driving as a marginal function, an employer may ask about an applicant's ability to both type and drive.

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EEOC Guidance on Pre-Employment Inquiries

3. **Inquiries About Impairments**. An impairment is a disability only if it substantially limits one or more major life activities. Thus, inquiries about impairments are unlawful at the pre-offer stage only if they are likely to elicit information about the applicant's disability. However, inquiries about impairments often reveal disability-related information. Therefore, the EEOC has instructed its investigators to scrutinize such inquiries closely to determine whether they are likely to elicit disability-related information.

   Example: An employer may ask an applicant with a broken leg how he broke his leg. Asking "how" the applicant broke his leg focuses only on the manner in which the leg was broken and is not likely to disclose whether the applicant has a disability (i.e. the inquiry does not concern the extent of the break or the duration of the healing period). Under these facts, the employer has not made a prohibited pre-offer inquiry about disability.

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4. **Inquiries About Ability to Perform Major Life Activities and About Substantial Limitations of Major Life Activities.** The inability to perform a major life activity is often the result of a physical or mental impairment. The EEOC has instructed its investigators to closely scrutinize an inquiry concerning whether an applicant can perform a major life activity to determine whether it is likely to elicit information about a disability.

   Example 1: An employer asks applicants for clerical positions questions such as: "Can you stand?" "Can you walk?" These broad questions about the ability to perform major life activities are likely to elicit information about disability. In addition, they are probably not specifically related to an applicant's ability to perform essential job functions. Therefore, they are prohibited at the pre-offer stage.

   Example 2: An employer is hiring for a clerical position that requires the employee to load three-pound boxes of paper into the copy machine. The employer asks applicants whether they can lift three-pound boxes of paper. This is an inquiry concerning whether an applicant is substantially limited in a major life activity of lifting and is likely to elicit information concerning whether the applicant has a disability resulting from a physical impairment. However, this inquiry also is specifically regarding the applicant's ability to perform a job function. Therefore, this inquiry is permissible at the pre-offer stage.

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5. **Request to Describe/Demonstrate Performance of Job-Related Functions.** An employer may ask applicants to describe or demonstrate how they would perform essential and marginal functions, with or without reasonable accommodations, only if all applicants are asked.

   Example 1: An employer may ask all applicants to demonstrate their ability to distinguish color-coded wires if distinguishing between color-coded wires is a job function.

   Example 2: An employer may ask all applicants to demonstrate their ability to lift 10-pound boxes of wood chips if such lifting is an actual job duty.

   If, in response to an employer's request to demonstrate performance, an applicant indicates that he/she will need a reasonable accommodation, the employer must either (1) provide a reasonable accommodation that does not create an undue hardship so that the applicant can demonstrate task performance; or (2) allow the applicant simply to describe how he/she would perform the task.

   When an applicant has a known disability, an employer may ask that applicant to describe or demonstrate how he/she would perform job-related functions, if the employer reasonably believes that the known disability may interfere with job-related functions.

   Example 3: An employer may ask an applicant with one leg who applies for a job as a telephone lines person to describe or demonstrate how he/she would perform the duties of the job, because the employer may reasonably believe that having one leg would interfere with the ability to climb telephone poles.

   If, on the other hand, the employer could not reasonably believe that the disability will interfere with a job-related function, the employer may ask the applicant to describe or demonstrate how he/she would perform the job only if the request is made of *all* applicants of the same job category.

   Example 4: An employer may ask an applicant with one leg who applies for a telephone marketing job to describe or demonstrate performance only if *all* applicants for the job are asked to describe or demonstrate such performance. This is because an employer could not reasonably believe that having only one leg interferes with an individual's ability to perform a telephone marketing job.

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6. **Inquiries Concerning the Need for Accommodation and Request for Documentation if Applicant Asked for Accommodation.** An employer may inform applicants on an application form or job advertisement that the hiring process includes a specific selection procedure. Applicants may be asked to inform the employer of any reasonable accommodation needed to complete the selection procedure. Such requests are not prohibited pre-offer inquiries.

   Example 1: An employer may state the following on its employment application: "All applicants are required to take a 60-minute written examination that tests reading comprehension and writing ability. Please inform the applicant center within three days of your submission of this application if, as a result of a disability, you will need an accommodation to take this test." Such a request is not prohibited.

   In general, an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for the job. This is because these questions are likely to elicit whether the applicant has a disability (generally only people who have disabilities will need reasonable accommodations).

   Example1: An employment application may not ask, "Do you need a reasonable accommodation to perform this job?"

   Example 2: An applicant with no known disability is being interviewed for a job. He has not asked for any reasonable accommodation, either for the application process or for the job. The employer may not ask him, "Will you need a reasonable accommodation to perform this job?"

   When an employer could reasonably believe that an applicant will need a reasonable accommodation to perform the functions of the job, the employer may ask that applicant certain limited questions. Specifically, the employer may ask whether s/he needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job. The employer could ask these questions if:

   - the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disablity;
   - the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
   - an applicant has voluntarily disclosed to the employer that s/he needs a reasonable accommodation in order to perform the job.

   Example: An individual with diabetes applying for a receptionist position voluntarily discloses that she will need periodic breaks to take medication. The employer may ask the applicant questions about the reasonable accommodation, such as how often she will need breaks, and how long the breaks must be. The employer may not ask any questions about the underlying impairment.

   If an applicant requests an accommodation, an employer may require the applicant to document the fact that he has a disability and is therefore entitled to reasonable accommodation as required by the ADA. The applicant may be required to provide documentation from an appropriate professional. Such requests are not prohibited pre-offer inquiries.

   Example 3: If an applicant states that she cannot read an employment test because of dyslexia, the employer may request the documentation reflecting that the inability to read

is the result of a physical or mental impairment that substantially limits a major life activity (e.g. as opposed to a lack of education).

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7. **Inquiries Concerning Known Disability.** At the pre-offer stage, an employer may not ask an applicant with a known disability about the nature or severity of the disability or about other disabilities. These inquiries are prohibited at the pre-offer stage even when an applicant with a known disability has been asked to demonstrate performance of job-related functions.

   Example: An employer may not ask an applicant who uses a wheelchair questions such as; "How did you become disabled?;" "What effect does being in a wheelchair have on your daily activities?;" or "Do you ever expect to be able to walk again?"

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8. **Inquiries Concerning Attendance.** An employer may state its attendance requirements and ask whether an applicant can abide by them.

   Example 1: An employer may state, "The regular work hours are 9:00 a.m. to 5:00 p.m., Monday through Friday. During the summer months, employees are required to work every other weekend. New employees get one week of vacation and seven sick leave days per year. Can you meet these requirements with or without reasonable accommodation?"

   An employer may also ask about an applicant's prior attendance record.

   Example 2: The employer may ask an applicant, "How many days were you absent from work last year?" or "Did you have any unauthorized absences from your job last year?"

   However, as illustrated by the next example, the employer may not follow up this lawful pre-offer inquiry with an unlawful pre-offer inquiry.

   Example 3: An employer asks an applicant, "How many days were you absent from work last year?" The applicant answers that she was absent 30 days from work. The employer may not ask an unlawful pre-offer follow-up question such as, "Were you sick?"

   An employer may also make inquiries designed to detect whether an applicant abused his leave because these inquiries are not likely to elicit information about a disability.

   Example 4: An employer may ask an applicant, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?" However, at the pre-offer stage, an employer may not ask how many days an applicant was sick, because such inquiries are likely to elicit information about a disability.

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9. **Inquiries Concerning Workers' Compensation History.** The ADA prohibits an employer from asking an applicant, at the pre-offer stage, about job-related injuries or workers' compensation history because these inquiries are likely to elicit information about an applicant's disability.

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10. **Inquiries Concerning Drug Use.** An individual who currently engages in the illegal use of drugs is not protected under the ADA when the employer acts on the basis of the drug use. Therefore, inquiries to determine the current illegal use of drugs are not likely to elicit information about a covered disability and may be made at any time, including the pre-offer stage.

    Example 1: An employer may ask, at the pre-offer stage, questions such as: "Are you currently illegally using drugs?"

    However, most inquiries about current or prior lawful use of controlled substances or other medication taken under the supervision of a licensed health care professional are impermissible at the pre-offer stage.

    Example 2: An employer may not ask, at the pre-offer stage, questions such as: "What medications are you currently taking?," or "Have you ever taken AZT?"

    If an applicant tests positive for illegal use of drugs, the employer may validate the test results by inquiring about lawful drug use or other biomedical explanations for the positive result. The EEOC specifically states that otherwise prohibited pre-offer questions about lawful drug use may only be asked after a positive test result for illegal drug use.

    Example 3: If an applicant tests positive for the use of a controlled substance, the employer may lawfully ask, "What medications have you taken that may have resulted in a positive drug test outcome for this controlled substance? Are you taking this medication in accordance with a lawful prescription?"

    Although an employer may ask whether an applicant has illegally used drugs in the past (e.g., "Have you ever illegally used drugs?" or "Have you used cocaine in the past two years?"), an employer may not ask, at the pre-offer stage, about the extent of such prior use because this is likely to elicit information about a disability (i.e. drug addiction).

    Example 4: An employer may not ask an applicant, at the pre-offer stage, questions such as, "How often did you use illegal drugs in the past?"; "Have you ever been addicted to drugs?"; "Have you ever been treated for drug addiction?"; or "Have you ever been treated for drug abuse?"

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11. **Inquiries Concerning Certifications/Licenses.** An employer may ask an applicant at the preoffer stage whether he/she has certifications or licenses related to central or marginal job functions.

    Example: A trucking company may ask applicants questions such as; "Do you have a Department of Transportation certification to drive a truck interstate?," or "Do you intend to obtain such certification?"

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12. **Inquiries Concerning Lifestyle.** The ADA does not prohibit an employer from asking an applicant questions regarding such topics as eating habits, weight, and exercise habits, if these inquiries are not likely to elicit information about the existence, nature, or severity of a disability.

    Example 1: At the pre-offer stage, the employer lawfully may ask applicants questions such as: "Do you regularly eat three meals per day?," or "How much do you weigh?" These inquiries are not likely to elicit information about a disability because there may be a number of reasons unrelated to disability why an individual does or does not regularly eat meals or has a high or low weight.

    Example 2: At the preoffer stage, the employer may not lawfully ask applicants questions such as: "Do you need to eat a number of small snacks at regular intervals throughout the day in order to maintain your energy level?" These inquiries are likely to elicit information about a disability, such as diabetes, because an employer can rationally infer from an applicant's answers whether or not she has such a condition.

    An employer may ask an applicant whether he or she drinks alcohol. However, at the preoffer stage, an employer may not ask an applicant whether he or she is an alcoholic, because alcoholism is a disability. In addition, an employer may not ask an applicant how much alcohol he or she consumes because this inquiry is likely to elicit information about the existence, nature, or severity of a disability.

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13. **Inquiries Concerning Arrest/Conviction Record.** The ADA does not prohibit an employer from asking at the pre-offer stage, about an applicant's arrest/conviction record because these inquiries are not likely to elicit information about an applicant's disability. However, employers must remember that Title VII applies to such inquiries, and that the EEOC has previously provided guides for investigators to follow concerning an employer's use of arrest/conviction records.

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14. **Inquiries to Comply with Affirmative Action Obligations.** At the pre-offer stage, an employer may invite applicants to voluntarily supply disability-related information needed by the employer to provide affirmative action information, if: (1) the employer is undertaking affirmative action in accordance with Section 503 of the Rehabilitation Act or any federal, state, or local law that requires affirmative action for individuals with disabilities; or (2) the employer is voluntarily undertaking affirmative action for individuals with disabilities. If the employer invites applicants to voluntarily self-identify, the employer must take the following steps prior to inviting an applicant to voluntarily self-identify:

    1. state clearly and conspicuously on any written questionnaire used for this purpose, or state clearly orally that the specific information requested is intended for use solely in connection with the employer's affirmative action obligations or its voluntary affirmative action efforts, and
    2. state clearly and conspicuously that the specific information is being requested on a voluntary basis, that it will be kept confidential and in accordance with the ADA, and that refusal to provide it will not subject the applicant to any adverse treatment.

    In order to ensure that the self-identification information is kept confidential, employers should invite such self-identification on a form separate and apart from the application or on a sheet that will be torn off from the application.

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15. **Inquiries to Third Parties Regarding an Applicant's Medical Condition.** At the pre-offer stage, an employer may ask a third party anything that it could ask the applicant directly. Similarly, at the pre-offer stage, an employer is prohibited from asking a third party anything that the employer is prohibited from asking the applicant directly.

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Why does the definition of "qualified individual" say with or without reasonable accommodation?

Many people with a disability do not require any accommodation to successfully do their job. However, the perception of some employers is that anyone with a disability does, in fact, need an accommodation to do their job. This definition specifically stated "with or without" to make the point that the individual is qualified whether or not they need an accommodation.

Does the DOER rating for passing an examination meet the first part of the definition of "qualified?"

This is the part which states the person must have the requisite knowledge, skills and abilities.

Not necessarily since we test for job classifications rather than specific jobs. Most exams test for knowledge, few can actually test for skills and abilities. The experience and training rating for certain job classifications do meet the first part of the definition. In other words, if a job requires a Bachelors degree and 2 years of experience as the requisite knowledge, skills and abilities and the person with a disability has that when they apply for the job, they meet the first part of the definition of "qualified individual with a disability."

What does substantially limited in the activity of working mean?

This is only to be considered if the person is not substantially limited in any other major life activity. It is difficult because the employee must be qualified and is claiming to be substantially limited in the activity of working.

An impairment is a substantial limitation to working if it ***disqualifies*** an individual from a class of jobs or a broad range of jobs in various classes.

> *Example 1* -- CP is a computer programmer. She develops a vision impairment that does not substantially limit her ability to see, but does prevent her from distinguishing characters on computer screens (without reasonable accommodation). As a result, she cannot perform any work that requires her to read characters on computer screens. Her vision impairment prevents her from working as a computer programmer, a systems analyst, a computer instructor, and a computer operator. CP is substantially limited in working because her impairment ***prevents her from working in the class of jobs*** requiring the use of a computer.
>
> *Example 2* -- Same as Example 1, above, except CP's vision impairment does not interfere with her ability to distinguish characters on most computer screens. It does prevent her, however, from distinguishing characters on the peculiar type of computer screens that R uses. Although CP cannot work with the unique screens that R uses, she can work with other computer screens. CP, therefore, is not substantially limited in the activity of working. Her impairment prevents her from being a computer programmer for one particular employer (R), but it does not prevent her from performing similar jobs for other employers.

Impairments that **preclude** an individual from performing a broad range of jobs in various classes also may substantially limit the major life activity of working.

Example: An individual could be substantially limited in working if (s)he has a severe allergy to a substance found in many high-rise office buildings. If the allergy prevents the individual from working in many of the high-rise office buildings in the geographical area to which the individual has reasonable access, then the individual is substantially limited in working. This is so because a great number of positions within many classes of jobs would be performed in those buildings.

By contrast, a severe allergy to the peculiar type or amount of dust found within one office building is not an impairment that substantially limits the ability to work.

Example 1 -- CP has a hearing impairment that only mildly affects his ability to hear. The impairment, however, makes CP extremely sensitive to very loud noises. CP experiences severe pain when he is exposed to loud noises for more than a brief period. Because of this sensitivity, CP cannot work in environments where noise levels routinely exceed a certain decibel level. As a result, R refused to hire CP for a welder's position. Further, CP could not work in carpentry or auto repair shops and could not be a heavy equipment operator, a demolition's expert, or a member of an airport ground crew. CP's impairment, therefore, prevents CP from working in a ***broad range of jobs in various classes***. Accordingly, CP has an impairment that substantially limits his ability to work.

Who is a "qualified individual with a disability"?

A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he 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 with a disability 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.

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What is "reasonable accommodation"?

Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. If efforts to accommodate an individual are not effective or possible, the employer shall consider reassignment to a vacant position for which the person is qualified. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

When is an employer required to make a reasonable accommodation?

An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The reasonable accommodation requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. The employee does not have to use any special words (i.e. reasonable accommodation) for the employer to have the obligation to consider reasonable accommodations. For example: if an employee reports difficulty getting to work on time due to chemotherapy, this report of difficulty is to be considered a request for reasonable accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability 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.

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

The individual with a disability 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. Undue hardship is determined on a case-by-case basis. 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 with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, 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 paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

How much time does an employer have to make an accommodation after it has been requested?

Employers have a reasonable amount of time to conduct a six-part process for identifying a reasonable accommodation:

1. Look at the particular job involved to review its purpose and its essential functions;
2. Consult with the individual with a disability to find out his/her other specific physical or mental abilities and limitations;
3. Engage in joint problem solving;
4. Identify, in consultation with the individual, potential accommodations and assess their effectiveness;
5. Assess options from other relevant and available resources; and
6. Consider the preference of the individual with a disability and select the accommodation that best serves the needs of the individual and the employer.

Is there a time limit as to how long an individual must wait for the accommodation?

A reasonable amount of time. There is no established period to define "reasonable," however, it is in the employer's interest to provide the accommodation as quickly as possible if it is reasonable. If the employer crosses the line of reasonableness, then a complaint to the EEOC would be recommended to speed up the process.

If the employer perceives the employee as having a disability affecting the person's job performance, must the employer raise the issue of possible reasonable accommodation before taking such steps as termination?

Yes. If the employer characterizes the individual as having a disability, the individual is protected by the ADA and the employer must consider reasonable accommodations. The employer may request that the employee sign a release of information for allowing the employer to obtain medical information which is job-related and consistent with business necessity from a treating professional who has examined the employee, in order to make the determination. Even if the individual does not have a disability, if the employer considers the individual to be disabled, the employer may not discriminate based on that belief.

If the individual is perceived as having a learning disability or mental impairment, does the employer have an obligation to obtain an assessment of the person before terminating him/her?

The employer may not terminate the individual solely because of the disability. The employer may request a limited medical exam or medical documentation to identify a disability and help determine what accommodations would be available. (See above.)

What can the employer do about an employee who is diagnosed with mental illness and has occasional outbursts against co-workers?

1. If the employer knows the employee has a diagnosed mental illness, the employer must determine if the impairment meets the ADA threshold of a disability. The employer may request an exam or medical documentation which is job-related to assist in making this determination. If the illness meets the ADA definition of a disability, the employer must work with the employee to determine what effective accommodations are available and if they are reasonable. If the employee is not disabled under the ADA, then the ADA does not apply.
2. The employer should hold the employee with a disability to the same conduct and performance standards as all other similarly situated employees.

Can an employer transfer or reassign an employee as a reasonable accommodation without the employee's consent if other options do not exist to accommodate the disability? If so, can the employee withdraw his/her request for reasonable accommodation under such circumstances?

The key question is whether the employee can perform the essential functions of the job,

with or without reasonable accommodation. If the first job cannot be performed by the individual and there is no reasonable accommodation available except reassignment, then that is the only alternative. The employee could only return to the first job if he/she could perform the essential job functions. If the employee cannot perform the essential functions of the first job and rejects the accommodation of the reassignment, then the employee is no longer "qualified" under the ADA.

If an employee with a disability needs increased leave time resulting in other employees having limited opportunities for vacation leave and complaints, could a morale issue be considered a hardship based upon limited resources?

Morale alone is not considered an undue hardship. However, if the workload of the other employees is substantially increased and vacation leave limited, an undue hardship defense could be raised. Undue hardship is determined on a case-by-case basis. If the employer is large and has many resources, the defense is more difficult to apply. Likewise, a smaller employer may have an easier time raising the defense. Also, the employer should be able to prove that less burdensome reasonable accommodations are not available.

Are glasses, prosthetics (knee brace) or hearing aids considered reasonable accommodations?

An employer is generally not required to provide personal items as accommodations. An exception may be in a situation where an employee who uses a manual wheelchair is unable to move around the office due to deep pile carpeting. In this situation, a reasonable accommodation may be to provide the employee with an electric wheelchair vs. recarpeting the office.

An employee has a known mental and physical disability. This disability is now disrupting the workplace (adding workload, physical endangerment, mental stress of fellow employees). What rights do the employee and employer have?

The ADA prohibits discrimination in employment based on disability. The employee cannot be terminated solely for having a disability if that individual can perform the essential job functions with or without a reasonable accommodation. The employer is not required to employ a disabled employee if a significant risk to the health and safety of others cannot be eliminated by reasonable accommodation. The employer is also not obligated to provide reasonable accommodations if it would be unduly burdensome.

The requirements for considering DIRECT THREAT are very strict and must be carefully adhered to. (See DIRECT THREAT)

Who determines what is a "reasonable accommodation?"

The employer, working with the employee, his/her treating physician and any other relevant and available resources.

- *A reasonable accommodation must be an effective accommodation*. (For example: if the employee lunchroom is on the second floor, there is no elevator, and it would be an undue hardship to install an elevator for an employee who uses a wheelchair, the employer can provide a comparable facility on the first floor. This facility does not have to be exactly the same but must provide food, beverages and space for the employee with a disability to eat with co-workers).
- *The employer is not required to provide an accommodation that is primarily for personal use*. (For example, eyeglasses, a wheelchair or artificial limbs).
- *A reasonable accommodation need not be the best accommodation available as long as it is effective*. (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, enabling the blind employee to perform his/her job duties.)

- *The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability.* (For example: If a blind computer operator requests the accommodation of reassignment to a warmer climate because he/she prefers to work in a warmer climate, this would not be required by the ADA).

Does an employer have to reassign essential functions to enable a person with a disability to be successful?

No. Remember the definition of "qualified individual with a disability." The person must be able to perform the essential function with or without reasonable accommodation. The employer may reassign marginal functions.

Is addiction to nicotine a qualified disability? If so, what reasonable accommodations can be made by employers?

No. Nicotine addiction is specifically excluded as a disability under the ADA. However, if emphysema or lung cancer evolve, then the individual would be a qualified individual with a disability.

Who makes the determination of reasonable accommodations?

The employer. This determination should be made after consulting with the disabled employee. It should be noted, that a reasonable accommodation must be an effective accommodation. That is, the accommodation must provide the person with a disability the opportunity to achieve the same level of performance or to enjoy benefits or privileges equal to those of a similarly situated non-disabled employee. If more than one accommodation will be effective, the employer is free to choose among effective accommodations.

Could an extended leave of absence be considered a reasonable accommodation?

An extended leave of absence may be considered as a reasonable accommodation if it does not impose an undue hardship. All determinations regarding what constitutes a reasonable accommodation should be made on a case-by-case basis.

Is the employer required to provide transportation to mandatory training sessions for mobility impaired employees if it does not provide a similar service to its non-impaired employees?

An employer may be required to provide transportation to any mandatory training sessions. Training opportunities cannot be denied because of the need to make the reasonable accommodation of providing transportation, unless providing the accommodation would be an undue hardship. 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."

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Is testing for the illegal use of drugs permissible under the ADA?

Yes. A test for the illegal use of 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.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

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Undue Hardship

How far are we required to go in order to accommodate?

An employer must provide reasonable accommodations to known qualified applicants or employees with disabilities that reduce barriers to employment. The ADA requires that an accommodation must be an effective accommodation, but need not be the most effective alternative available. An employer is not obligated to provide an accommodation which imposes an undue hardship.

An undue hardship is an action that is:

- unduly costly;
- extensive;
- substantial;
- disruptive; or
- that would fundamentally alter the nature of operation of the business.

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What do we do when ADA conflicts with union rules?

Labor unions are covered under the ADA and have the same obligations as an employer to comply with the act's requirements. Whenever there is a conflict between ADA and union rules, the ADA takes precedence. It is imperative that employers and labor unions work collaboratively on ADA issues. To help employers and unions avoid conflict, the Congressional Committee Report advises that the parties add a provision to labor-management agreements permitting the employer to take all actions necessary to comply with the act.

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