TECHNICAL ASSISTANCE MANUAL:
Title I of the ADA

A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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ADA Technical Assistance Manual Addendum (10/29/02)

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INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) is issuing this Technical Assistance Manual as part of an active technical assistance program to help employers, other covered entities, and persons with disabilities learn about their obligations and rights under the employment provisions of the Americans with Disabilities Act (Title I of the ADA). ADA requirements for nondiscrimination in employment become effective for employers with 25 or more employees and other covered entities on July 26, 1992, and for employers with 15 to 24 employees on July 26, 1994.

The Manual provides guidance on the practical application of legal requirements established in the statute and EEOC regulations. It also provides a directory of resources to aid in compliance. The Manual is designed to be updated periodically with supplements as the Commission develops further policy guidance and identifies additional resources.

Part One of the Manual explains key legal requirements in practical terms, including:

- who is protected by, and who must comply with, the ADA;
- what the law permits and prohibits with respect to establishing qualification standards, assessing the qualifications and capabilities of people with disabilities to perform specific jobs, and requiring medical examinations and other inquiries;
- the nature of the obligation to make a reasonable accommodation;
- how the law's nondiscrimination requirements apply to aspects of the employment process such as promotion, transfer, termination, compensation, leave, fringe benefits and contractual arrangements;
- how ADA provisions regarding drug and alcohol use affect other legal obligations and employer policies concerning drugs and alcohol; and
- how ADA requirements affect workers' compensation policies and practices.

The manual explains many employment provisions through the use of examples. These examples are used only to illustrate the particular point or principle to which they relate in the text and should not be taken out of context as statements of EEOC policy that would apply in different circumstances.

Part Two of the Manual is a Resource Directory listing public and private agencies and organizations that provide information, expertise, and technical assistance on many aspects of employing people with disabilities, including reasonable accommodation.

EEOC has published informational booklets on the ADA for employers and for people with disabilities, and will provide other written and audiovisual educational materials; it will provide ADA training for people with disabilities, for employers and other covered entities, and will participate in meetings and training programs of various organizations. EEOC also has established a free "800" number "Helpline" to respond to individual requests for information and assistance.

The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from EEOC will not be subject to any enforcement action because of such inquiries. The Commission believes that the majority of employers wish to comply voluntarily with the ADA, and will do so if guidance and technical assistance are provided.

To obtain additional single copies of this Manual or other ADA informational materials, call EEOC at 1-800-669-EEOC (voice) or 1-800-800-3302 (TDD) or write to EEOC Office of Communications and Legislative Affairs, 1801 L Street, N.W., Washington, D.C. 20507. Copies of these materials also are available in braille, large print, audiotape, and electronic file on computer disk. To obtain copies in an accessible format, call the EEOC Office of Equal Employment Opportunity at (202) 663-4395 or (202) 663-4398 (voice); (202) 663-4399 (TDD) or write this office at the address above.

Introduction and Purpose

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

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

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

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

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

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

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

HOW TO USE THIS MANUAL

The information in this Manual is presented in an order designed to explain the ADA's basic employment nondiscrimination requirements. The first three chapters provide an overview of Title I legal requirements and discuss in detail the basic requirement not to discriminate against a "qualified individual with a disability," including the requirement for reasonable accommodation. The following chapters apply these legal requirements to specific employment practices and activities. Readers familiar with Title I legal requirements may wish to go directly to chapters that address specific practices. However, in many cases, these chapters refer back to the earlier sections to fully explain the requirements that apply.

The following summary of Manual chapters may be helpful in locating specific types of information.

Chapter I. Provides a summary of Title I legal requirements with cross-references to the chapters where these requirements are discussed.

Chapter II. Looks at the definitions of "an individual with a disability" and a "qualified individual with a disability," drawing upon guidance set out in EEOC's Title I regulation and interpretive appendix. These definitions are important, because an individual is only protected by the ADA if s/he meets both definitions. In addition, the second definition incorporates the ADA's basic employment nondiscrimination requirement, by defining a "qualified" individual as a person who can "perform the essential functions of a job . . . with or

without reasonable accommodation." Chapter II also provides practical guidance on identifying "essential" job functions.

Chapter III. Provides guidance on the obligation to make a "reasonable accommodation," including why reasonable accommodation is necessary for nondiscrimination and what is required. This chapter also provides many examples of reasonable accommodations for people with different types of disabilities in different jobs. The following chapters provide further guidance on making reasonable accommodations in the employment practices described in those chapters.

Chapter IV. Explains how to establish qualification standards and selection criteria that do not discriminate under the ADA, including standards necessary to assure health and safety in the workplace.

Chapter V. Provides guidance on nondiscrimination in recruitment and selection, including important ADA requirements regarding pre-employment inquiries. Among other issues, this chapter discusses nondiscrimination in advertising, recruiting, application forms, and the overall application process, including interviews and testing.

Chapter VI. Discusses ADA requirements applicable to medical examinations and medical inquiries, including the different requirements that apply before making a job offer, after making a conditional job offer, and after an individual is employed.

Chapter VII. Discusses and illustrates the obligation to apply ADA nondiscrimination requirements to all other employment practices and activities, and to all terms, conditions, and benefits of employment. In particular, the chapter looks at the application of ADA requirements to promotion and advancement opportunities, training, evaluation, and employee benefits such as insurance. The chapter also discusses the ADA's prohibition of discrimination on the basis of a "relationship or association with a person with a disability."

Chapter VIII. Discusses ADA requirements related to employment policies regarding drug and alcohol abuse.

Chapter IX. Provides further guidance on ADA requirements as they relate to workers' compensation practices.

Chapter X. Describes the enforcement provisions of the ADA and how they will be applied by EEOC.

I. TITLE I: AN OVERVIEW OF LEGAL REQUIREMENTS

This chapter of the manual provides a brief overview of the basic requirements of Title I of the ADA. Following chapters look at these and other requirements in more detail and illustrate how they apply to specific employment practices.

Who Must Comply with Title I of the ADA?

Private employers, state and local governments, employment agencies, labor unions, and joint labor-management committees must comply with Title I of the ADA. The ADA calls these "covered entities." For simplicity, this manual generally refers to all covered entities as "employers," except where there is a specific reason to emphasize the responsibilities of a particular type of entity.

An employer cannot discriminate against qualified applicants and employees on the basis of disability. The ADA's requirements ultimately will apply to employers with 15 or more employees. To give smaller employers more time to prepare for compliance, coverage is phased in two steps as follows:

- Number of employees: 25 or more Coverage begins: July 26, 1992
- Number of employees: 15 or more Coverage begins: July 26, 1994

Covered employers are those who have 25 or more employees (1992) or 15 or more employees (1994), including part-time employees, working for them for 20 or more calendar weeks in the current or preceding calendar year. The ADA's definition of "employee" includes U.S. citizens who work for American companies, their subsidiaries, or firms controlled by Americans outside the USA. However, the Act provides an exemption from coverage for any action in compliance with the ADA which would violate the law of the foreign country in which a workplace is located.

(Note that state and local governments, regardless of size, are covered by employment nondiscrimination requirements under Title II of the ADA as of January 26, 1992. See Coordination of Overlapping Federal Requirements below.)

The definition of "employer" includes persons who are "agents" of the employer, such as managers, supervisors, foremen, or others who act for the employer, such as agencies used to conduct background checks on candidates. Therefore, the employer is responsible for actions of such persons that may violate the law. These coverage requirements are similar to those of Title VII of the Civil Rights Act of 1964.

Special Situations

Religious organizations are covered by the ADA, but they may give employment preference to people of their own religion or religious organization.

For example: A church organization could require that its employees be members of its religion. However, it could not discriminate in employment on the basis of disability against members of its religion.

The legislative branch of the U.S. Government is covered by the ADA, but is governed by different enforcement procedures established by the Congress for its employees.

Certain individuals appointed by elected officials of state and local governments also are covered by the special enforcement procedures established for Congressional employees.

Who Is Exempt?

Executive agencies of the U.S. Government are exempt from the ADA, but these agencies are covered by similar nondiscrimination requirements and additional affirmative employment requirements under Section 501 of the Rehabilitation Act of 1973. Also exempted from the ADA (as they are from Title VII of the Civil Rights Act) are corporations fully owned by the U.S. Government, Indian tribes, and bona fide private membership clubs that are not labor organizations and that are exempt from taxation under the Internal Revenue Code.

Who Is Protected by Title I?

The ADA prohibits employment discrimination against "qualified individuals with disabilities." A qualified individual with a disability is:

An individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

To understand who is and who is not protected by the ADA, it is first necessary to understand the Act's definition of an "individual with a disability" and then determine if the individual meets the Act's definition of a "qualified individual with a disability."

The ADA definition of individual with a disability is very specific. A person with a "disability" is an individual who:

- has a physical or mental impairment that substantially limits one or more of his/her major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

(See Chapter II.)

Individuals Specifically not Protected by the ADA

The ADA specifically states that certain individuals are not protected by its provisions:

Persons who currently use drugs illegally

Individuals who currently use drugs illegally are not individuals with disabilities protected under the Act when an employer takes action because of their continued use of drugs. This includes people who use prescription drugs illegally as well as those who use illegal drugs.

However, people who have been rehabilitated and do not currently use drugs illegally, or who are in the process of completing a rehabilitation program may be protected by the ADA. (See Chapter VIII.)

Other specific exclusions

The Act states that homosexuality and bisexuality are not impairments and therefore are not disabilities under the ADA. In addition, the Act specifically excludes a number of behavior disorders from the definition of "individual with a disability." (See Chapter II.)

Employment Practices Regulated by Title I of the ADA

Employers cannot discriminate against people with disabilities in regard to any employment practices or terms, conditions, and privileges of employment. This prohibition covers all aspects of the employment process, including:

- application
- promotion
- testing
- medical examinations
- hiring
- layoff/recall
- assignments
- termination
- evaluation
- compensation
- disciplinary actions

- leave
- training
- benefits

Actions which Constitute Discrimination

The ADA specifies types of actions that may constitute discrimination. These actions are discussed more fully in the following chapters, as indicated:

1) Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability. (See Chapter VII.)

2) Participating in a contractual or other arrangement or relationship that subjects an employer's qualified applicant or employee with a disability to discrimination. (See Chapter VII.)

3) Denying employment opportunities to a qualified individual because s/he has a relationship or association with a person with a disability. (See Chapter VII.)

4) Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the business. (See Chapters III. and VII.)

5) Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability unless they are job-related and necessary for the business. (See Chapter IV.)

6) Failing to use employment tests in the most effective manner to measure actual abilities. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or speaking skills of an employee or applicant with a disability (unless those are the skills the test is designed to measure). (See Chapter V.)

7) Denying an employment opportunity to a qualified individual because s/he has a relationship or association with an individual with a disability. (See Chapter VII.)

8) Discriminating against an individual because s/he has opposed an employment practice of the employer or filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the Act. (See Chapter X.)

Reasonable Accommodation and the Undue Hardship Limitation

Reasonable accommodation

Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination. Reasonable accommodation is any change in the work environment or in the way things are usually done that results in equal employment opportunity for an individual with a disability.

An employer must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an undue hardship on the operation of its business.

Some examples of reasonable accommodation include:

- making existing facilities used by employees readily accessible to, and usable by, an individual with a disability;
- job restructuring;
- modifying work schedules;
- reassignment to a vacant position;
- acquiring or modifying equipment or devices;
- adjusting or modifying examinations, training materials, or policies;
- providing qualified readers or interpreters.

An employer is not required to lower quality or quantity standards to make an accommodation. Nor is an employer obligated to provide personal use items, such as glasses or hearing aids, as accommodations.

Undue hardship

An employer is not required to provide an accommodation if it will impose an undue hardship on the operation of its business. Undue hardship is defined by the ADA as an action that is:

"Excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."

In determining undue hardship, factors to be considered include the nature and cost of the accommodation in relation to the size, the financial resources, the nature and structure of the employer's operation, as well as the impact of the accommodation on the specific facility providing the accommodation. (See Chapter III.)

Health or Safety Defense

An employer may require that an individual not pose a "direct threat" to the health or safety of himself/herself or others. A health or safety risk can only be considered if it is "a significant risk of substantial harm." Employers cannot deny an employment opportunity merely because of a slightly increased risk. An assessment of "direct threat" must be strictly based on valid medical analyses and/or other objective evidence, and not on speculation. Like any qualification standard, this requirement must apply to all applicants and employees, not just to people with disabilities.

If an individual appears to pose a direct threat because of a disability, the employer must first try to eliminate or reduce the risk to an acceptable level with reasonable accommodation. If an effective accommodation cannot be found, the employer may refuse to hire an applicant or discharge an employee who poses a direct threat. (See Chapter IV.)

Pre-employment Inquiries and Medical Examinations

An employer may not ask a job applicant about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. An employer may not make medical inquiries or conduct a medical examination until after a job offer has been made. A job offer may be conditioned on the results of a medical examination or inquiry, but only if this is required for all entering employees in similar jobs. Medical examinations of employees must be job-related and consistent with the employer's business needs. (See Chapters V. and VI.)

Drug and Alcohol Use

It is not a violation of the ADA for employers to use drug tests to find out if applicants or employees are currently illegally using drugs. Tests for illegal use of drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal users of drugs and alcoholics to the same performance and conduct standards as other employees. (See Chapter VIII.)

Enforcement and Remedies

The U.S. Equal Employment Opportunity Commission (EEOC) has responsibility for enforcing compliance with Title I of the ADA. An individual with a disability who believes that (s)he has been discriminated against in employment can file a charge with EEOC. The procedures for processing charges of discrimination under the ADA are the same as those under Title VII of the Civil Rights Act of 1964. (See Chapter X.)

Remedies that may be required of an employer who is found to have discriminated against an applicant or employee with a disability include compensatory and punitive damages, back pay, front pay, restored benefits, attorney's fees, reasonable accommodation, reinstatement, and job offers. (See Chapter X.)

Posting Notices

An employer must post notices concerning the provisions of the ADA. The notices must be accessible, as needed, to persons with visual or other reading disabilities. A new equal employment opportunity (EEO) poster, containing ADA provisions and other federal employment nondiscrimination provisions may be obtained by writing EEOC at 1801 L Street N.W., Washington, D.C., 20507, or calling 1-800-669-EEOC or 1-800-800-3302 (TDD).

Coordination of Overlapping Federal Requirements

Employers covered by Title I of the ADA also may be covered by other federal requirements that prohibit discrimination on the basis of disability. The ADA directs the agencies with enforcement authority for these legal requirements to coordinate their activities to prevent duplication and avoid conflicting standards. Overlapping requirements exist for both public and private employers.

Title II of the ADA, enforced by the U.S. Department of Justice, prohibits discrimination in all **s**tate and local government programs and activities, including employment, after January 26, 1992.

The Department of Justice regulations implementing Title II provide that EEOC's Title I regulations will constitute the employment nondiscrimination requirements for those state and local governments covered by Title I (governments with 25 or more employees after July 26, 1992; governments with 15 or more employees after July 26, 1994). If a government is not covered by Title I, or until it is covered, the Title II employment nondiscrimination requirements will be those in the Department of Justice coordination regulations applicable to federally assisted programs under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of federal financial assistance.

Section 504 employment requirements in most respects are the same as those of Title I, because the ADA was based on the Section 504 regulatory requirements. (Note that governments receiving federal financial assistance, as well as federally funded private entities, will continue to be covered by Section 504.)

In addition, some private employers are covered by Section 503 of the Rehabilitation Act. Section 503 requires nondiscrimination and affirmative action by federal contractors and subcontractors to employ and advance individuals with disabilities, and is enforced by the Office of Federal Contract Compliance Programs (OFCCP)

in the U.S. Department of Labor.

The EEOC, the Department of Labor, the Department of Justice and the other agencies that enforce Section 504 (i.e., Federal agencies with programs of financial assistance) will coordinate their enforcement efforts under the ADA and the Rehabilitation Act, to assure consistent standards and to eliminate unnecessary duplication. (See Chapter X. For further information see Resource Directory: "Federal Agencies that Enforce Other Laws Prohibiting Discrimination on the Basis of Disability.")

II. WHO IS PROTECTED BY THE ADA?

INDIVIDUAL WITH A DISABILITY
QUALIFIED INDIVIDUAL WITH A DISABILITY

2.1 Introduction

The ADA protects qualified individuals with disabilities from employment discrimination. Under other laws that prohibit employment discrimination, it usually is a simple matter to know whether an individual is covered because of his or her race, color, sex, national origin or age. But to know whether a person is covered by the employment provisions of the ADA can be more complicated. It is first necessary to understand the Act's very specific definitions of "disability" and "qualified individual with a disability." Like other determinations under the ADA, deciding who is a "qualified" individual is a case-by case process, depending on the circumstances of the particular employment situation.

2.2 Individual With a Disability

The ADA has a three-part definition of "disability." This definition, based on the definition under the Rehabilitation Act, reflects the specific types of discrimination experienced by people with disabilities. Accordingly, it is not the same as the definition of disability in other laws, such as state workers' compensation laws or other federal or state laws that provide benefits for people with disabilities and disabled veterans.

Under the ADA, an individual with a disability is a person who has:

- a physical or mental impairment that substantially limits one or more major life activities;
- a record of such an impairment; or
- is regarded as having such an impairment.

2.1(a) An Impairment that Substantially Limits Major Life Activities

The first part of this definition has three major subparts that further define who is and who is not protected by the ADA.

(i) A Physical or Mental Impairment

A physical impairment is defined by the ADA as:

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

A mental impairment is defined by the ADA as:

"[A]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Neither the statute nor EEOC regulations list all diseases or conditions that make up "physical or mental impairments," because it would be impossible to provide a comprehensive list, given the variety of possible impairments.

A person's impairment is determined without regard to any medication or assistive device that s/he may use.

For example: A person who has epilepsy and uses medication to control seizures, or a person who walks with an artificial leg would be considered to have an impairment, even if the medicine or prosthesis reduces the impact of that impairment.

An impairment under the ADA is a physiological or mental disorder; simple physical characteristics, therefore, such as eye or hair color, lefthandedness, or height or weight within a normal range, are not impairments. A physical condition that is not the result of a physiological disorder, such as pregnancy, or a predisposition to a certain disease would not be an impairment. Similarly, personality traits such as poor judgment, quick temper or irresponsible behavior, are not themselves impairments. Environmental, cultural, or economic disadvantages, such as lack of education or a prison record also are not impairments.

For example: A person who cannot read due to dyslexia is an individual with a disability because dyslexia, which is a learning disability, is an impairment. But a person who cannot read because she dropped out of school is not an individual with a disability, because lack of education is not an impairment.

"Stress" and "depression" are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder.

For example: A person suffering from general "stress" because of job or personal life pressures would not be considered to have an impairment. However, if this person is diagnosed by a psychiatrist as having an identifiable stress disorder, s/he would have an impairment that may be a disability.

A person who has a contagious disease has an impairment. For example, infection with the Human Immunodeficiency Virus (HIV) is an impairment. The Supreme Court has ruled that an individual with tuberculosis which affected her respiratory system had an impairment under Section 504 of the Rehabilitation Act<1>. However, although a person who has a contagious disease may be covered by the ADA, an employer would not have to hire or retain a person whose contagious disease posed a direct threat to health or safety, if no reasonable accommodation could reduce or eliminate this threat. (See Health and Safety Standards, Chapter IV.)

(ii) Major Life Activities

To be a disability covered by the ADA, an impairment must substantially limit one or more major life activities. These are activities that an average person can perform with little or no difficulty. Examples are:

- walking
- seeing
- speaking
- hearing
- breathing

- learning
- performing manual tasks
- caring for oneself
- working

These are examples only. Other activities such as sitting, standing, lifting, or reading are also major life activities.

(iii) Substantially Limits

An impairment is only a "disability" under the ADA if it substantially limits one or more major life activities. An individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an average person in the general population.

The regulations provide three factors to consider in determining whether a person's impairment substantially limits a major life activity.

- its nature and severity;
- how long it will last or is expected to last;
- its permanent or long term impact, or expected impact.

These factors must be considered because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the effect of an impairment or condition on the life of a particular person. Some impairments, such as blindness, deafness, HIV infection or AIDS, are by their nature substantially limiting, but many other impairments may be disabling for some individuals but not for others, depending on the impact on their activities.

For example: Although cerebral palsy frequently significantly restricts major life activities such as speaking, walking and performing manual tasks, an individual with very mild cerebral palsy that only slightly interferes with his ability to speak and has no significant impact on other major life activities is not an individual with a disability under this part of the definition.

The determination as to whether an individual is substantially limited must always be based on the effect of an impairment on that individual's life activities.

For example: An individual who had been employed as a receptionist-clerk sustained a back injury that resulted in considerable pain. The pain permanently restricted her ability to walk, sit, stand, drive, care for her home, and engage in recreational activities. Another individual who had been employed as a general laborer had sustained a back injury, but was able to continue an active life, including recreational sports, and had obtained a new position as a security guard. The first individual was found by a court to be an individual with a disability; the second individual was found not significantly restricted in any major life activity, and therefore not an individual with a disability.

Sometimes, an individual may have two or more impairments, neither of which by itself substantially limits a major life activity, but that together have this effect. In such a situation, the individual has a disability.

For example: A person has a mild form of arthritis in her wrists and hands and a mild form of osteoporosis. Neither impairment by itself substantially limits a major life activity. Together, however, these impairments significantly restrict her ability to lift and perform manual tasks. She has a disability under the ADA.

Temporary Impairments

Employers frequently ask whether "temporary disabilities" are covered by the ADA. How long an impairment lasts is a factor to be considered, but does not by itself determine whether a person has a disability under the ADA. The basic question is whether an impairment "substantially limits" one or more major life activities. This question is answered by looking at the extent, duration, and impact of the impairment. Temporary, non-chronic impairments that do not last for a long time and that have little or no long term impact usually are not disabilities.

For example: Broken limbs, sprains, concussions, appendicitis, common colds, or influenza generally would not be disabilities. A broken leg that heals normally within a few months, for example, would not be a disability under the ADA. However, if a broken leg took significantly longer than the normal healing period to heal, and during this period the individual could not walk, s/he would be considered to have a disability. Or, if the leg did not heal properly, and resulted in a permanent impairment that significantly restricted walking or other major life activities, s/he would be considered to have a disability.

Substantially Limited in Working

It is not necessary to consider if a person is substantially limited in the major life activity of "working" if the person is substantially limited in any other major life activity.

For example: If a person is substantially limited in seeing, hearing, or walking, there is no need to consider whether the person is also substantially limited in working.

In general, a person will not be considered to be substantially limited in working if s/he is substantially limited in performing only a particular job for one employer, or unable to perform a very specialized job in a particular field.

For example: A person who cannot qualify as a commercial airline pilot because of a minor vision impairment, but who could qualify as a co-pilot or a pilot for a courier service, would not be considered substantially limited in working just because he could not perform a particular job. Similarly, a baseball pitcher who develops a bad elbow and can no longer pitch would not be substantially limited in working because he could no longer perform the specialized job of pitching in baseball.

But a person need not be totally unable to work in order to be considered substantially limited in working. The person must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, compared to an average person with similar training, skills, and abilities.

The regulations provide factors to help determine whether a person is substantially limited in working. These include:

- the type of job from which the individual has been disqualified because of the impairment;
- the geographical area in which the person may reasonably expect to find a job;
- the number and types of jobs using similar training, knowledge, skill, or abilities from which the individual is disqualified within the geographical area; and/or
- the number and types of other jobs in the area that do not involve similar training, knowledge, skill, or abilities from which the individual also is disqualified because of the impairment.

For example: A person would be considered significantly restricted in a "class of jobs" if a back condition prevents him from working in any heavy labor job. A person would be considered significantly limited in the ability to perform "a broad range of jobs in various classes" if she has an allergy to a substance found in most

high-rise office buildings in the geographic area in which she could reasonably seek work, and the allergy caused extreme difficulty in breathing. In this case, she would be substantially limited in the ability to perform the many different kinds of jobs that are performed in high-rise buildings. By contrast, a person who has a severe allergy to a substance in the particular office in which she works, but who is able to work in many other offices that do not contain this substance, would not be significantly restricted in working.

For example: A computer programmer develops a vision impairment that does not substantially limit her ability to see, but because of poor contrast is unable to distinguish print on computer screens. Her impairment prevents her from working as a computer operator, programmer, instructor, or systems analyst. She is substantially limited in working, because her impairment prevents her from working in the class of jobs requiring use of a computer.

In assessing the "number" of jobs from which a person might be excluded by an impairment, the regulations make clear that it is only necessary to indicate an approximate number of jobs from which an individual would be excluded (such as "few," "many," "most"), compared to an average person with similar training, skills and abilities, to show that the individual would be significantly limited in working.

Specific Exclusions

A person who currently illegally uses drugs is not protected by the ADA , as an "individual with a disability", when an employer acts on the basis of such use. However, former drug addicts who have been successfully rehabilitated may be protected by the Act. (See Chapter VIII). (See also discussion below of a person "regarded as" a drug addict.)

Homosexuality and bisexuality are not impairments and therefore are not disabilities covered by the ADA. The Act also states that the term "disability" does not include the following sexual and behavioral disorders:

- transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- compulsive gambling, kleptomania, or pyromania; or
- psychoactive substance use disorders resulting from current illegal use of drugs.

The discussion so far has focused on the first part of the definition of an "individual with a disability," which protects people who currently have an impairment that substantially limits a major life activity. The second and third parts of the definition protect people who may or may not actually have such an impairment, but who may be subject to discrimination because they have a record of or are regarded as having such an impairment.

2.2(b) Record of a Substantially Limiting Condition

This part of the definition protects people who have a history of a disability from discrimination, whether or not they currently are substantially limited in a major life activity.

For example: It protects people with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, controlled or in remission. It also protects people with a history of mental illness.

This part of the definition also protects people who may have been misclassified or misdiagnosed as having a disability.

For example: It protects a person who may at one time have been erroneously classified as having mental retardation or having a learning disability. These people have a record of disability. (If an employer relies on any record [such as an educational, medical or employment record] containing such information to make an

adverse employment decision about a person who currently is qualified to perform a job, the action is subject to challenge as a discriminatory practice.)

Other examples of individuals who have a record of disability, and of potential violations of the ADA if an employer relies on such a record to make an adverse employment decision:

- A job applicant formerly was a patient at a state institution. When very young she was misdiagnosed as being psychopathic and this misdiagnosis was never removed from her records. If this person is otherwise qualified for a job, and an employer does not hire her based on this record, the employer has violated the ADA.
- A person who has a learning disability applies for a job as secretary/receptionist. The employer reviews records from a previous employer indicating that he was labeled as "mentally retarded." Even though the person's resume shows that he meets all requirements for the job, the employer does not interview him because he doesn't want to hire a person who has mental retardation. This employer has violated the ADA.
- A job applicant was hospitalized for treatment for cocaine addiction several years ago. He has been successfully rehabilitated and has not engaged in the illegal use of drugs since receiving treatment. This applicant has a record of an impairment that substantially limited his major life activities. If he is qualified to perform a job, it would be discriminatory to reject him based on the record of his former addiction.

In the last example above, the individual was protected by the ADA because his drug addiction was an impairment that substantially limited his major life activities. However, if an individual had a record of casual drug use, s/he would not be protected by the ADA, because casual drug use, as opposed to addiction, does not substantially limit a major life activity.

To be protected by the ADA under this part of the definition, a person must have a record of a physical or mental impairment that substantially limits one or more major life activities. A person would not be protected, for example, merely because s/he has a record of being a "disabled veteran," or a record of "disability" under another Federal statute or program unless this person also met the ADA definition of an individual with a record of a disability.

2.2(c) Regarded as Substantially Limited

This part of the definition protects people who are not substantially limited in a major life activity from discriminatory actions taken because they are perceived to have such a limitation. Such protection is necessary, because, as the Supreme Court has stated and the Congress has reiterated, "society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments."

The legislative history of the ADA indicates that Congress intended this part of the definition to protect people from a range of discriminatory actions based on "myths, fears and stereotypes" about disability, which occur even when a person does not have a substantially limiting impairment.

An individual may be protected under this part of the definition in three circumstances:

1. The individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment.

For example: An employee has controlled high blood pressure which does not substantially limit his work activities. If an employer reassigns the individual to a less strenuous job because of unsubstantiated fear that the person would suffer a heart attack if he continues in the present job, the employer has "regarded" this person as

disabled.

2. The individual has an impairment that is substantially limiting because of attitudes of others toward the condition.

For example: An experienced assistant manager of a convenience store who had a prominent facial scar was passed over for promotion to store manager. The owner promoted a less experienced part-time clerk, because he believed that customers and vendors would not want to look at this person. The employer discriminated against her on the basis of disability, because he perceived and treated her as a person with a substantial limitation.

3. The individual may have no impairment at all, but is regarded by an employer as having a substantially limiting impairment.

For example: An employer discharged an employee based on a rumor that the individual had HIV disease. This person did not have any impairment, but was treated as though she had a substantially limiting impairment.

This part of the definition protects people who are "perceived" as having disabilities from employment decisions based on stereotypes, fears, or misconceptions about disability. It applies to decisions based on unsubstantiated concerns about productivity, safety, insurance, liability, attendance, costs of accommodation, accessibility, workers' compensation costs or acceptance by co-workers and customers.

Accordingly, if an employer makes an adverse employment decision based on unsubstantiated beliefs or fears that a person's perceived disability will cause problems in areas such as those listed above, and cannot show a legitimate, nondiscriminatory reason for the action, that action would be discriminatory under this part of the definition.

2.3 Qualified Individual with a Disability

To be protected by the ADA, a person must not only be an individual with a disability, but must be qualified. An employer is not required to hire or retain an individual who is not qualified to perform a job. The regulations define a qualified individual with a disability as a person with a disability who:

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

There are two basic steps in determining whether an individual is "qualified" under the ADA:

(1) Determine if the individual meets necessary prerequisites for the job, such as:

- education;
- work experience;
- training;
- skills;
- licenses;
- certificates;
- other job-related requirements, such as good judgment or ability to work with other people.

For example: The first step in determining whether an accountant who has cerebral palsy is qualified for a certified public accountant job is to determine if the person is a licensed CPA. If not, s/he is not qualified. Or, if

it is a company's policy that all its managers have at least three years' experience working with the company, an individual with a disability who has worked for two years for the company would not be qualified for a managerial position.

This first step is sometimes referred to as determining if an individual with a disability is "otherwise qualified." Note, however, that if an individual meets all job prerequisites except those that s/he cannot meet because of a disability, and alleges discrimination because s/he is "otherwise qualified" for a job, the employer would have to show that the requirement that screened out this person is "job related and consistent with business necessity." (See Chapter IV)

If the individual with a disability meets the necessary job prerequisites:

(2) Determine if the individual can perform the essential functions of the job, with or without reasonable accommodation.

This second step, a key aspect of nondiscrimination under the ADA, has two parts:

- Identifying "essential functions of the job"; and
- Considering whether the person with a disability can perform these functions, unaided or with a "reasonable accommodation."

The ADA requires an employer to focus on the essential functions of a job to determine whether a person with a disability is qualified. This is an important nondiscrimination requirement. Many people with disabilities who can perform essential job functions are denied employment because they cannot do things that are only marginal to the job.

For example: A file clerk position description may state that the person holding the job answers the telephone, but if in fact the basic functions of the job are to file and retrieve written materials, and telephones actually or usually are handled by other employees, a person whose hearing impairment prevents use of a telephone and who is qualified to do the basic file clerk functions should not be considered unqualified for this position.

2.3(a) Identifying the Essential Functions of a Job

Sometimes it is necessary to identify the essential functions of a job in order to know whether an individual with a disability is "qualified" to do the job. The regulations provide guidance on identifying the essential functions of the job. The first consideration is whether employees in the position actually are required to perform the function.

For example: A job announcement or job description for a secretary or receptionist may state that typing is a function of the job. If, in fact, the employer has never or seldom required an employee in that position to type, this could not be considered an essential function.

If a person holding a job does perform a function, the next consideration is whether removing that function would fundamentally change the job.

The regulations list several reasons why a function could be considered essential:

1. The position exists to perform the function.

For example:

- A person is hired to proofread documents. The ability to proofread accurately is an essential function, because this is the reason that this position exists.
- A company advertises a position for a "floating" supervisor to substitute when regular supervisors on the day, night, and graveyard shifts are absent. The only reason this position exists is to have someone who can work on any of the three shifts in place of an absent supervisor. Therefore, the ability to work at any time of day is an essential function of the job.

2. There are a limited number of other employees available to perform the function, or among whom the function can be distributed.

This may be a factor because there are only a few other employees, or because of fluctuating demands of a business operation.

For example: It may be an essential function for a file clerk to answer the telephone if there are only three employees in a very busy office and each employee has to perform many different tasks. Or, a company with a large workforce may have periods of very heavy labor-intensive activity alternating with less active periods. The heavy work flow during peak periods may make performance of each function essential, and limit an employer's flexibility to reassign a particular function.

3. A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.

For example, A company wishes to expand its business with Japan. For a new sales position, in addition to sales experience, it requires a person who can communicate fluently in the Japanese language. Fluent communication in the Japanese language is an essential function of the job.

The regulation also lists several types of evidence to be considered in determining whether a function is essential. This list is not all-inclusive, and factors not on the list may be equally important as evidence. Evidence to be considered includes:

a. The employer's judgment

An employer's judgment as to which functions are essential is important evidence. However, the legislative history of the ADA indicates that Congress did not intend that this should be the only evidence, or that it should be the prevailing evidence. Rather, the employer's judgment is a factor to be considered along with other relevant evidence.

However, the consideration of various kinds of evidence to determine which functions are essential does not mean that an employer will be second-guessed on production standards, setting the quality or quantity of work that must be performed by a person holding a job, or be required to set lower standards for the job.

For example: If an employer requires its typists to be able to accurately type 75 words per minute, the employer is not required to show that such speed and accuracy are "essential" to a job or that less accuracy or speed would not be adequate. Similarly, if a hotel requires its housekeepers to thoroughly clean 16 rooms per day, it does not have to justify this standard as "essential." However, in each case, if a person with a disability is disqualified by such a standard, the employer should be prepared to show that it does in fact require employees to perform at this level, that these are not merely paper requirements and that the standard was not established for a discriminatory reason.

b. A written job description prepared before advertising or interviewing applicants for a job

The ADA does not require an employer to develop or maintain job descriptions. A written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. However, the job description will not be given greater weight than other relevant evidence.

A written job description may state that an employee performs a certain essential function. The job description will be evidence that the function is essential, but if individuals currently performing the job do not in fact perform this function, or perform it very infrequently, a review of the actual work performed will be more relevant evidence than the job description.

If an employer uses written job descriptions, the ADA does not require that they be limited to a description of essential functions or that "essential functions" be identified. However, if an employer wishes to use a job description as evidence of essential functions, it should in some way identify those functions that the employer believes to be important in accomplishing the purpose of the job.

If an employer uses written job descriptions, they should be reviewed to be sure that they accurately reflect the actual functions of the current job. Job descriptions written years ago frequently are inaccurate.

For example: A written job description may state that an employee reads temperature and pressure gauges and adjusts machine controls to reflect these readings. The job description will be evidence that these functions are essential. However, if this job description is not up-to-date, and in fact temperature and pressure are now determined automatically, the machine is controlled by a computer and the current employee does not perform the stated functions or does so very infrequently, a review of actual work performed will be more relevant evidence of what the job requires.

In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function if an accommodation would enable this person to perform the job in a different way, and the accommodation does not impose an undue hardship. Although it may be essential that a function be performed, frequently it is not essential that it be performed in a particular way.

For example: In a job requiring use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not "essential" that a person in this job enter information manually, or visually read the information on the computer screen. Adaptive devices or computer software can enable a person without arms or a person with impaired vision to perform the essential functions of the job.

Similarly, an essential function of a job on a loading dock may be to move heavy packages from the dock to a storage room, rather than to lift and carry packages from the dock to the storage room.

(See also discussion of Job Analysis and Essential Functions of a Job, below).

If the employer intends to use a job description as evidence of essential functions, the job description must be prepared before advertising or interviewing for a job; a job description prepared after an alleged discriminatory action will not be considered as evidence.

c. The amount of time spent performing the function

For example: If an employee spends most of the time or a majority of the time operating one machine, this

would be evidence that operating this machine was an essential function.

d. The consequences of not requiring a person in this job to perform a function

Sometimes a function that is performed infrequently may be essential because there will be serious consequences if it is not performed.

For example:

- An airline pilot spends only a few minutes of a flight landing a plane, but landing the plane is an essential function because of the very serious consequences if the pilot could not perform this function.
- A firefighter may only occasionally have to carry a heavy person from a burning building, but being able to perform this function would be essential to the firefighter's job.
- A clerical worker may spend only a few minutes a day answering the telephones, but this could be an essential function if no one else is available to answer the phones at that time, and business calls would go unanswered.

e. The terms of a collective bargaining agreement

Where a collective bargaining agreement lists duties to be performed in particular jobs, the terms of the agreement may provide evidence of essential functions. However, like a position description, the agreement would be considered along with other evidence, such as the actual duties performed by people in these jobs.

f. Work experience of people who have performed a job in the past and work experience of people who currently perform similar jobs

The work experience of previous employees in a job and the experience of current employees in similar jobs provide pragmatic evidence of actual duties performed. The employer should consult such employees and observe their work operations to identify essential job functions, since the tasks actually performed provide significant evidence of these functions.

g. Other relevant factors

The nature of the work operation and the employer's organizational structure may be factors in determining whether a function is essential.

For example:

- A particular manufacturing facility receives large orders for its product intermittently. These orders must be filled under very tight deadlines. To meet these deadlines, it is necessary that each production worker be able to perform a variety of different tasks with different requirements. All of these tasks are essential functions for a production worker at that facility. However, another facility that receives orders on a continuous basis finds it most efficient to organize an assembly line process, in which each production worker repeatedly performs one major task. At this facility, this single task may be the only essential function of the production worker's job.
- An employer may structure production operations to be carried out by a "team" of workers. Each worker performs a different function, but every worker is required, on a rotating basis, to perform each different function. In this situation, all the functions may be considered to be essential for the

job, rather than the function that any one worker performs at a particular time.

Changing Essential Job Functions

The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability's qualifications for a job are evaluated in relation to its essential functions.

For example: A grocery store may have two different jobs at the checkout stand, one titled, "checkout clerk" and the other "bagger." The essential functions of the checkout clerk are entering the price for each item into a cash register, receiving money, making change, and passing items to the bagger. The essential functions of the bagging job are putting items into bags, giving the bags to the customer directly or placing them in grocery carts.

For legitimate business reasons, the store management decides to combine the two jobs in a new job called "checker-bagger." In the new job, each employee will have to perform the essential functions of both former jobs. Each employee now must enter prices in a new, faster computer-scanner, put the items in bags, give the bags to the customer or place them in carts. The employee holding this job would have to perform all of these functions. There may be some aspects of each function, however, that are not "essential" to the job, or some possible modification in the way these functions are performed, that would enable a person employed as a "checker" whose disability prevented performance of all the bagging operations to do the new job.

For example: If the checker's disability made it impossible to lift any item over one pound, s/he might not be qualified to perform the essential bagging functions of the new job. But if the disability only precluded lifting items of more than 20 pounds, it might be possible for this person to perform the bagging functions, except for the relatively few instances when items or loaded bags weigh more than 20 pounds. If other employees are available who could help this individual with the few heavy items, perhaps in exchange for some incidental functions that they perform, or if this employee could keep filled bags loads under 20 pounds, then bagging loads over 20 pounds would not be an essential function of the new job.

2.3(b) Job Analysis and the "Essential Functions" of a Job

The ADA does not require that an employer conduct a job analysis or any particular form of job analysis to identify the essential functions of a job. The information provided by a job analysis may or may not be helpful in properly identifying essential job functions, depending on how it is conducted.

The term "job analysis" generally is used to describe a formal process in which information about a specific job or occupation is collected and analyzed. Formal job analysis may be conducted by a number of different methods. These methods obtain different kinds of information that is used for different purposes. Some of these methods will not provide information sufficient to determine if an individual with a disability is qualified to perform "essential" job functions.

For example: One kind of formal job analysis looks at specific job tasks and classifies jobs according to how these tasks deal with data, people, and objects. This type of job analysis is used to set wage rates for various jobs; however, it may not be adequate to identify the essential functions of a particular job, as required by the ADA. Another kind of job analysis looks at the kinds of knowledge, skills, and abilities that are necessary to perform a job. This type of job analysis is used to develop selection criteria for various jobs. The information from this type of analysis sometimes helps to measure the importance of certain skills, knowledge and abilities, but it does not take into account the fact that people with disabilities often can perform essential functions using

other skills and abilities.

Some job analysis methods ask current employees and their supervisors to rate the importance of general characteristics necessary to perform a job, such as "strength," "endurance," or "intelligence," without linking these characteristics to specific job functions or specific tasks that are part of a function. Such general information may not identify, for example, whether upper body or lower body "strength" is required, or whether muscular endurance or cardiovascular "endurance" is needed to perform a particular job function. Such information, by itself, would not be sufficient to determine whether an individual who has particular limitations can perform an essential function with or without an accommodation.

As already stated, the ADA does not require a formal job analysis or any particular method of analysis to identify the essential functions of a job. A small employer may wish to conduct an informal analysis by observing and consulting with people who perform the job or have previously performed it and their supervisors. If possible, it is advisable to observe and consult with several workers under a range of conditions, to get a better idea of all job functions and the different ways they may be performed. Production records and workloads also may be relevant factors to consider.

To identify essential job functions under the ADA, a job analysis should focus on the purpose of the job and the importance of actual job functions in achieving this purpose. Evaluating "importance" may include consideration of the frequency with which a function is performed, the amount of time spent on the function, and the consequences if the function is not performed. The analysis may include information on the work environment (such as unusual heat, cold, humidity, dust, toxic substances or stress factors). The job analysis may contain information on the manner in which a job currently is performed, but should not conclude that ability to perform the job in that manner is an essential function, unless there is no other way to perform the function without causing undue hardship. A job analysis will be most helpful for purposes of the ADA if it focuses on the results or outcome of a function, not solely on the way it customarily is performed.

For example:

- An essential function of a computer programmer job might be described as "ability to develop programs that accomplish necessary objectives," rather than "ability to manually write programs." Although a person currently performing the job may write these programs by hand, that is not the essential function, because programs can be developed directly on the computer.
- If a job requires mastery of information contained in technical manuals, this essential function would be "ability to learn technical material," rather than "ability to read technical manuals." People with visual and other reading impairments could perform this function using other means, such as audiotapes.
- A job that requires objects to be moved from one place to another should state this essential function. The analysis may note that the person in the job "lifts 50 pound cartons to a height of 3 or 4 feet and loads them into truck-trailers 5 hours daily," but should not identify the "ability to manually lift and load 50 pound cartons" as an essential function unless this is the only method by which the function can be performed without causing an undue hardship.

A job analysis that is focused on outcomes or results also will be helpful in establishing appropriate qualification standards, developing job descriptions, conducting interviews, and selecting people in accordance with ADA requirements. It will be particularly useful in helping to identify accommodations that will enable an individual with specific functional abilities and limitations to perform the job. (See Chapter III.)

2.3(c) Perform Essential Functions "With or Without Reasonable Accommodation"

Many individuals with disabilities are qualified to perform the essential functions of jobs without need of any

accommodation. However, if an individual with a disability who is otherwise qualified cannot perform one or more essential job functions because of his or her disability, the employer, in assessing whether the person is qualified to do the job, must consider whether there are modifications or adjustments that would enable the person to perform these functions. Such modifications or adjustments are called "reasonable accommodations."

Reasonable accommodation is a key nondiscrimination requirement under the ADA. An employer must first consider reasonable accommodation in determining whether an individual with a disability is qualified; reasonable accommodation also must be considered when making many other employment decisions regarding people with disabilities. The following chapter discusses the employer's obligation to provide reasonable accommodation and the limits to that obligation. The chapter also provides examples of reasonable accommodations.

III.THE REASONABLE ACCOMMODATION OBLIGATION

3.1 Overview of Legal Obligations

- An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business.
- Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.
- The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes.
- An employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation, unless it would cause an undue hardship.
- An employer does not have to make an accommodation for an individual who is not otherwise qualified for a position.
- Generally, it is the obligation of an individual with a disability to request a reasonable accommodation.
- A qualified individual with a disability has the right to refuse an accommodation. However, if the individual cannot perform the essential functions of the job without the accommodation, s/he may not be qualified for the job.
- If the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of providing the accommodation or paying that portion of the cost which would constitute an undue hardship.

3.2 Why Is a Reasonable Accommodation Necessary?

Reasonable accommodation is a key nondiscrimination requirement of the ADA because of the special nature of discrimination faced by people with disabilities. Many people with disabilities can perform jobs without any need for accommodations. But many others are excluded from jobs that they are qualified to perform because of unnecessary barriers in the workplace and the work environment. The ADA recognizes that such barriers may discriminate against qualified people with disabilities just as much as overt exclusionary practices. For this reason, the ADA requires reasonable accommodation as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities.

People with disabilities are restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that make it difficult to get into and around a work site or to use necessary work equipment. Some are excluded or limited by the way people communicate with each other. Others are excluded because of rigid work schedules that allow no flexibility for people with special needs caused by disability.

Many are excluded only by barriers in other people's minds; these include unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers.

Under the ADA, when an individual with a disability is qualified to perform the essential functions of a job except for functions that cannot be performed because of related limitations and existing job barriers, an employer must try to find a reasonable accommodation that would enable this person to perform these functions. The reasonable accommodation should reduce or eliminate unnecessary barriers between the individual's abilities and the requirements for performing the essential job functions.

3.3 What Is a Reasonable Accommodation?

Reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. An equal employment opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to an average similarly-situated employee without a disability. The ADA requires reasonable accommodation in three aspects of employment:

- to ensure equal opportunity in the application process;
- to enable a qualified individual with a disability to perform the essential functions of a job; and
- to enable an employee with a disability to enjoy equal benefits and privileges of employment.

Reasonable Accommodation in the Application Process

Reasonable accommodation must be provided in the job application process to enable a qualified applicant to have an equal opportunity to be considered for a job.

For example: A person who uses a wheelchair may need an accommodation if an employment office or interview site is not accessible. A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form. Without such accommodations, these individuals may have no opportunity to be considered for a job.

(See Chapter V. for further discussion of accommodations in the application process).

Accommodations to Perform the Essential Functions of a Job

Reasonable accommodation must be provided to enable a qualified applicant to perform the essential functions of the job s/he is seeking, and to enable a qualified employee with a disability to perform the essential functions of a job currently held. Modifications or adjustments may be required in the work environment, in the manner or circumstances in which the job customarily is performed, or in employment policies. Many accommodations of this nature are discussed later in this chapter.

Accommodations to Ensure Equal Benefits of Employment

Reasonable accommodations must be provided to enable an employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by similarly situated non-disabled employees.

For example: Employees with disabilities must have equal access to lunchrooms, employee lounges, rest rooms, meeting rooms, and other employer-provided or sponsored services such as health programs, transportation, and

social events.

(See Chapter VII for further discussion of this requirement).

3.4 Some Basic Principles of Reasonable Accommodation

A reasonable accommodation must be an effective accommodation. It must provide an opportunity for a 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 non-disabled person. However, the accommodation does not have to ensure equal results or provide exactly the same benefits or privileges.

For example: An employer provides an employee lunchroom with food and beverages on the second floor of a building that has no elevator. If it would be an undue hardship to install an elevator for an employee who uses a wheelchair, the employer must provide a comparable facility on the first floor. The facility does not have to be exactly the same as that on the second floor, but must provide food, beverages and space for the disabled employee to eat with co-workers. It would not be a reasonable accommodation merely to provide a place for this employee to eat by himself. Nor would it be a reasonable accommodation to provide a separate facility for the employee if access to the common facility could be provided without undue hardship. For example, if the lunchroom was only several steps up, a portable ramp could provide access.

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

For example: Reassignment is one type of accommodation that may be required under the ADA. If an employee whose job requires driving loses her sight, reassignment to a vacant position that does not require driving would be a reasonable accommodation, if the employee is qualified for that position with or without an accommodation. However, if a blind computer operator working at an employer's Michigan facility requested reassignment to a facility in Florida because he prefers to work in a warmer climate, this would not be a reasonable accommodation required by the ADA. In the second case, the accommodation is not needed because of the employee's disability.

A reasonable accommodation need not be the best accommodation available, as long as it is effective for the purpose; that is, it gives the person with a disability an equal opportunity to be considered for a job, to perform the essential functions of the job, or to enjoy equal benefits and privileges of the job.

For example: An employer would not have to hire a full-time reader for a blind employee if a co-worker is available as a part-time reader when needed, and this will enable the blind employee to perform his job duties effectively.

An employer is not required to provide an accommodation that is primarily for personal use. Reasonable accommodation applies to modifications that specifically assist an individual in performing the duties of a particular job. Equipment or devices that assist a person in daily activities on and off the job are considered personal items that an employer is not required to provide. However, in some cases, equipment that otherwise would be considered "personal" may be required as an accommodation if it is specifically designed or required to meet job-related rather than personal needs.

For example: An employer generally would not be required to provide personal items such as eyeglasses, a wheelchair, or an artificial limb. However, the employer might be required to provide a person who has a visual impairment with glasses that are specifically needed to use a computer monitor. Or, if deep pile carpeting in a work area makes it impossible for an individual to use a manual wheelchair, the employer may need to replace

the carpet, place a usable surface over the carpet in areas used by the employee, or provide a motorized wheelchair.

The ADA's requirements for certain types of adjustments and modifications to meet the reasonable accommodation obligation do not prevent an employer from providing accommodations beyond those required by the ADA.

For example: "Supported employment" programs may provide free job coaches and other assistance to enable certain individuals with severe disabilities to learn and/or to progress in jobs. These programs typically require a range of modifications and adjustments to customary employment practices. Some of these modifications may also be required by the ADA as reasonable accommodations. However, supported employment programs may require modifications beyond those required under the ADA, such as restructuring of essential job functions. Many employers have found that supported employment programs are an excellent source of reliable productive new employees. Participation in these programs advances the underlying goal of the ADA - - to increase employment opportunities for people with disabilities. Making modifications for supported employment beyond those required by the ADA in no way violates the ADA.

3.5 Some Examples of Reasonable Accommodation

The statute and EEOC's regulations provide examples of common types of reasonable accommodation that an employer may be required to provide, but many other accommodations may be appropriate for particular situations. Accommodations may include:

- making facilities readily accessible to and usable by an individual with a disability;
- restructuring a job by reallocating or redistributing marginal job functions;
- altering when or how an essential job function is performed;
- part-time or modified work schedules;
- obtaining or modifying equipment or devices;
- modifying examinations, training materials or policies;
- providing qualified readers and interpreters;
- reassignment to a vacant position;
- permitting use of accrued paid leave or unpaid leave for necessary treatment;
- providing reserved parking for a person with a mobility impairment; and
- allowing an employee to provide equipment or devices that an employer is not required to provide.

These and other types of reasonable accommodation are discussed in the pages that follow. However, the examples in this Manual cannot cover the range of potential accommodations, because every reasonable accommodation must be determined on an individual basis. A reasonable accommodation always must take into consideration two unique factors:

- the specific abilities and functional limitations of a particular applicant or employee with a disability; and
- the specific functional requirements of a particular job.

In considering an accommodation, the focus should be on the abilities and limitations of the individual, not on the name of a disability or a particular physical or mental condition. This is necessary because people who have any particular disability may have very different abilities and limitations. Conversely, people with different kinds of disabilities may have similar functional limitations.

For example: If it is an essential function of a job to press a foot pedal a certain number of times a minute and an individual with a disability applying for the job has some limitation that makes this difficult or impossible,

the accommodation process should focus on ways that this person might be able to do the job function, not on the nature of her disability or on how persons with this kind of disability generally might be able to perform the job.

3.6 Who Is Entitled to a Reasonable Accommodation?

As detailed in Chapter II, an individual is entitled to a reasonable accommodation if s/he:

meets the ADA definition of "a qualified individual with a disability" (meets all prerequisites for performing the essential functions of a job [being considered for a job or enjoying equal benefits and privileges of a job] except any that cannot be met because of a disability).

If there is a reasonable accommodation that will enable this person to perform the essential functions of a job (be considered, or receive equal benefits, etc.), the employer is obligated to provide it, unless it would impose an undue hardship on the operation of the business.

When is an Employer Obligated to Make a Reasonable Accommodation?

An employer is obligated to make an accommodation only to the known limitations of an otherwise qualified individual with a disability. In general, it is the responsibility of the applicant or employee with a disability to inform the employer that an accommodation is needed to participate in the application process, to perform essential job functions or to receive equal benefits and privileges of employment. An employer is not required to provide an accommodation if unaware of the need.

However, the employer is responsible for notifying job applicants and employees of its obligation to provide accommodations for otherwise qualified individuals with disabilities.

The ADA requires an employer to post notices containing the provisions of the ADA, including the reasonable accommodation obligation, in conspicuous places on its premises. Such notices should be posted in employment offices and other places where applicants and employees can readily see them. EEOC provides posters for this purpose. (See Chapter I for additional information on the required notice.)

Information about the reasonable accommodation obligation also can be included in job application forms, job vacancy notices, and in personnel manuals, and may be communicated orally.

An applicant or employee does not have to specifically request a "reasonable accommodation," but must only let the employer know that some adjustment or change is needed to do a job because of the limitations caused by a disability.

If a job applicant or employee has a "hidden" disability - - one that is not obvious - - it is up to that individual to make the need for an accommodation known. If an applicant has a known disability, such as a visible disability, that appears to limit, interfere with, or prevent the individual from performing job-related functions, the employer may ask the applicant to describe or demonstrate how s/he would perform the function with or without a reasonable accommodation. Chapter V provides guidance on how to make such an inquiry without violating the ADA prohibition against pre-employment inquiries in the application and interview process.

If an employee with a known disability is not performing well or is having difficulty in performing a job, the employer should assess whether this is due to a disability. The employer may inquire at any time whether the employee needs an accommodation.

Documentation of Need for Accommodation

If an applicant or employee requests an accommodation and the need for the accommodation is not obvious, or if the employer does not believe that the accommodation is needed, the employer may request documentation of the individual's functional limitations to support the request.

For example: An employer may ask for written documentation from a doctor, psychologist, rehabilitation counselor, occupational or physical therapist, independent living specialist, or other professional with knowledge of the person's functional limitations. Such documentation might indicate, for example, that this person cannot lift more than 15 pounds without assistance.

3.7 How Does an Employer Determine What Is a Reasonable Accommodation?

When a qualified individual with a disability requests an accommodation, the employer must make a reasonable effort to provide an accommodation that is effective for the individual (gives the individual an equally effective opportunity to apply for a job, perform essential job functions, or enjoy equal benefits and privileges).

In many cases, an appropriate accommodation will be obvious and can be made without difficulty and at little or no cost. Frequently, the individual with a disability can suggest a simple change or adjustment, based on his or her life or work experience.

An employer should always consult the person with the disability as the first step in considering an accommodation. Often this person can suggest much simpler and less costly accommodations than the employer might have believed necessary.

For example: A small employer believed it necessary to install a special lower drinking fountain for an employee using a wheelchair, but the employee indicated that he could use the existing fountain if paper cups were provided in a holder next to the fountain.

However, in some cases, the appropriate accommodation may not be so easy to identify. The individual requesting the accommodation may not know enough about the equipment being used or the exact nature of the worksite to suggest an accommodation, or the employer may not know enough about the individual's functional limitations in relation to specific job tasks.

In such cases, the employer and the individual with a disability should work together to identify the appropriate accommodation. EEOC regulations require, when necessary, an informal, interactive process to find an effective accommodation. The process is described below in relation to an accommodation that will enable an individual with a disability to perform the essential functions of a job. However, the same approach can be used to identify accommodations for job applicants and accommodations to provide equal benefits and privileges of employment.

3.8 A process for identifying a reasonable accommodation

1. Look at the particular job involved. Determine its purpose and its essential functions.

Chapter II recommended that the essential functions of the job be identified before advertising or interviewing for a job. However, it is useful to reexamine the specific job at this point to determine or confirm its essential functions and requirements.

2. Consult with the individual with a disability to find out his or her specific physical or mental abilities and

limitations as they relate to the essential job functions. Identify the barriers to job performance and assess how these barriers could be overcome with an accommodation.

3. In consultation with the individual, identify potential accommodations and assess how effective each would be in enabling the individual to perform essential job functions. If this consultation does not identify an appropriate accommodation, technical assistance is available from a number of sources, many without cost. There are also financial resources to help with accommodation costs. (See Financial and Technical Assistance for Accommodations, 4.1 below).

4. If there are several effective accommodations that would provide an equal employment opportunity, consider the preference of the individual with a disability and select the accommodation that best serves the needs of the individual and the employer.

If more than one accommodation would be effective for the individual with a disability, or if the individual would prefer to provide his or her own accommodation, the individual's preference should be given first consideration. However, the employer is free to choose among effective accommodations, and may choose one that is less expensive or easier to provide.

The fact that an individual is willing to provide his or her own accommodation does not relieve the employer of the duty to provide this or another reasonable accommodation should this individual for any reason be unable or unwilling to continue to provide the accommodation.

Examples of the Reasonable Accommodation Process:

- A "sack-handler" position requires that the employee in this job pick up 50 pound sacks from a loading dock and carry them to the storage room. An employee who is disabled by a back impairment requests an accommodation. The employer analyzes the job and finds that its real purpose and essential function is to move the sacks from the loading dock to the store room. The person in the job does not necessarily have to lift and carry the sacks. The employer consults with the employee to determine his exact physical abilities and limitations. With medical documentation, it is determined that this person can lift 50 pound sacks to waist level, but cannot carry them to the storage room. A number of potential accommodations are identified: use of a dolly, a hand-truck or a cart. The employee prefers the dolly. After considering the relative cost, efficiency, and availability of the alternative accommodations, and after considering the preference of the employee, the employer provides the dolly as an accommodation. In this case, the employer found the dolly to be the most cost-effective accommodation, as well as the one preferred by the employee. If the employer had found a hand-truck to be as efficient, it could have provided the hand-truck as a reasonable accommodation.
- A company has an opening for a warehouse foreman. Among other functions, the job requires checking stock for inventory, completing bills of lading and other reports, and using numbers. To perform these functions, the foreman must have good math skills. An individual with diabetes who has good experience performing similar warehouse supervisory functions applies for the job. Part of the application process is a computerized test for math skills, but the job itself does not require use of a computer. The applicant tells the employer that although he has no problem reading print, his disability causes some visual impairment which makes it difficult to read a computer screen. He says he can take the test if it is printed out by the computer. However, this accommodation won't work, because the computer test is interactive, and the questions change based on the applicant's replies to each previous question. Instead, the employer offers a reader as an accommodation; this provides an effective equivalent method to test the applicant's math skills.

An individual with a disability is not required to accept an accommodation if the individual has not requested an

accommodation and does not believe that one is needed. However, if the individual refuses an accommodation necessary to perform essential job functions, and as a result cannot perform those functions, the individual may not be considered qualified.

For example: An individual with a visual impairment that restricts her field of vision but who is able to read would not be required to accept a reader as an accommodation. However, if this person could not read accurately unaided, and reading is an essential function of the job, she would not be qualified for the job if she refused an accommodation that would enable her to read accurately.

3.9 The Undue Hardship Limitation

An employer is not required to make a reasonable accommodation if it would impose an undue hardship on the operation of the business. However, if a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship.

An undue hardship is an action that requires "significant difficulty or expense" in relation to the size of the employer, the resources available, and the nature of the operation.

Accordingly, whether a particular accommodation will 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 for the same employer at another time. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.

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.

The statute and regulations provide factors to be considered in determining whether an accommodation uld impose an undue hardship on a particular business:

1. The nature and net cost of the accommodation needed.

The cost of an accommodation that is considered in determining undue hardship will be the actual cost to the employer. Specific Federal tax credits and tax deductions are available to employers for making accommodations required by the ADA, and there are also sources of funding to help pay for some accommodations. If an employer can receive tax credits or tax deductions or partial funding for an accommodation, only the net cost to the employer will be considered in a determination of undue hardship. (See Financial and Technical Assistance for Accommodations, 4.1 below);

2. The financial resources of the facility making the accommodation, the number of employees at this facility, and the effect on expenses and resources of the facility.

If an employer has only one facility, the cost and impact of the accommodation will be considered in relation to the effect on expenses and resources of that facility. However, if the facility is part of a larger entity that is

covered by the ADA, factors 3. and 4. below also will be considered in determinations of undue hardship.

3. The overall financial resources, size, number of employees, and type and location of facilities of the entity covered by the ADA (if the facility involved in the accommodation is part of a larger entity).

4. The type of operation of the covered entity, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the larger entity.

Factor 4. may include consideration of special types of employment operations, on a case-by-case basis, where providing a particular accommodation might be an undue hardship.

For example: It might "fundamentally alter" the nature of a temporary construction site or be unduly costly to make it physically accessible to an employee using a wheelchair, if the terrain and structures are constantly changing as construction progresses.

Factor 4. will be considered, along with factors 2. and 3., where a covered entity operates more than one facility, in order to assess the financial resources actually available to the facility making the accommodation, in light of the interrelationship between the facility and the covered entity. In some cases, consideration of the resources of the larger covered entity may not be justified, because the particular facility making the accommodation may not have access to those resources.

For example: A local, independently owned fast food franchise of a national company that receives no funding from that company may assert that it would be an undue hardship to provide an interpreter to enable a deaf applicant for store manager to participate in weekly staff meetings, because its own resources are inadequate and it has no access to resources of the national company. If the financial relationship between the national company and the local company is limited to payment of an annual franchise fee, only the resources of the local franchise would be considered in determining whether this accommodation would be an undue hardship. However, if the facility was part of a national company with financial and administrative control over all of its facilities, the resources of the company as a whole would be considered in making this determination.

5.The impact of the accommodation on the operation of the facility that is making the accommodation.

This may include the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

An employer may be able to show that providing a particular accommodation would be unduly disruptive to its other employees or to its ability to conduct business.

For example: If an employee with a disability requested that the thermostat in the workplace be raised to a certain level to accommodate her disability, and this level would make it uncomfortably hot for other employees or customers, the employer would not have to provide this accommodation. However, if there was an alternative accommodation that would not be an undue hardship, such as providing a space heater or placing the employee in a room with a separate thermostat, the employer would have to provide that accommodation.

For example: A person with a visual impairment who requires bright light to see well applies for a waitress position at an expensive nightclub. The club maintains dim lighting to create an intimate setting, and lowers its lights further during the floor show. If the job applicant requested bright lighting as an accommodation so that she could see to take orders, the employer could assert that this would be an undue hardship, because it would seriously affect the nature of its operation.

In determining whether an accommodation would cause an undue hardship, an employer may consider the impact of an accommodation on the ability of other employees to do their jobs. However, an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the morale of other employees. Nor can an employer claim undue hardship because of "disruption" due to employees' fears about, or prejudices toward, a person's disability.

For example: If restructuring a job to accommodate an individual with a disability creates a heavier workload for other employees, this may constitute an undue hardship. But if other employees complain because an individual with a disability is allowed to take additional unpaid leave or to have a special flexible work schedule as a reasonable accommodation, such complaints or other negative reactions would not constitute an undue hardship.

For example: If an employee objects to working with an individual who has a disability because the employee feels uncomfortable or dislikes being near this person, this would not constitute an undue hardship. In this case, the problem is caused by the employee's fear or prejudice toward the individual's disability, not by an accommodation.

Problems of employee morale and employee negative attitudes should be addressed by the employer through appropriate consultations with supervisors and, where relevant, with union representatives. Employers also may wish to provide supervisors, managers and employees with "awareness" training, to help overcome fears and misconceptions about disabilities, and to inform them of the employer's obligations under the ADA.

Other Cost Issues

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 established 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 accommodations. 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 should be offered the option of paying for the portion of the cost that constitutes an undue hardship, or of providing the accommodation.

For example: If the cost of an assistive device is $2000, and an employer believes that it can demonstrate that spending more than $1500 would be an undue hardship, the individual with a disability should be offered the option of paying the additional $500. Or, if it would be an undue hardship for an employer to purchase brailling equipment for a blind applicant, the applicant should be offered the option of providing his own equipment (if there is no other effective accommodation that would not impose an undue hardship).

The terms of a collective bargaining agreement may be relevant in determining whether an accommodation would impose an undue hardship.

For example: A worker who has a deteriorated disc condition and cannot perform the heavy labor functions of a machinist job, requests reassignment to a vacant clerk's job as a reasonable accommodation. If the collective bargaining agreement has specific seniority lists and requirements governing each craft, it might be an undue hardship to reassign this person if others had seniority for the clerk's job.

However, since both the employer and the union are covered by the ADA's requirements, including the duty to provide a reasonable accommodation, the employer should consult with the union and try to work out an

acceptable accommodation.

To avoid continuing conflicts between a collective bargaining agreement and the duty to provide reasonable accommodation, employers may find it helpful to seek a provision in agreements negotiated after the effective date of the ADA permitting the employer to take all actions necessary to comply with this law. (See Chapter VII.)

3.10 Examples of Reasonable Accommodations

1. Making Facilities Accessible and Usable

The ADA establishes different requirements for accessibility under different sections of the Act. A private employer's obligation to make its facilities accessible to its job applicants and employees under Title I of the ADA differs from the obligation of a place of public accommodation to provide access in existing facilities to its customers and clients, and from the obligations of public accommodations and commercial facilities to provide accessibility in renovated or newly constructed buildings under Title III of the Act. The obligation of a state and local government to provide access for applicants and employees under Title I also differs from its obligation to provide accessibility under Title II of the ADA.

The employer's obligation under Title I is to provide access for an individual applicant to participate in the job application process, and for an individual employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. The employer must provide such access unless it would cause an undue hardship.

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment related activities or benefits.

In contrast, Title III of the ADA requires that places of public accommodation (such as banks, retail stores, theaters, hotels and restaurants) make their goods and services accessible generally, to all people with disabilities. Under Title III, existing buildings and facilities of a public accommodation must be made accessible by removing architectural barriers or communications barriers that are structural in nature, if this is "readily achievable." If this is not "readily achievable," services must be provided to people with disabilities in some alternative manner if this is "readily achievable."

The obligation for state and local governments to provide "program accessibility" in existing facilities under Title II also differs from their obligation to provide access as employers under Title I. Title II requires that these governments operate each service, program or activity in existing facilities so that, when viewed in its entirety, it is readily accessible to and useable by persons with disabilities, unless this would cause a "fundamental alteration" in the nature of the program or service, or would result in "undue financial and administrative burdens."

In addition, private employers that occupy commercial facilities or operate places of public accommodation and state and local governments must conform to more extensive accessibility requirements under Title III and Title II when making alterations to existing facilities or undertaking new construction. (see Requirements for Renovation and New Construction below.)

The accessibility requirements under Title II and III are established in Department of Justice regulations. Employers may contact the Justice Department's Office on the Americans with Disabilities Act for information on these requirements and for copies of the regulations with applicable accessibility guidelines (see Resource

Directory).

When making changes to meet an individual's needs under Title I, an employer will find it helpful to consult the applicable Department of Justice accessibility guidelines as a starting point. It is advisable to make changes that conform to these guidelines, if they meet the individual's needs and do not impose an undue hardship, since such changes will be useful in the future for accommodating others. However, even if a modification meets the standards required under Title II or III, further adaptations may be needed to meet the needs of a particular individual.

For example: A restroom may be modified to meet standard accessibility requirements (including wider door and stalls, and grab bars in specified locations) but it may be necessary to install a lower grab bar for a very short person in a wheelchair so that this person can transfer from the chair to the toilet.

Although the requirement for accessibility in employment is triggered by the needs of a particular individual, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will apply for jobs in the future.

For example: Employment offices and interview facilities should be accessible to people using wheelchairs and others with mobility impairments. Plans also should be in place for making job information accessible and for communicating with people who have visual or hearing impairments. (See Chapter V. for additional guidance on accommodation in the application process.)

Accessibility to Perform the Essential Functions of the Job

The obligation to provide accessibility for a qualified individual with a disability includes accessibility of the job site itself and all work-related facilities.

Examples of accommodations that may be needed to make facilities accessible and usable include:

- installing a ramp at the entrance to a building;
- removing raised thresholds;
- reserving parking spaces close to the work site that are wide enough to allow people using wheelchairs to get in and out of vehicles;
- making restrooms accessible, including toilet stalls, sinks, soap, and towels;
- rearranging office furniture and equipment;
- making a drinking fountain accessible (for example, by installing a paper cup dispenser);
- making accessible, and providing an accessible "path of travel" to, equipment and facilities used by an employee, such as copying machines, meeting and training rooms, lunchrooms and lounges;
- removing obstacles that might be potential hazards in the path of people without vision;
- adding flashing lights when alarm bells are normally used, to alert an employee with a hearing impairment to emergencies.

Requirements for Renovation or New Construction

While an employer's requirements for accessibility under Title I relate to accommodation of an individual, as described above, employers will have more extensive accessibility requirements under Title II or III of the ADA if they make renovations to their facilities or undertake new construction.

Title III of the ADA requires that any alterations to, or new construction of "commercial facilities," as well as places of public accommodation, made after January 26, 1992, must conform to the "ADA Accessibility Guidelines" (incorporated in Department of Justice Title III regulations). "Commercial facilities" are defined as

any nonresidential facility whose operations affect commerce, including office buildings, factories and warehouses; therefore, the facilities of most employers will be subject to this requirement. An alteration is any change that affects the "usability" of a facility; it does not include normal maintenance, such as painting, roofing or changes to mechanical or electrical systems, unless the changes affect the "usability" of the facility.

For example: If, during remodeling or renovation, a doorway is relocated, the new doorway must be wide enough to meet the requirements of the ADA Accessibility Guidelines.

Under Title III, all newly constructed public accommodations and commercial facilities for which the last building permit is certified after January 26, 1992, and which are occupied after January 26, 1993, must be accessible in accordance with the standards of the ADA Accessibility Guidelines. However, Title III does not require elevators in facilities under 3 stories or with less than 3000 square feet per floor, unless the building is a shopping center, mall, professional office of a health provider, or public transportation station.

Under Title II, any alterations to, or new construction of, State or local government facilities made after January 26, 1992, must conform either with the ADA Accessibility Guidelines (however, the exception regarding elevators does not apply to State or local governments) or with the Uniform Federal Accessibility Standards. Facilities under design on January 26, 1992 must comply with this requirement if bids were invited after that date.

Providing accessibility in remodeled and new buildings usually can be accomplished at minimal additional cost. Over time, fully accessible new and remodeled buildings will reduce the need for many types of individualized reasonable accommodations. Employers planning alterations to their facilities or new construction should contact the Office on the Americans with Disabilities Act in the U.S. Department of Justice for information on accessibility requirements, including the ADA Accessibility Guidelines and the Uniform Federal Accessibility Guidelines. Employers may get specific technical information and guidance on accessibility by calling, toll-free, the Architectural and Transportation Barriers Compliance Board, at 1-800-USA-ABLE. (See Resource Directory.)

2. Job Restructuring

Job restructuring or job modification is a form of reasonable accommodation which enables many qualified individuals with disabilities to perform jobs effectively. Job restructuring as a reasonable accommodation may involve reallocating or redistributing the marginal functions of a job. However, an employer is not required to reallocate essential functions of a job as a reasonable accommodation. Essential functions, by definition, are those that a qualified individual must perform, with or without an accommodation.

For example: Inspection of identification cards is generally an essential function of the job of a security job. If a person with a visual impairment could not verify the identification of an individual using the photo and other information on the card, the employer would not be required to transfer this function to another employee.

Job restructuring frequently is accomplished by exchanging marginal functions of a job that cannot be performed by a person with a disability for marginal job functions performed by one or more other employees.

For example: An employer may have two jobs, each containing essential functions and a number of marginal functions. The employer may hire an individual with a disability who can perform the essential functions of one job and some, but not all, of the marginal functions of both jobs. As an accommodation, the employer may redistribute the marginal functions so that all of the functions that can be performed by the person with a disability are in this person's job and the remaining marginal functions are transferred to the other job.

Although an employer is not required to reallocate essential job functions, it may be a reasonable

accommodation to modify the essential functions of a job by changing when or how they are done.

For example:

- An essential function that is usually performed in the early morning might be rescheduled to be performed later in the day, if an individual has a disability that makes it impossible to perform this function in the morning, and this would not cause an undue hardship.
- A person who has a disability that makes it difficult to write might be allowed to computerize records that have been maintained manually.
- A person with mental retardation who can perform job tasks but has difficulty remembering the order in which to do the tasks might be provided with a list to check off each task; the checklist could be reviewed by a supervisor at the end of the day.

Technical assistance in restructuring or modifying jobs for individuals with specific limitations can be obtained from state vocational rehabilitation agencies and other organizations with expertise in job analysis and job restructuring for people with various disabilities. (See Job Restructuring and Job Modification in Resource Directory Index.)

3. Modified Work Schedules

An employer should consider modification of a regular work schedule as a reasonable accommodation unless this would cause an undue hardship. Modified work schedules may include flexibility in work hours or the work week, or part-time work, where this will not be an undue hardship.

Many people with disabilities are fully qualified to perform jobs with the accommodation of a modified work schedule. Some people are unable to work a standard 9-5 work day, or a standard Monday to Friday work week; others need some adjustment to regular schedules.

Some examples of modified work schedules as a reasonable accommodation:

- An accountant with a mental disability required two hours off, twice weekly, for sessions with a psychiatrist. He was permitted to take longer lunch breaks and to make up the time by working later on those days.
- A machinist has diabetes and must follow a strict schedule to keep blood sugar levels stable. She must eat on a regular schedule and take insulin at set times each day. This means that she cannot work the normal shift rotations for machinists. As an accommodation, she is assigned to one shift on a permanent basis.
- An employee who needs kidney dialysis treatment is unable to work on two days because his treatment is only available during work hours on weekdays. Depending on the nature of his work and the nature of the employer's operation, it may be possible, without causing an undue hardship, for him to work Saturday and Sunday in place of the two weekdays, to perform work assignments at home on the weekend, or to work three days a week as part-time employee.

People whose disabilities may need modified work schedules include those who require special medical treatment for their disability (such as cancer patients, people who have AIDS, or people with mental illness); people who need rest periods (including some people who have multiple sclerosis, cancer, diabetes, respiratory conditions, or mental illness); people whose disabilities (such as diabetes) are affected by eating or sleeping schedules; and people with mobility and other impairments who find it difficult to use public transportation during peak hours, or who must depend upon special para-transit schedules.

4. Flexible Leave Policies

Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disability. An employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause an undue hardship.

People with disabilities may require special leave for a number of reasons related to their disability, such as:

- medical treatment related to the disability;
- repair of a prosthesis or equipment;
- temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing temperature above 85 degrees could seriously harm the condition of a person with multiple sclerosis);
- training in the use of an assistive device or a dog guide. (However, if an assistive device is used at work and provided as a reasonable accommodation, and if other employees receive training during work hours, the disabled employee should receive training on this device during work hours, without need to take leave.)

5. Reassignment to a Vacant Position

In general, the accommodation of reassignment should be considered only when an accommodation is not possible in an employee's present job, or when an accommodation in the employee's present job would cause an undue hardship. Reassignment also may be a reasonable accommodation if both employer and employee agree that this is more appropriate than accommodation in the present job.

Consideration of reassignment is only required for employees. An employer is not required to consider a different position for a job applicant if s/he is not able to perform the essential functions of the position s/he is applying for, with or without reasonable accommodation.

Reassignment may be an appropriate accommodation when an employee becomes disabled, when a disability becomes more severe, or when changes or technological developments in equipment affect the job performance of an employee with a disability. If there is no accommodation that will enable the person to perform the present job, or if it would be an undue hardship for the employer to provide such accommodation, reassignment should be considered.

Reassignment may not be used to limit, segregate, or otherwise discriminate against an employee with a disability. An employer may not reassign people with disabilities only to certain undesirable positions, or only to certain offices or facilities.

Reassignment should be made to a position equivalent to the one presently held in terms of pay and other job status, if the individual is qualified for the position and if such a position is vacant or will be vacant within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis, considering relevant factors such as the types of jobs for which the employee with a disability would be qualified; the frequency with which such jobs become available; the employer's general policies regarding reassignments of employees; and any specific policies regarding sick or injured employees.

For example: If there is no vacant position available at the time that an individual with a disability requires a reassignment, but the employer knows that an equivalent position for which this person is qualified will become vacant within one or two weeks, the employer should reassign the individual to the position when it becomes

available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no positions vacant or soon to be vacant for which the employee is qualified (with or without an accommodation). In such a situation, the employer does not have to maintain the individual's salary at the level of the higher graded position, unless it does so for other employees who are reassigned to lower graded positions.

An employer is not required to create a new job or to bump another employee from a job in order to provide reassignment as a reasonable accommodation. Nor is an employer required to promote an individual with a disability to make such an accommodation.

6. Acquisition or Modification of Equipment and Devices

Purchase of equipment or modifications to existing equipment may be effective accommodations for people with many types of disabilities.

There are many devices that make it possible for people to overcome existing barriers to performing functions of a job. These devices range from very simple solutions, such as an elastic band that can enable a person with cerebral palsy to hold a pencil and write, to "high-tech" electronic equipment that can be operated with eye or head movements by people who cannot use their hands.

There are also many ways to modify standard equipment so as to enable people with different functional limitations to perform jobs effectively and safely.

Many of these assistive devices and modifications are inexpensive. Frequently, applicants and employees with disabilities can suggest effective low cost devices or equipment. They have had a great deal of experience in accommodating their disabilities, and many are informed about new and available equipment. Where the job requires special adaptations of equipment, the employer and the applicant or employee should use the process described earlier (see 3.8) to identify the exact functional abilities and limitations of the individual in relation to functional job needs, and to determine what type of assistance may be needed.

There are many sources of technical assistance to help identify and locate devices and equipment for specific job applications. An employer may be able to get information needed simply by telephoning the Job Accommodation Network, a free consulting service on accommodations, or other sources listed under "Accommodations" in the Resource Directory. Employers who need further assistance may use resources such as vocational rehabilitation specialists, occupational therapists and Independent Living Centers who will come on site to conduct a job analysis and recommend appropriate equipment or job modifications.

As indicated above (see 3.4), an employer is only obligated to provide equipment that is needed to perform a job; there is no obligation to provide equipment that the individual uses regularly in daily life, such as glasses, a hearing aid or a wheelchair. However, as previously stated, the employer may be obligated to provide items of this nature if special adaptations are required to perform a job.

For example: It may be a reasonable accommodation to provide an employee with a motorized wheelchair if her job requires movement between buildings that are widely separated, and her disability prevents her operation of a wheelchair manually for that distance, or if heavy, deep-pile carpeting prevents operation of a manual wheelchair.

In some cases, it may be a reasonable accommodation to allow an applicant or employee to provide and use

equipment that an employer would not be obligated to provide.

For example: It would be a reasonable accommodation to allow an individual with a visual disability to provide his own guide dog.

Some examples of equipment and devices that may be reasonable accommodations:

- TDDs (Telecommunication Devices for the Deaf) make it possible for people with hearing and/or speech impairments to communicate over the telephone;
- telephone amplifiers are useful for people with hearing impairments;
- special software for standard computers and other equipment can enlarge print or convert print documents to spoken words for people with vision and/or reading disabilities;
- tactile markings on equipment in brailled or raised print are helpful to people with visual impairments;
- telephone headsets and adaptive light switches can be used by people with cerebral palsy or other manual disabilities;
- talking calculators can be used by people with visual or reading disabilities;
- speaker phones may be effective for people who are amputees or have other mobility impairments.

Some examples of effective low cost assistive devices as reported by the Job Accommodation Network and other sources:

- A timer with an indicator light allowed a medical technician who was deaf to perform laboratory tests. Cost $27.00;
- A clerk with limited use of her hands was provided a "lazy susan" file holder that enabled her to reach all materials needed for her job. Cost $85.00;
- A groundskeeper who had limited use of one arm was provided a detachable extension arm for a rake. This enabled him to grasp the handle on the extension with the impaired hand and control the rake with the functional arm. Cost $20.00;
- A desk layout was changed from the right to left side to enable a data entry operator who is visually impaired to perform her job. Cost $0;
- A telephone amplifier designed to work with a hearing aid allowed a plant worker to retain his job and avoid transfer to a lower paid job. Cost $24.00;
- A blind receptionist was provided a light probe which allowed her to determine which lines on the switchboard were ringing, on hold, or in use. (A light-probe gives an audible signal when held over an illuminated source.) Cost $50.00 to $100.00;
- A person who had use of only one hand, working in a food service position could perform all tasks except opening cans. She was provided with a one-handed can opener. Cost $35.00;
- Purchase of a light weight mop and a smaller broom enabled an employee with Downs syndrome and congenital heart problems to do his job with minimal strain. Cost under $40;
- A truck driver had carpal tunnel syndrome which limited his wrist movement and caused extreme discomfort in cold weather. A special wrist splint used with a glove designed for skin divers made it possible for him to drive even in extreme weather conditions. Cost $55.00;
- A phone headset allowed an insurance salesman with cerebral palsy to write while talking to clients. Rental cost $6.00 per month;
- A simple cardboard form, called a "jig" made it possible for a person with mental retardation to properly fold jeans as a stock clerk in a retail store. Cost $0.

Many recent technological innovations make it possible for people with severe disabilities to be very productive employees. Although some of this equipment is expensive, Federal tax credits, tax deductions, and other

sources of financing are available to help pay for higher cost equipment.

For example: A company hired a person who was legally blind as a computer operator. The State Commission for the Blind paid half of the cost of a braille terminal. Since all programmers were provided with computers, the cost of the accommodation to this employer was only one-half of the difference in cost between the braille terminal and a regular computer. A smaller company also would be eligible for a tax credit for such cost. (See Tax Credit for Small Business, 4.1a below)

For sources of information and technical assistance to help employers develop or locate "assistive devices and equipment," see this listing in the Index to the Resource Directory.

7. Adjusting and Modifying Examinations, Training Materials, and Policies

An employer may be required to modify, adjust, or make other reasonable accommodations in the ways that tests and training are administered in order to provide equal employment opportunities for qualified individuals with disabilities. Revisions to other employment policies and practices also may be required as reasonable accommodations.

a. Tests and Examinations

Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions, rather than reflecting limitations caused by the disability. The ADA requires that tests 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 that is the job-related skill the test is designed to measure.

For example: An applicant who has dyslexia, which causes difficulty in reading, should be given an oral rather than a written test, unless reading is an essential function of the job. Or, an individual with a visual disability or a learning disability might be allowed more time to take a test, unless the test is designed to measure speed required on a job.

The employer is only required to provide a reasonable accommodation for a test if the individual with a disability requests such an accommodation. But the employer has an obligation to inform job applicants in advance that a test will be given, so that an individual who needs an accommodation can make such a request. (See Chapter V. for further guidance on accommodations in testing.)

b. Training

Reasonable accommodation should be provided, when needed, to give employees with disabilities equal opportunity for training to perform their jobs effectively and to progress in employment. Needed accommodations may include:

- providing accessible training sites;
- providing training materials in alternate formats to accommodate a disability.

For example: An individual with a visual disability may need training materials on tape, in large print, or on a computer diskette. A person with mental retardation may need materials in simplified language or may need help in understanding test instructions;

- modifying the manner in which training is provided.

For example: It may be a reasonable accommodation to allow more time for training or to provide extra assistance to people with learning disabilities or people with mental impairments.

Additional guidance on accommodations in training is provided in Chapter VII.

c. Other Policies

Adjustments to various existing policies may be necessary to provide reasonable accommodation. As discussed above (see 3.10.3 and 3.10.4), modifications to existing leave policies and regular work hours may be required as accommodations. Or, for example, a company may need to modify a policy prohibiting animals in the work place, so that a visually impaired person can use a guide dog. Policies on providing information to employees may need adjustment to assure that all information is available in accessible formats for employees with disabilities. Policies on emergency evacuations should be adjusted to provide effective accommodations for people with different disabilities. (See Chapter VII).

8. Providing Qualified Readers

It may be a reasonable accommodation to provide a reader for a qualified individual with a disability, if this would not impose an undue hardship.

For example: A court has held under the Rehabilitation Act that it was not an undue hardship for a large state agency to provide full-time readers for three blind employees, in view of its very substantial budget. However, it may be an undue hardship for a smaller agency or business to provide such an accommodation.

In some job situations a reader may be the most effective and efficient accommodation, but in other situations alternative accommodations may enable an individual with a visual disability to perform job tasks just as effectively.

When an applicant or employee has a visual disability, the employer and the individual should use the "process" outlined in 3.8 above to identify specific limitations of the individual in relation to specific needs of the job and to assess possible accommodations.

For example: People with visual impairments perform many jobs that do not require reading. Where reading is an essential job function, depending on the nature of a visual impairment and the nature of job tasks, print magnification equipment or a talking computer may be more effective for the individual and less costly for an employer than providing another employee as a reader. Where an individual has to read lengthy documents, a reader who transcribes documents onto tapes may be a more effective accommodation.

Providing a reader does not mean that it is necessary to hire a full-time employee for this service. Few jobs require an individual to spend all day reading. A reader may be a part-time employee or full-time employee who performs other duties. However, the person who reads to a visually impaired employee must read well enough to enable the individual to perform his or her job effectively. It would not be a reasonable accommodation to provide a reader whose poor skills hinder the job performance of the individual with a disability.

9. Providing Qualified Interpreters

Providing an interpreter on an "as-needed" basis may be a reasonable accommodation for a person who is deaf in some employment situations, if this does not impose an undue hardship.

If an individual with a disability is otherwise qualified to perform essential job functions, the employer's basic

obligation is to provide an accommodation that will enable this person to perform the job effectively. A person who is deaf or hearing-impaired should be able to communicate effectively with others as required by the duties of the job. Identifying the needs of the individual in relation to specific job tasks will determine whether or when an interpreter may be needed. The resources available to the employer would be considered in determining whether it would be an undue hardship to provide such an accommodation.

For example: It may be necessary to obtain a qualified interpreter for a job interview, because for many jobs the applicant and interviewer must communicate fully and effectively to evaluate whether the applicant is qualified to do the job. Once hired, however, if the individual is doing clerical work, research, computer applications, or other job tasks that do not require much verbal communication, an interpreter may only be needed occasionally. Interpretation may be necessary for training situations, staff meetings or an employee party, so that this person can fully participate in these functions. Communication on the job may be handled through different means, depending on the situation, such as written notes, "signing" by other employees who have received basic sign language training, or by typing on a computer or typewriter.

People with hearing impairments have different communication needs and use different modes of communication. Some use signing in American Sign Language, but others use sign language that has different manual codes. Some people rely on an oral interpreter who silently mouths words spoken by others to make them easier to lip read. Many hearing-impaired people use their voices to communicate, and some combine talking and signing. The individual should be consulted to determine the most effective means of communication.

Communication between a person who is deaf and others through a supervisor and/or co-worker with basic sign language training may be sufficient in many job situations. However, where extensive discussions or complex subject matter is involved, a trained interpreter may be needed to provide effective communication. Experienced interpreters usually have received special training and may be certified by a professional interpreting organization or state or local Commission serving people who are deaf. (See Resource Directory Index listing of "Interpreters" for information about interpreters and how to obtain them).

10. Other Accommodations

There are many other accommodations that may be effective for people with different disabilities in different jobs. The examples of accommodations in EEOC regulations and the examples in this Manual are not the only types of accommodations that may be required. Some other accommodations that may be appropriate include:

- making transportation provided by the employer accessible;
- providing a personal assistant for certain job-related functions, such as a page turner for a person who has no hands, or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips
- use of a job coach for people with mental retardation and other disabilities who benefit from individualized on-the job training and services provided at no cost by vocational rehabilitation agencies in "supported employment" programs. (See Resource Directory Index for "Supported Employment.")

3.11 Financial and Technical Assistance for Accommodations

a. Financial Assistance

There are several sources of financial assistance to help employers make accommodations and comply with ADA requirements.

1.Tax Credit for Small Business (Section 44 of the Internal Revenue Code)

In 1990, Congress established a special tax credit to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to $5000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of "eligible access expenditures" that are more than $250 but less than $10,250.

For example: If an accommodation cost $10,250, an employer could get a tax credit of $5000 ($10,250 minus $250, divided by 2). If the accommodation cost $7000, a tax credit of $3375 would be available.

An eligible small business is one with gross receipts of $l million or less for the taxable year, or 30 or fewer full time employees.

"Eligible access expenditures" for which the tax credit may be taken include the types of accommodations required under Title I of the ADA as well as accessibility requirements for commercial facilities and places of public accommodation under Title III. "Eligible access expenditures" include:

- removal of architectural, communication, physical, or transportation barriers to make the business accessible to, or usable by, people with disabilities;
- providing qualified interpreters or other methods to make communication accessible to people with hearing disabilities;
- providing qualified readers, taped texts, or other methods to make information accessible to people with visual disabilities; and/or
- acquiring or modifying equipment or devices for people with disabilities.

To be eligible for the tax credit, changes made to remove barriers or to provide services, materials or equipment must meet technical standards of the ADA Accessibility Guidelines, where applicable.

2.Tax Deduction for Architectural and Transportation Barrier Removal (Section 190 of the Internal Revenue Code)

Any business may take a full tax deduction, up to $15,000 per year, for expenses of removing specified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, toilet facilities, and transportation vehicles. Both the tax credit and the tax deduction are available to eligible small businesses.

For example: If a small business makes a qualified expenditure of $24,000, it may take the $5000 tax credit for the initial $10,250 and, if the remaining $13,750 qualifies under Section 190, may deduct that amount from its taxable income. However, a business may not receive a double benefit for the same expense: for example, it may not take both the tax credit and the tax deduction for $10,000 spent to renovate bathrooms.

Information on the Section 44 tax credit and the Section 190 tax deduction can be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service. (See Resource Directory.)

3.Targeted Jobs Tax Credit

Tax credits also are available under the Targeted Jobs Tax Credit Program (TJTCP) for employers who hire individuals with disabilities referred by state or local vocational rehabilitation agencies, State Commissions on the Blind and the U.S. Department of Veterans Affairs and certified by a State Employment Service. This

program promotes hiring of several "disadvantaged" groups, including people with disabilities.

Under the TJTCP, a tax credit may be taken for 40% of the first $6000 of an employee's first-year salary. This program must be reauthorized each year by Congress, and currently has been extended through June 30, 1992. Information about this program can be obtained from the State Employment Services or from State Governor's Committees on the Employment of People with Disabilities. (See State listings in Resource Directory.)

4.Other Funding Sources

State or local vocational rehabilitation agencies and State Commissions for the Blind can provide financial assistance for equipment and accommodations for their clients. The U.S. Department of Veterans Affairs also provides financial assistance to disabled veterans for equipment needed to help perform jobs. Some organizations that serve people with particular types of disabilities also provide financial assistance for needed accommodations. Other types of assistance may be available in the community. For example, some Independent Living Centers provide transportation service to the workplace for people with disabilities. For further information, see "Financial Assistance for Accommodations" in Resource Directory Index.

b. Technical Assistance

There are many sources of technical assistance to help employers make effective accommodations for people with different disabilities in various job situations. Many of these resources are available without cost. Major resources for information, assistance, and referral to local specialized resources are 10 new ADA Regional Business and Disability Technical Assistance Centers that have been funded by Congress specifically to help implement the ADA. These Centers have been established to provide information, training and technical assistance to employers and all other entities covered by the ADA and to people with disabilities. The Centers also can refer employers to local technical assistance sources. (See ADA Regional Business and Disability Technical Assistance Centers in Resource Directory.) Other resources include:

State and local vocational rehabilitation agencies

- **Independent Living Centers** in some 400 communities around the country provide technical assistance to employers and people with disabilities on accessibility and other accommodations and make referrals to specialized sources of assistance.
- **he Job Accommodation Network** (JAN) a free national consultant service, available through a toll-free number, helps employers make individualized accommodations.
- **ABLEDATA**, a computerized database of disability-related products and services, conducts customized information searches on worksite modifications, assistive devices and other accommodations.
- **The President's Committee on Employment of People with Disabilities** provides technical information, including publications with practical guidance on job analysis and accommodations.
- **Governors' Committees on Employment of People with Disabilities** in each State, allied with the President's Committee, are local resources of information and technical assistance.

These and many other sources of specialized technical assistance are listed in the Resource Directory. The Index to the Directory will be helpful in locating specific types of assistance.

IV. ESTABLISHING NONDISCRIMINATORY QUALIFICATION STANDARDS AND SELECTION CRITERIA

4.1 Introduction

The ADA does not prohibit an employer from establishing job-related qualification standards, including education, skills, work experience, and physical and mental standards necessary for job performance, health and safety.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. ADA requirements are designed to assure that people with disabilities are not excluded from jobs that they can perform.

ADA requirements apply to all selection standards and procedures, including, but not limited to:

- education and work experience requirements;
- physical and mental requirements;
- safety requirements;
- paper and pencil tests;
- physical or psychological tests;
- interview questions; and
- rating systems.

4.2 Overview of Legal Obligations

- Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability must be **job-related and consistent with business necessity.**
- Even if a standard is job-related and consistent with business necessity, if it screens out an individual with a disability on the basis of disability, the employer **must consider** if the individual could meet the standard with a **reasonable accommodation.**
- An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job.
- If an individual with a disability cannot perform a marginal function of a job because of a disability, an employer may base a hiring decision only on the individual's ability to perform the essential functions of the job, with or without a reasonable accommodation.

4.3 What is Meant by "Job-Related" and "Consistent with Business Necessity"?

1. Job-Related

If a qualification standard, test or other selection criterion operates to screen out an individual with a disability, or a class of such individuals on the basis of disability, it must be a legitimate measure or qualification for the specific job it is being used for. It is not enough that it measures qualifications for a general class of jobs.

For example: A qualification standard for a secretarial job of "ability to take shorthand dictation" is not job-related if the person in the particular secretarial job actually transcribes taped dictation.

The ADA does not require that a qualification standard or selection criterion apply only to the "essential functions" of a job. A "job-related" standard or selection criterion may evaluate or measure all functions of a job and employers may continue to select and hire people who can perform all of these functions. It is only when an individual's disability prevents or impedes performance of marginal job functions that the ADA requires the employer to evaluate this individual's qualifications solely on his/her ability to perform the essential functions of the job, with or without an accommodation.

For example: An employer has a job opening for an administrative assistant. The essential functions of the job

are administrative and organizational. Some occasional typing has been part of the job, but other clerical staff are available who can perform this marginal job function. There are two job applicants. One has a disability that makes typing very difficult, the other has no disability and can type. The employer may not refuse to hire the first applicant because of her inability to type, but must base a job decision on the relative ability of each applicant to perform the essential administrative and organizational job functions, with or without accommodation. The employer may not screen out the applicant with a disability because of the need to make an accommodation to perform the essential job functions. However, if the first applicant could not type for a reason not related to her disability (for example, if she had never learned to type) the employer would be free to select the applicant who could best perform all of the job functions.

2. Business Necessity

"Business necessity" will be interpreted under the ADA as it has been interpreted by the courts under Section 504 of the Rehabilitation Act.

Under the ADA, as under the Rehabilitation Act:

If a test or other selection criterion excludes an individual with a disability because of the disability and does not relate to the essential functions of a job, it is not consistent with business necessity.

This standard is similar to the legal standard under Title VII of the Civil Rights Act which provides that a selection procedure which screens out a disproportionate number of persons of a particular race, sex or national origin "class" must be justified as a "business necessity." However, under the ADA the standard may be applied to an individual who is screened out by a selection procedure because of disability, as well as to a class of persons. It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard.

Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on "people with disabilities." Often, there may be little or no statistical data to measure the impact of a procedure on any "class" of people with a particular disability compared to people without disabilities. As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability.

Because of these differences, the federal Uniform Guidelines on Employee Selection Procedures that apply to selection procedures on the basis of race, sex, and national origin under Title VII of the Civil Rights Act and other Federal authorities do not apply under the ADA to selection procedures affecting people with disabilities.

A standard may be job-related but not justified by business necessity, because it does not concern an essential function of a job.

For example: An employer may ask candidates for a clerical job if they have a driver's license, because it would be desirable to have a person in the job who could occasionally run errands or take packages to the post office in an emergency. This requirement is "job-related," but it relates to an incidental, not an essential, job function. If it disqualifies a person who could not obtain a driver's license because of a disability, it would not be justified as a "business necessity" for purposes of the ADA.

Further, the ADA requires that even if a qualification standard or selection criterion is job-related and consistent with business necessity, it may not be used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criterion with a reasonable accommodation.

For example: It may be job-related and necessary for a business to require that a secretary produce letters and other documents on a word processor. But it would be discriminatory to reject a person whose disability prevented manual keyboard operation, but who could meet the qualification standard using a computer assistive device, if providing this device would not impose an undue hardship.

4.4 Establishing Job-Related Qualification Standards

The ADA does not restrict an employer's authority to establish needed job qualifications, including requirements related to:

- education;
- skills;
- work experience;
- licenses or certification;
- physical and mental abilities;
- health and safety; or
- other job-related requirements, such as judgment, ability to work under pressure or interpersonal skills.

Physical and Mental Qualification Standards

An employer may establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighter jobs; security guard jobs) or to protect health and safety.

However, as with other job qualification standards, if a physical or mental qualification standard screens out an individual with a disability or a class of individuals with disabilities, the employer must be prepared to show that the standard is:

- job-related and
- consistent with business necessity.

Even if a physical or mental qualification standard is job-related and necessary for a business, if it is applied to exclude an otherwise qualified individual with a disability, the employer must consider whether there is a reasonable accommodation that would enable this person to meet the standard. The employer does not have to consider such accommodations in establishing a standard, but only when an otherwise qualified person with a disability requests an accommodation.

For example: An employer has a forklift operator job. The essential function of the job is mechanical operation of the forklift machinery. The job has a physical requirement of ability to lift a 70 pound weight, because the operator must be able to remove and replace the 70 pound battery which powers the forklift. This standard is job-related. However, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70 pound weight because of a disability, if other operators or employees are available to help this person remove and replace the battery.

Evaluating Physical and Mental Qualification Standards Under the ADA

Employers generally have two kinds of physical or mental standards:

1. Standards that may exclude an entire class of individuals with disabilities.

For example: No person who has epilepsy, diabetes, or a heart or back condition is eligible for a job.

2. Standards that measure a physical or mental ability needed to perform a job.

For example: The person in the job must be able to lift x pounds for x hours daily, or run x miles in x minutes.

Standards that exclude an entire class of individuals with disabilities

"Blanket" exclusions of this kind usually have been established because employers believed them to be necessary for health or safety reasons. Such standards also may be used to screen out people who an employer fears, or assumes, may cause higher medical insurance or workers' compensation costs, or may have a higher rate of absenteeism.

Employers who have such standards should review them carefully. In most cases, they will not meet ADA requirements.

The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety (see below). But the ADA requires an objective assessment of a particular individual's current ability to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA. (However, the ADA recognizes employers' obligations to comply with Federal laws that mandate such exclusions in certain occupations. [See Health and Safety Requirements of Other Federal or State Laws below.])

The ADA requires that:

- any determination of a direct threat to health or safety must be based on an individualized assessment of objective and specific evidence about a particular individual's present ability to perform essential job functions, not on general assumptions or speculations about a disability. (See Standards Necessary for Health and Safety: A "Direct Threat" below).

For example: An employer who excludes all persons who have epilepsy from jobs that require use of dangerous machinery will be required to look at the life experience and work history of an individual who has epilepsy. The individual evaluation should take into account the type of job, the degree of seizure control, the type(s) of seizures (if any), whether the person has an "aura" (warning of seizure), the person's reliability in taking prescribed anti-convulsant medication, and any side effects of such medication. Individuals who have no seizures because they regularly take prescribed medication, or who have sufficient advance warning of a seizure so that they can stop hazardous activity, would not pose a "direct threat" to safety.

Standards that measure needed physical or mental ability to perform a job

Specific physical or mental abilities may be needed to perform certain types of jobs.

For example: Candidates for jobs such as airline pilots, policemen and firefighters may be required to meet certain physical and psychological qualifications.

In establishing physical or mental standards for such jobs, an employer does not have to show that these standards are "job related," justified by "business necessity" or that they relate only to "essential" functions of the job. However, if such a standard screens out an otherwise qualified individual with a disability, the employer must be prepared to show that the standard, as applied, is job-related and consistent with business necessity under the ADA. And, even if this can be shown, the employer must consider whether this individual could meet the standard with a reasonable accommodation.

For example: A police department that requires all its officers to be able to make forcible arrests and to perform all job functions in the department might be able to justify stringent physical requirements for all officers, if in fact they are all required to be available for any duty in an emergency.

However, if a position in a mailroom required as a qualification standard that the person in the job be able to reach high enough to place and retrieve packages from 6-foot high shelves, an employer would have to consider whether there was an accommodation that would enable a person with a disability that prevented reaching that high to perform these essential functions. Possible accommodations might include lowering the shelf-height, providing a step stool or other assistive device.

Physical agility tests

An employer may give a physical agility test to determine physical qualifications necessary for certain jobs prior to making a job offer if it is simply an agility test and not a medical examination. Such a test would not be subject to the prohibition against pre-employment medical examinations if given to all similarly situated applicants or employees, regardless of disability. However, if an agility test screens out or tends to screen out an individual with a disability or a class of such individuals because of disability, the employer must be prepared to show that the test is job-related and consistent with business necessity and that the test or the job cannot be performed with a reasonable accommodation.

It is important to understand the distinction between physical agility tests and prohibited pre-employment medical inquiries and examinations. One difference is that agility tests do not involve medical examinations or diagnoses by a physician, while medical examinations may involve a doctor.

For example: At the pre-offer stage, a police department may conduct an agility test to measure a candidate's ability to walk, run, jump, or lift in relation to specific job duties, but it cannot require the applicant to have a medical screening before taking the agility test. Nor can it administer a medical examination before making a conditional job offer to this person.

Some employers currently may require a medical screening before administering a physical agility test to assure that the test will not harm the applicant. There are two ways that an employer can handle this problem under the ADA:

- the employer can request the applicant's physician to respond to a very restricted inquiry which describes the specific agility test and asks: "Can this person safely perform this test?"
- the employer may administer the physical agility test after making a conditional job offer, and in this way may obtain any necessary medical information, as permitted under the ADA. (See Chapter VI.) The employer may find it more cost-efficient to administer such tests only to those candidates who have met other job qualifications.

4.5 Standards Necessary for Health and Safety: A "Direct Threat"

An employer may require as a qualification standard that an individual not pose a "direct threat" to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job. However, an

employer must meet very specific and stringent requirements under the ADA to establish that such a "direct threat" exists.

The employer must be prepared to show that there is:

- significant risk of substantial harm;
- the specific risk must be identified;
- it must be a current risk, not one that is speculative or remote;
- the assessment of risk must be based on objective medical or other factual evidence regarding a particular individual; and
- even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.

Looking at each of these requirements more closely:

1. Significant risk of substantial harm

An employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The employer must be prepared to show that there is a significant risk, that is, a high probability of substantial harm, if the person were employed.

The assessment of risk cannot be based on mere speculation unrelated to the individual in question.

For example: An employer cannot assume that a person with cerebral palsy who has restricted manual dexterity cannot work in a laboratory because s/he will pose a risk of breaking vessels with dangerous contents. The abilities or limitations of a particular individual with cerebral palsy must be evaluated.

2. The specific risk must be identified

If an individual has a disability, the employer must identify the aspect of the disability that would pose a direct threat, considering the following factors:

- the duration of the risk.

For example: An elementary school teacher who has tuberculosis may pose a risk to the health of children in her classroom. However, with proper medication, this person's disease would be contagious for only a two-week period. With an accommodation of two-weeks absence from the classroom, this teacher would not pose a "direct threat."

- the nature and severity of the potential harm.

For example: A person with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger her own life and the lives of others if employed as a bus driver. But this person would not pose a severe threat of harm if employed in a clerical job.

- the likelihood that the potential harm will occur.

For example: An employer may believe that there is a risk of employing an individual with HIV disease as a teacher. However, it is medically established that this disease can only be transmitted through sexual contact, use of infected needles, or other entry into a person's blood stream. There is little or no likelihood that

employing this person as a teacher would pose a risk of transmitting this disease.

- the imminence of the potential harm.

For example: A physician's evaluation of an applicant for a heavy labor job that indicated the individual had a disc condition that might worsen in 8 or 10 years would not be sufficient indication of imminent potential harm.

If the perceived risk to health or safety arises from the behavior of an individual with a mental or emotional disability, the employer must identify the specific behavior that would pose the "direct threat".

3. The risk must be current, not one that is speculative or remote

The employer must show that there is a current risk -- "a high probability of substantial harm" -- to health or safety based on the individual's present ability to perform the essential functions of the job. A determination that an individual would pose a "direct threat" cannot be based on speculation about future risk. This includes speculation that an individual's disability may become more severe. An assessment of risk cannot be based on speculation that the individual will become unable to perform a job in the future, or that this individual may cause increased health insurance or workers compensation costs, or will have excessive absenteeism. (See Insurance, Chapter VII., and Workers' Compensation, Chapter IX.)

4. The assessment of risk must be based on objective medical or other evidence related to a particular individual

The determination that an individual applicant or employee with a disability poses a "direct threat" to health or safety must be based on objective, factual evidence related to that individual's present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability generally. Nor can such a determination be based on patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job.

For example: An employer may not exclude a person with a vision impairment from a job that requires a great deal of reading because of concern that the strain of heavy reading may further impair her sight.

The determination of a "direct threat" to health or safety must be based on a reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence. This may include:

- input from the individual with a disability;
- the experience of this individual in previous jobs;
- documentation from medical doctors, psychologists, rehabilitation counselors, physical or occupational therapists, or others who have expertise in the disability involved and/or direct knowledge of the individual with a disability.

Where the psychological behavior of an employee suggests a threat to safety, factual evidence of this behavior also may constitute evidence of a "direct threat." An employee's violent, aggressive, destructive or threatening behavior may provide such evidence.

Employers should be careful to assure that assessments of "direct threat" to health or safety are based on current medical knowledge and other kinds of evidence listed above, rather than relying on generalized and frequently out-of- date assumptions about risk associated with certain disabilities. They should be aware that Federal contractors who have had similar disability nondiscrimination requirements under the Rehabilitation Act have had to make substantial backpay and other financial payments because they excluded individuals with disabilities who were qualified to perform their jobs, based on generalized assumptions that were not supported

by evidence about the individual concerned.

Examples of Contractor Cases:

- A highly qualified experienced worker was rejected for a sheet metal job because of a company's general medical policy excluding anyone with epilepsy from this job. The company asserted that this person posed a danger to himself and to others because of the possibility that he might have a seizure on the job. However, this individual had been seizure-free for 6 years and co-workers on a previous job testified that he carefully followed his prescribed medication schedule. The company was found to have discriminated against this individual and was required to hire him, incurring large back pay and other costs.
- An applicant who was deaf in one ear was rejected for an aircraft mechanic job because the company feared that his impairment might cause a future workers' compensation claim. His previous work record gave ample evidence of his ability to perform the aircraft mechanic job. The company was found to have discriminated because it provided no evidence that this person would have been a danger to himself or to others on the job.
- An experienced carpenter was not hired because a blood pressure reading by the company doctor at the end of a physical exam was above the company's general medical standard. However, his own doctor provided evidence of much lower readings, based on measurements of his blood pressure at several times during a physical exam. This doctor testified that the individual could safely perform the carpenter's job because he had only mild hypertension. Other expert medical evidence confirmed that a single blood pressure reading was not sufficient to determine if a person has hypertension, that such a reading clearly was not sufficient to determine if a person could perform a particular job, and that hypertension has very different effects on different people. In this case, it was found that there was merely a slightly elevated risk, and that a remote possibility of future injury was not sufficient to disqualify an otherwise qualified person. (Note that while it is possible that a person with mild hypertension does not have an impairment that "substantially limits a major life activity," in this case the person was excluded because he was "regarded as" having such an impairment. The employer was still required to show that this person posed a "direct threat" to safety.)

"Direct Threat" to Self

An employer may require that an individual not pose a direct threat of harm to his or her own safety or health, as well as to the health or safety of others. However, as emphasized above, such determinations must be strictly based on valid medical analyses or other objective evidence related to this individual, using the factors set out above. A determination that a person might cause harm to himself or herself cannot be based on stereotypes, patronizing assumptions about a person with a disability, or generalized fears about risks that might occur if an individual with a disability is placed in a certain job. Any such determination must be based on evidence of specific risk to a particular individual.

For example: An employer would not be required to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment, if there is no accommodation that would reduce or eliminate the risk of harm. But an advertising agency could not reject an applicant for a copywriter job who has a history of mental illness, based on a generalized fear that working in this high stress job might trigger a relapse of the individual's mental illness. Nor could an employer reject an applicant with a visual or mobility disability because of a generalized fear of risks to this person in the event of a fire or other emergency.

5. If there is a significant risk, reasonable accommodation must be considered

Where there is a significant risk of substantial harm to health or safety, an employer still must consider whether

there is a reasonable accommodation that would eliminate this risk or reduce the risk so that it is below the level of a "direct threat."

For example: A deaf bus mechanic was denied employment because the transit authority feared that he had a high probability of being injured by buses moving in and out of the garage. It was not clear that there was, in fact, a "high probability" of harm in this case, but the mechanic suggested an effective accommodation that enabled him to perform his job with little or no risk. He worked in a corner of the garage, facing outward, so that he could see moving buses. A co-worker was designated to alert him with a tap on the shoulder if any dangerous situation should arise.

"Direct Threat" and Accommodation in Food Handling Jobs

The ADA includes a specific application of the "direct threat" standard and the obligation for reasonable accommodation in regard to individuals who have infectious or communicable diseases that may be transmitted through the handling of food.

The law provides that the U.S. Department of Health and Human Services (HHS) must prepare and update annually a list of contagious diseases that are transmitted through the handling of food and the methods by which these diseases are transmitted.

When an individual who has one of the listed diseases applies for work or works in a job involving food handling, the employer must consider whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through handling of food. If there is such an accommodation, and it would not impose an undue hardship, the employer must provide the accommodation.

An employer would not be required to hire a job applicant in such a situation if no reasonable accommodation is possible. However, an employer would be required to consider accommodating an employee by reassignment to a position that does not require handling of food, if such a position is available, the employee is qualified for it, and it would not pose an undue hardship.

In August 1991, the Centers for Disease Control (CDC) of the Public Health Service in HHS issued a list of infectious and communicable diseases that are transmitted through handling of food, together with information about how these diseases are transmitted. The list of diseases is brief. In conformance with established medical opinion, it does not include AIDS or the HIV virus. In issuing the list, the CDC emphasized that the greatest danger of food-transmitted illness comes from contamination of infected food-producing animals and contamination in food processing, rather than from handling of food by persons with infectious or communicable diseases. The CDC also emphasized that proper personal hygiene and sanitation in food-handling jobs were the most important measures to prevent transmission of disease.

The CDC list of diseases that are transmitted through food handling and recommendations for preventing such transmission appears in Appendix C.

4.6 Health and Safety Requirements of Other Federal or State Laws

The ADA recognizes employers' obligations to comply with requirements of other laws that establish health and safety standards. However, the Act gives greater weight to Federal than to state or local law.

1. Federal Laws and Regulations

The ADA does not override health and safety requirements established under other Federal laws. 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: An employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration (OSHA).

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.

For example: In hiring a person to drive a vehicle in interstate commerce, an employer must conform to existing Department of Transportation regulations that exclude any person with epilepsy, diabetes, and certain other conditions from such a job.

But, for example, if DOT regulations require that a truck have 3 grab bars in specified places, and an otherwise qualified individual with a disability could perform essential job functions with the assistance of 2 additional grab bars, it would be a reasonable accommodation to add these bars, unless this would be an undue hardship.

The Department of Transportation, as directed by Congress, currently is reviewing several motor vehicle standards that require "blanket" exclusions of individuals with diabetes, epilepsy and certain other disabilities.

2. State and Local Laws

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with ADA requirements. This means that if there is a state or local law that would exclude an individual with a disability for 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 there is such a "direct threat," the employer also must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer may not rely on the existence of a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

For example: A state law that required a school bus driver to have a high level of hearing in both ears without use of a hearing aid was found by a court to violate Section 504 of the Rehabilitation Act, and would violate the ADA. The court found that the driver could perform his job with a hearing aid without a risk to safety.

(See further guidance on Medical Examinations and Inquiries in Chapter VI.)

V. NONDISCRIMINATION IN THE HIRING PROCESS: RECRUITMENT; APPLICATIONS; PRE-EMPLOYMENT INQUIRIES; TESTING

This chapter discusses nondiscrimination requirements that apply to recruitment and the job application process, including pre-employment inquiries. Chapter VI. discusses these requirements more specifically in relation to medical inquiries and examinations.

5.1 Overview of Legal Obligations

- An employer must provide an equal opportunity for an individual with a disability to participate in the job application process and to be considered for a job.
- An employer may not make any pre-employment inquiries regarding disability, but may ask questions about the ability to perform specific job functions and may, with certain limitations, ask an

individual with a disability to describe or demonstrate how s/he would perform these functions.

- An employer may not require pre-employment medical examinations or medical histories, but may condition a job offer on the results of a post-offer medical examination, if all entering employees in the same job category are required to take this examination.
- Tests for illegal drugs are not medical examinations under the ADA and may be given at any time.
- A test that screens out or tends to screen out a person 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 an individual rather than impaired sensory, manual, or speaking skills, unless those are job-related skills the test is designed to measure.

A careful review of all procedures used in recruiting and selecting employees is advisable to assure nondiscrimination in the hiring process. Reasonable accommodation must be provided as needed, to assure that individuals with disabilities have equal opportunities to participate in this process.

5.2 Job Advertisements and Notices

It is advisable that job announcements, advertisements, and other recruitment notices include information on the essential functions of the job. Specific information about essential functions will attract applicants, including individuals with disabilities, who have appropriate qualifications.

Employers may wish to indicate in job advertisements and notices that they do not discriminate on the basis of disability or other legally prohibited bases. An employer may wish to include a statement such as: "We are an Equal Opportunity Employer. We do not discriminate on the basis of race, religion, color, sex, age, national origin or disability."

Accessibility of Job Information

Information about job openings should be accessible to people with different disabilities. An employer is not obligated to provide written information in various formats in advance, but should make it available in an accessible format on request.

For example: Job information should be available in a location that is accessible to people with mobility impairments. If a job advertisement provides only a telephone number to call for information, a TDD (telecommunication device for the deaf) number should be included, unless a telephone relay service has been established<2>. Printed job information in an employment office or on employee bulletin boards should be made available, as needed, to persons with visual or other reading impairments. Preparing information in large print will help make it available to some people with visual impairments. Information can be recorded on a cassette or read to applicants with more severe vision impairments and those who have other disabilities which limit reading ability.

5.3 Employment Agencies

Employment agencies are "covered entities" under the ADA, and must comply with all ADA requirements that are applicable to their activities.

The definition of an "employment agency" under the ADA is the same as that under Title VII of the Civil Rights Act. It includes private and public employment agencies and other organizations, such as college placement services, that regularly procure employees for an employer.

When an employer uses an employment agency to recruit, screen, and refer potential employees, both the

employer and the employment agency may be liable if there is any violation of ADA requirements.

For example: An employer uses an employment agency to recruit and the agency places a newspaper advertisement with a telephone number that all interested persons must call, because no address is given. However, there is no TDD number. If there is no telephone relay service, and a deaf person is unable to obtain information about a job for which she is qualified and files a discrimination charge, both the employer and the agency may be liable.

An employer should inform an employment agency used to recruit or screen applicants of the mutual obligation to comply with ADA requirements. In particular, these agencies should be informed about requirements regarding qualification standards, pre-employment inquiries, and reasonable accommodation.

If an employer has a contract with an employment agency, the employer may wish to include a provision stating that the agency will conduct its activities in compliance with ADA and other legal nondiscrimination requirements.

5.4 Recruitment

The ADA is a nondiscrimination law. It does not require employers to undertake special activities to recruit people with disabilities. However, it is consistent with the purpose of the ADA for employers to expand their "outreach" to sources of qualified candidates with disabilities. (See **Locating Qualified Individuals with Disabilities** below).

Recruitment activities that have the effect of screening out potential applicants with disabilities may violate the ADA.

For example: If an employer conducts recruitment activity at a college campus, job fair, or other location that is physically inaccessible, or does not make its recruitment activity accessible at such locations to people with visual, hearing or other disabilities, it may be liable if a charge of discrimination is filed.

Locating Qualified Individuals with Disabilities

There are many resources for locating individuals with disabilities who are qualified for different types of jobs. People with disabilities represent a large, underutilized human resource pool. Employers who have actively recruited and hired people with disabilities have found valuable sources of employees for jobs of every kind.

Many of the organizations listed in the Resource Directory are excellent sources for recruiting qualified individuals with disabilities as well as sources of technical assistance for any accommodations needed. For example, many colleges and universities have coordinators of services for students with disabilities who can be helpful in recruitment and in making accommodations. The Association on Handicapped Student Service Programs in Post Secondary Education can provide information on these resources. Local Independent Living Centers, state and local vocational rehabilitation agencies, organizations such as Goodwill Industries, and many organizations representing people who have specific disabilities are among other recruitment sources. (See "Recruitment Sources" in Resource Directory Index).

5.5 Pre-Employment Inquiries

The ADA Prohibits Any Pre-Employment Inquiries About a Disability.

This prohibition is necessary to assure that qualified candidates are not screened out because of their disability

before their actual ability to do a job is evaluated. Such protection is particularly important for people with hidden disabilities who frequently are excluded, with no real opportunity to present their qualifications, because of information requested in application forms, medical history forms, job interviews, and pre-employment medical examinations.

The prohibition on pre-employment inquiries about disability does not prevent an employer from obtaining necessary information regarding an applicant's qualifications, including medical information necessary to assess qualifications and assure health and safety on the job.

The ADA requires only that such inquiries be made in two separate stages of the hiring process.

1. Before making a job offer.

At this stage, an employer:

- may ask questions about an applicant's ability to perform specific job functions;
- may not make an inquiry about a disability;
- may make a job offer that is conditioned on satisfactory results of a post-offer medical examination or inquiry.

2. After making a conditional job offer and before an individual starts work

At this stage, an employer may conduct a medical examination or ask health-related questions, providing that all candidates who receive a conditional job offer in the same job category are required to take the same examination and/or respond to the same inquiries.

Inquiries that may and may not be made at the pre-offer stage are discussed in the section that follows. Guidance on obtaining and using information from post-offer medical and inquiries and examinations is provided in Chapter VI.

5.5(a) Basic Requirements Regarding Pre-Offer Inquiries

- An employer may not make any pre-employment inquiry about a disability, or about the nature or severity of a disability:
    - on application forms
    - in job interviews
    - in background or reference checks.
- An employer may not make any medical inquiry or conduct any medical examination prior to making a conditional offer of employment.
- An employer may ask a job applicant questions about ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability. Questions need not be limited to the "essential" functions of the job.
- An employer may ask all applicants to describe or demonstrate how they will perform a job, with or without an accommodation.
- If an individual has a known disability that might interfere with or prevent performance of job functions, s/he may be asked to describe or demonstrate how these functions will be performed, with or without an accommodation, even if other applicants are not asked to do so; however,
- If a known disability would not interfere with performance of job functions, an individual may only be required to describe or demonstrate how s/he will perform a job if this is required of all applicants for the position.
- An employer may condition a job offer on the results of a medical examination or on the responses

to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability; information obtained from such inquiries or examinations must be handled according to the strict confidentiality requirements of the ADA. (See Chapter VI.)

5.5(b) The Job Application Form

A review of job application forms should be a priority before the ADA's effective date, to eliminate any questions related to disability.

Some Examples of Questions that May Not be Asked on Application Forms or in Job Interviews:

- Have you ever had or been treated for any of the following conditions or diseases? (Followed by a checklist of various conditions and diseases.)
- Please list any conditions or diseases for which you have been treated in the past 3 years.
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there any health-related reason you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last 5 years?
- How many days were you absent from work because of illness last year?

(Pre-employment questions about illness may not be asked, because they may reveal the existence of a disability. However, an employer may provide information on its attendance requirements and ask if an applicant will be able to meet these requirements. [See also **The Job Interview** below.])

- Do you have any physical defects which preclude you from performing certain kinds of work? If yes, describe such defects and specific work limitations.
- Do you have any disabilities or impairments which may affect your performance in the position for which you are applying?

(This question should not be asked even if the applicant is requested in a follow-up question to identify accommodations that would enable job performance. Inquiries should not focus on an applicant's disabilities. The applicant may be asked about ability to perform specific job functions, with or without a reasonable accommodation. [See **Information That May be Asked**, below.])

- Are you taking any prescribed drugs?

(Questions about use of prescription drugs are not permitted before a conditional job offer, because the answers to such questions might reveal the existence of certain disabilities which require prescribed medication.)

- Have you ever been treated for drug addiction or alcoholism?

(Information may not be requested regarding treatment for drug or alcohol addiction, because the ADA protects people addicted to drugs who have been successfully rehabilitated, or who are undergoing rehabilitation, from discrimination based on drug addiction. [See Chapter VI. for discussion of post-offer inquiries and Chapter VIII. for drug and alcohol issues.])

- Have you ever filed for workers' compensation insurance?

(An employer may not ask about an applicant's workers' compensation history at the pre-offer stage, but may obtain such information after making a conditional job offer. Such questions are prohibited because they are likely to reveal the existence of a disability. In addition, it is discriminatory under the ADA not to hire an individual with a disability because of speculation that the individual will cause increased workers' compensation costs. (See Chapter IV, **4.5(3)**, and Chapter IX.)

Information about an applicant's ability to perform job tasks, with or without accommodation, can be obtained through the application form and job interview, as explained below. Other needed information may be obtained through medical inquiries or examinations conducted after a conditional offer of employment, as described in Chapter VI.

5.5(c) Exception for Federal Contractors Covered by Section 503 of the Rehabilitation Act and Other Federal Programs Requiring Identification of Disability.

Federal contractors and subcontractors who are covered by the affirmative action requirements of Section 503 of the Rehabilitation Act may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records. (For further information, see Office of Federal Contract Compliance Programs listing in Resource Directory.)

A pre-employment inquiry about a disability also is permissible if it is required or necessitated by another Federal law or regulation. For example, a number of programs administered or funded by the U.S. Department of Labor target benefits to individuals with disabilities, such as, disabled veterans, veterans of the Vietnam era, individuals eligible for Targeted Job Tax Credits, and individuals eligible for Job Training Partnership Act assistance. Pre-employment inquiries about disabilities may be necessary under these laws to identify disabled applicants or clients in order to provide the required special services for such persons. These inquiries would not violate the ADA.

5.5(d) Information that May Be Requested on Application Forms or in Interviews.

An employer may ask questions to determine whether an applicant can perform specific job functions. The questions should focus on the applicant's ability to perform the job, not on a disability.

For example: An employer could attach a job description to the application form with information about specific job functions. Or the employer may describe the functions. This will make it possible to ask whether the applicant can perform these functions. It also will give an applicant with a disability needed information to request any accommodation required to perform a task. The applicant could be asked:

- **Are you able to perform these tasks with or without an accommodation?**

If the applicant indicates that s/he can perform the tasks with an accommodation, s/he may be asked:

- **How would you perform the tasks, and with what accommodation(s)?**

However, the employer must keep in mind that it cannot refuse to hire a qualified individual with a disability

because of this person's need for an accommodation that would be required by the ADA.

An employer may inform applicants on an application form that they may request any needed accommodation to participate in the application process.

For example: accommodation for a test, a job interview, or a job demonstration.

The employer may wish to provide information on the application form and in the employment office about specific aspects of the job application process, so that applicants may request any needed accommodation. The employer is not required to provide such information, but without it the applicant may have no advance notice of the need to request an accommodation. Since the individual with a disability has the responsibility to request an accommodation and the employer has the responsibility to provide the accommodation (unless it would cause an undue hardship), providing advance information on various application procedures may help avoid last minute problems in making necessary accommodations. This information can be communicated orally or on tape for people who are visually impaired. (See also Testing, 5.6 below)

5.5(e) Making Job Applications Accessible

Employers have an obligation to make reasonable accommodations to enable an applicant with a disability to apply for a job. Some of the kinds of accommodations that may be needed have been suggested in the section on Accessibility of Job Information, **5.2** above. Individuals with visual or learning disabilities or other mental disabilities also may require assistance in filling out application forms.

5.5(f) The Job Interview

The basic requirements regarding pre-employment inquiries and the types of questions that are prohibited on job application forms apply to the job interview as well. (See 5.5(a) and (b) above.) An interviewer may not ask questions about a disability, but may obtain more specific information about the ability to perform job tasks and about any needed accommodation, as set out below.

To assure that an interview is conducted in a nondiscriminatory manner, interviewers should be well-informed about the ADA's requirements. The employer may wish to provide written guidelines to people who conduct job interviews.

Most employment discrimination against people with disabilities is not intentional. Discrimination most frequently occurs because interviewers and others involved in hiring lack knowledge about the differing capabilities of individuals with disabilities and make decisions based on stereotypes, misconceptions, or unfounded fears. To avoid discrimination in the hiring process, employers may wish to provide "awareness" training for interviewers and others involved in the hiring process. Such training provides factual information about disability and the qualifications of people with disabilities, emphasizes the importance of individualized assessments, and helps interviewers feel more at ease in talking with people who have different disabilities.

Sources that provide "awareness training," some at little or no cost, may be found under this heading in the Resource Directory Index.

The job interview should focus on the ability of an applicant to perform the job, not on disability.

For example: If a person has only one arm and an essential function of a job is to drive a car, the interviewer should not ask if or how the disability would affect this person's driving. The person may be asked if s/he has a valid driver's license, and whether s/he can perform any special aspect of driving that is required, such as

frequent long-distance trips, with or without an accommodation.

The interviewer also could obtain needed information about an applicant's ability and experience in relation to specific job requirements through statements and questions such as: "Eighty-percent of the time of this sales job must be spent on the road covering a three-state territory. What is your outside selling experience? Do you have a valid driver's license? What is your accident record?"

Where an applicant has a visible disability (for example, uses a wheelchair or a guide dog, or has a missing limb) or has volunteered information about a disability, the interviewer may not ask questions about:

- the nature of the disability;
- the severity of the disability;
- the condition causing the disability;
- any prognosis or expectation regarding the condition or disability; or
- whether the individual will need treatment or special leave because of the disability.

The interviewer may describe or demonstrate the specific functions and tasks of the job and ask whether an applicant can perform these functions with or without a reasonable accommodation.

For example: An interviewer could say: "The person in this mailroom clerk position is responsible for receiving incoming mail and packages, sorting the mail, and taking it in a cart to many offices in two buildings, one block apart. The mail clerk also must receive incoming boxes of supplies up to 50 pounds in weight, and place them on storage shelves up to 6 feet in height. Can you perform these tasks? Can you perform them with or without a reasonable accommodation?"

As suggested above, (see 5.5(d)), the interviewer also may give the applicant a copy of a detailed position description and ask whether s/he can perform the functions described in the position, with or without a reasonable accommodation.

Questions may be asked regarding ability to perform all job functions, not merely those that are essential to the job.

For example: A secretarial job may involve the following functions:

- transcribing dictation and written drafts from the supervisor and other staff into final written documents;
- proof-reading documents for accuracy;
- developing and maintaining files;
- scheduling and making arrangements for meetings and conferences;
- logging documents and correspondence in and out;
- placing, answering, and referring telephone calls;
- distributing documents to appropriate staff members;
- reproducing documents on copying machines; and
- occasional travel to perform clerical tasks at out of town conferences.

Taking into account the specific activities of the particular office in which this secretary will work, and availability of other staff, the employer has identified functions 1-6 as essential, and functions 7-9 as marginal to this secretary's job. The interviewer may ask questions related to all 9 functions; however, an applicant with limited mobility should not be screened out because of inability to perform the last 3 functions due to her disability. S/he should be evaluated on ability to perform the first 6 functions, with or without accommodation.

Inquiries Related to Ability to Perform Job Functions and Accommodations

An interviewer may obtain information about an applicant's ability to perform essential job functions and about any need for accommodation in several ways, depending on the particular job applicant and the requirements of a particular job:

- The applicant may be asked to describe or demonstrate how s/he will perform specific job functions, if this is required of everyone applying for a job in this job category, regardless of disability.

For example: An employer might require all applicants for a telemarketing job to demonstrate selling ability by taking a simulated telephone sales test, but could not require that a person using a wheelchair take this test if other applicants are not required to take it.

- If an applicant has a known disability that would appear to interfere with or prevent performance of a job-related function, s/he may be asked to describe or demonstrate how this function would be performed, even if other applicants do not have to do so.

For example: If an applicant has one arm and the job requires placing bulky items on shelves up to six feet high, the interviewer could ask the applicant to demonstrate how s/he would perform this function, with or without an accommodation. If the applicant states that s/he can perform this function with a reasonable accommodation, for example, with a step stool fitted with a device to assist lifting, the employer either must provide this accommodation so that the applicant can show that s/he can shelve the items, or let the applicant describe how s/he would do this task.

- However, if an applicant has a known disability that would not interfere with or prevent performance of a job related function, the employer can only ask the applicant to demonstrate how s/he would perform the function if all applicants in the job category are required to do so, regardless of disability.

For example: If an applicant with one leg applies for a job that involves sorting small parts while seated, s/he may not be required to demonstrate the ability to do this job unless all applicants are required to do so.

If an applicant indicates that s/he cannot perform an essential job function even with an accommodation, the applicant would not be qualified for the job in question.

Inquiries About Attendance

An interviewer may not ask whether an applicant will need or request leave for medical treatment or for other reasons related to a disability.

The interviewer may provide information on the employer's regular work hours, leave policies, and any special attendance needs of the job, and ask if the applicant can meet these requirements (provided that the requirements actually are applied to employees in a particular job).

For example: "Our regular work hours are 9 to 5, five days weekly, but we expect employees in this job to work overtime, evenings, and weekends for 6 weeks during the Christmas season and on certain other holidays. New employees get 1 week of vacation, 7 sick leave days and may take no more than 5 days of unpaid leave per year. Can you meet these requirements?"

Information about previous work attendance records may be obtained on the application form, in the interview

or in reference checks, but the questions should not refer to illness or disability.

If an applicant has had a poor attendance record on a previous job, s/he may wish to provide an explanation that includes information related to a disability, but the employer should not ask whether a poor attendance record was due to illness, accident or disability. For example, an applicant might wish to disclose voluntarily that the previous absence record was due to surgery for a medical condition that is now corrected, treatment for cancer that is now in remission or to adjust medication for epilepsy, but that s/he is now fully able to meet all job requirements.

Accommodations for Interviews

The employer must provide an accommodation, if needed, to enable an applicant to have equal opportunity in the interview process. As suggested earlier, the employer may find it helpful to state in an initial job notice, and/or on the job application form, that applicants who need accommodation for an interview should request this in advance.

Needed accommodations for interviews may include:

- an accessible location for people with mobility impairments;
- a sign interpreter for a deaf person;
- a reader for a blind person.

Conducting an Interview

The purpose of a job interview is to obtain appropriate information about the background qualifications and other personal qualities of an applicant in relation to the requirements of a specific job.

This chapter has discussed ways to obtain this information by focusing on the abilities rather than the disability of a disabled applicant. However, there are other aspects of an interview that may create barriers to an accurate and objective assessment of an applicant's job qualifications. The interviewer may not know how to communicate effectively with people who have particular disabilities, or may make negative, incorrect assumptions about the abilities of a person with a disability because s/he misinterprets some external manifestation of the disability.

For example: An interviewer may assume that a person who displays certain characteristics of cerebral palsy, such as indistinct speech, lisping, and involuntary or halting movements, is limited in intelligence. In fact, cerebral palsy does not affect intelligence at all.

If an applicant who is known to have a disability was referred by a rehabilitation agency or other source familiar with the person, it may be helpful to contact the agency to learn more about this individual's ability to perform specific job functions; however, questions should not be asked about the nature or extent of the person's disability. General information on different disabilities may be obtained from many organizations listed in the Resource Directory. See Index under the specific disability.

5.5(g) Background and Reference Checks

Before making a conditional job offer, an employer may not request any information about a job applicant from a previous employer, family member, or other source that it may not itself request of the job applicant.

If an employer uses an outside firm to conduct background checks, the employer should assure that this firm

complies with the ADA's prohibitions on pre-employment inquiries. Such a firm is an agent of the employer. The employer is responsible for actions of its agents and may not do anything through a contractual relationship that it may not itself do directly.

Before making a conditional offer of employment, an employer may not ask previous employers or other sources about an applicant's:

- disability;
- illness;
- workers' compensation history;
- or any other questions that the employer itself may not ask of the applicant.

A previous employer may be asked about:

- job functions and tasks performed by the applicant;
- the quality and quantity of work performed;
- how job functions were performed;
- attendance record;
- other job-related issues that do not relate to disability.

If an applicant has a known disability and has indicated that s/he could perform a job with a reasonable accommodation, a previous employer may be asked about accommodations made by that employer.

5.6 Testing

Employers may use any kind of test to determine job qualifications. 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, including, but not limited to: aptitude tests, tests of knowledge and skill, intelligence tests, agility tests, and job demonstrations.

A test will most likely be an accurate predictor of the job performance of a person with a disability when it most directly or closely measures actual skills and ability needed to do a job. For example: a typing test, a sales demonstration test, or other job performance test would indicate what the individual actually could do in performing a job, whereas a test that measured general qualities believed to be desirable in a job may screen out people on the basis of disability who could do the job. For example, a standardized test used for a job as a heavy equipment operator might screen out a person with dyslexia or other learning disability who was able to perform all functions of the job itself.

An employer is only required to show that a test is job-related and consistent with business necessity if it screens out a person with a disability because of the disability. If a person was screened out for a reason unrelated to disability, ADA requirements do not apply.

For example: If a person with paraplegia who uses a wheelchair is screened out because s/he does not have sufficient speed or accuracy on a typing test, this person probably was not screened out because of his or her disability. The employer has no obligation to consider this person for a job which requires fast, accurate typing.

Even if a test is job-related and justified by business necessity, the employer has an obligation to provide a specific reasonable accommodation, if needed. For example, upon request, test sites must be accessible to people who have mobility disabilities. The ADA also has a very specific requirement for accommodation in testing, described below.

2. Accommodation in testing

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 this requirement is to assure that tests accurately reflect a person's job skills, aptitudes, or whatever else the test is supposed to measure, rather than the person's impaired skills. This requirement applies the reasonable accommodation obligation to testing. It protects people with disabilities from being excluded from jobs that they actually can do because a disability prevents them from taking a test or negatively influences a test result. However, an employer does not have to provide an alternative test format for a person with an impaired skill if the purpose of the test is to measure that skill.

For example:

- A person with dyslexia should be given an opportunity to take a written test orally, if the dyslexia seriously impairs the individual's ability to read. But if ability to read is a job-related function that the test is designed to measure, the employer could require that a person with dyslexia take the written test. However, even in this situation, reasonable accommodation should be considered. The person with dyslexia might be accommodated with a reader, unless the ability to read unaided is an essential job function, unless such an accommodation would not be possible on the job for which s/he is being tested, or would be an undue hardship. For example, the ability to read without help would be essential for a proofreader's job. Or, a dyslexic firefighter applicant might be disqualified if he could not quickly read necessary instructions for dealing with specific toxic substances at the site of a fire when no reader would be available.
- Providing extra time to take a test may be a reasonable accommodation for people with certain disabilities, such as visual impairments, learning disabilities, or mental retardation. On the other hand, an employer could require that an applicant complete a test within an established time frame if speed is one of the skills that the test is designed to measure. However, the results of a timed test should not be used to exclude a person with a disability, unless the test measures a particular speed necessary to perform an essential function of the job, and there is no reasonable accommodation that would enable this person to perform that function within prescribed time frames, or the accommodation would cause an undue hardship.

Generally, an employer is only required to provide such an accommodation if it knows, before administering a test, that an accommodation will be needed. Usually, it is the responsibility of the individual with a disability to request any required accommodation for a test. It has been suggested that the employer inform applicants, in advance, of any tests that will be administered as part of the application process so that they may request an accommodation, if needed. (See 5.5(d) above.) The employer may require that an individual with a disability request an accommodation within a specific time period before administration of the test. The employer also may require that documentation of the need for accommodation accompany such a request.

Occasionally, however, an individual with a disability may not realize in advance that s/he will need an accommodation to take a particular test.

For example: A person with a visual impairment who knows that there will be a written test may not request an

accommodation because she has her own specially designed lens that usually is effective for reading printed material. However, when the test is distributed, she finds that her lens is not sufficient, because of unusually low color contrast between the paper and the ink. Under these circumstances, she might request an accommodation and the employer would be obligated to provide one. The employer might provide the test in a higher contrast format at that time, reschedule the test, or make any other effective accommodation that would not impose an undue hardship.

An employer is not required to offer an applicant the specific accommodation requested. This request should be given primary consideration, but the employer is only obligated to provide an effective accommodation. (See Chapter III.) The employer is only required to provide, upon request, an "accessible" test format for individuals whose disabilities impair sensory, manual, or speaking skills needed to take the test, unless the test is designed to measure these skills.

Some Examples of Alternative Test Formats and Accommodations:

- Substituting a written test for an oral test (or written instructions for oral instructions) for people with impaired speaking or hearing skills;
- Administering a test in large print, in Braille, by a reader, or on a computer for people with visual or other reading disabilities;
- Allowing people with visual or learning disabilities or who have limited use of their hands to record test answers by tape recorder, dictation or computer;
- Providing extra time to complete a test for people with certain learning disabilities or impaired writing skills;
- Simplifying test language for people who have limited language skills because of a disability;
- Scheduling rest breaks for people with mental and other disabilities that require such relief;
- Assuring that a test site is accessible to a person with a mobility disability;
- Allowing a person with a mental disability who cannot perform well if there are distractions to take a test in a separate room, if a group test setting is not relevant to the job itself;
- Where it is not possible to test an individual with a disability in an alternative format, an employer may be required, as a reasonable accommodation, to evaluate the skill or ability being tested through some other means, such as an interview, education, work experience, licenses or certification, or a job demonstration for a trial period.

There are a number of technical assistance resources for effective alternative methods of testing people with different disabilities. (See "Alternative Testing Formats" in Resource Directory Index).

VI. MEDICAL EXAMINATIONS AND INQUIRIES

6.1 Overview of Legal Obligations

Pre-Employment, Pre-Offer

- An employer may not require a job applicant to take a medical examination, to respond to medical inquiries or to provide information about workers' compensation claims before the employer makes a job offer.

Pre-Employment, Post-Offer

- An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be "job-related" and "consistent with business necessity."

Questions also may be asked about previous injuries and workers' compensation claims.

- If an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and necessary for the business. The employer also must show that no reasonable accommodation was available that would enable this individual to perform the essential job functions, or that accommodation would impose an undue hardship.
- A post-offer medical examination may disqualify an individual who would pose a "direct threat" to health or safety. Such a disqualification is job-related and consistent with business necessity.
- A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

Employee Medical Examinations and Inquiries

- After a person starts work, a medical examination or inquiry of an employee must be job related and necessary for the business.
- Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current "fitness" to perform a particular job and voluntary examinations that are part of employee health programs.

Confidentiality

· Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions specified in the ADA. (See **6.5** below.)

Drug Testing

- Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions on such examinations. (See Chapter VIII.)

6.2 Basic Requirements

The ADA does not prevent employers from obtaining medical and related information necessary to evaluate the ability of applicants and employees to perform essential job functions, or to promote health and safety on the job. However, to protect individuals with disabilities from actions based on such information that are not job-related and consistent with business necessity, including protection of health and safety, the ADA imposes specific and differing obligations on the employer at three stages of the employment process:

1. Before making a job offer, an employer may not make any medical inquiry or conduct any medical examination.

2. After making a conditional job offer, before a person starts work, an employer may make unrestricted medical inquiries, but may not refuse to hire an individual with a disability based on results of such inquiries, unless the reason for rejection is job-related and justified by business necessity.

3. After employment, any medical examination or inquiry required of an employee must be job-related and justified by business necessity. Exceptions are voluntary examinations conducted as part of employee health programs and examinations required by other federal laws.

Under the ADA, "medical" documentation concerning the qualifications of an individual with a disability, or

whether this individual constitutes a "direct threat" to health and safety, does not mean only information from medical doctors. It may be necessary to obtain information from other sources, such as rehabilitation experts, occupational or physical therapists, psychologists, and others knowledgeable about the individual and the disability concerned. It also may be more relevant to look at the individual's previous work history in making such determinations than to rely on an examination or tests by a physician.

The basic requirements regarding actions based on medical information and inquiries have been set out in Chapter IV. As emphasized there, such actions taken because of a disability must be job-related and consistent with business necessity. When an individual is rejected as a "direct threat" to health and safety:

- the employer must be prepared to show a significant current risk of substantial harm (not a speculative or remote risk);
- the specific risk must be identified;
- the risk must be documented by objective medical or other factual evidence regarding the particular individual;
- even if a genuine significant risk of substantial harm exists, the employer must consider whether it can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.

This chapter discusses in more detail the content and manner of medical examinations and inquiries that may be made, and the documentation that may be required (1) before employment and (2) after employment.

6.3 Examinations and Inquiries Before Employment

No Pre-Offer Medical Examination or Inquiry

The ADA prohibits medical inquiries or medical examinations before making a conditional job offer to an applicant. This prohibition is necessary because the results of such inquiries and examinations frequently are used to exclude people with disabilities from jobs they are able to perform.

Some employers have medical policies or rely on doctors' medical assessments that overestimate the impact of a particular condition on a particular individual, and/or underestimate the ability of an individual to cope with his or her condition. Medical policies that focus on disability, rather than the ability of a particular person, frequently will be discriminatory under the ADA.

For example: A policy that prohibits employment of any individual who has epilepsy, diabetes or a heart condition from a certain type of job, and which does not consider the ability of a particular individual, in most cases would violate the ADA. (See Chapter IV.)

Many employers currently use a pre-employment medical questionnaire, a medical history, or a pre-employment medical examination as one step in a several-step selection process. Where this is so, an individual who has a "hidden" disability such as diabetes, epilepsy, heart disease, cancer, or mental illness, and who is rejected for a job, frequently does not know whether the reason for rejection was information revealed by the medical exam or inquiry (which may not have any relation to this person's ability to do the job), or whether the rejection was based on some other aspect of the selection process.

A history of such rejections has discouraged many people with disabilities from applying for jobs, because of fear that they will automatically be rejected when their disability is revealed by a medical examination. The ADA is designed to remove this barrier to employment.

6.4 Post-Offer Examinations and Inquiries Permitted

The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job pre-requisites. The employer may make a job offer to such an individual, conditioned on the satisfactory outcome of a medical examination or inquiry, providing that the employer requires such examination or inquiry for all entering employees in a particular job category, not merely individuals with known disabilities, or those whom the employer believes may have a disability.

A post-offer medical examination does not have to be given to all entering employees in all jobs, only to those in the same job category.

For example: An examination might be given to all entering employees in physical labor jobs, but not to employees entering clerical jobs.

The ADA does not require an employer to justify its requirement of a post-offer medical examination. An employer may wish to conduct a post-offer medical exam or make post-offer medical inquiries for purposes such as:

To determine if an individual currently has the physical or mental qualifications necessary to perform certain jobs:

For example: If a job requires continuous heavy physical exertion, a medical examination may be useful to determine whether an applicant's physical condition will permit him/her to perform the job.

To determine that a person can perform a job without posing a "direct threat" to the health or safety of self or others.

For example:

- A medical examination and evaluation might be required to ensure that prospective construction crane operators do not have disabilities such as uncontrolled seizures that would pose a significant risk to other workers.
- Workers in certain health care jobs may need to be examined to assure that they do not have a current contagious disease or infection that would pose a significant risk of transmission to others, and that could not be accommodated (for example, by giving the individual a delayed starting date until the period of contagion is over).

Compliance with medical requirements of other Federal laws

Employers may comply with medical and safety requirements established under other Federal laws without violating the ADA.

For example: Federal Highway Administration regulations require medical examinations and evaluations of interstate truck drivers, and the Federal Aviation Administration requires examinations for pilots and air controllers.

However, an employer still has an obligation to consider whether there is a reasonable accommodation, consistent with the requirements of other Federal laws, that would not exclude individuals who can perform jobs safely.

Employers also may conduct post-offer medical examinations that are required by state laws, but, as explained in Chapter IV, may not take actions based on such examinations if the state law is inconsistent with ADA requirements. (See Health and Safety Requirements of Other Federal or State Laws, 4.6.)

Information That May Be Requested in Post-Offer Examinations or Inquiries

After making a conditional job offer, an employer may make inquiries or conduct examinations to get any information that it believes to be relevant to a person's ability to perform a job. For example, the employer may require a full physical examination. An employer may ask questions that are prohibited as pre-employment inquiries about previous illnesses, diseases or medications. (See Chapter V.)

If a post-offer medical examination is given, it must be administered to all persons entering a job category. If a response to an initial medical inquiry (such as a medical history questionnaire) reveals that an applicant has had a previous injury, illness, or medical condition, the employer cannot require the applicant to undergo a medical examination unless all applicants in the job category are required to have such examination. However, the ADA does not require that the scope of medical examinations must be identical. An employer may give follow-up tests or examinations where an examination indicates that further information is needed.

For example: All potential employees in a job category must be given a blood test, but if a person's initial test indicates a problem that may affect job performance, further tests may be given to that person only, in order to get necessary information.

A post-offer medical examination or inquiry, made before an individual starts work, need not focus on ability to perform job functions. Such inquiries and examinations themselves, unlike examinations/inquiries of employees, do not have to be "job related" and "consistent with business necessity." However, if a conditional job offer is withdrawn because of the results of such examination or inquiry, an employer must be able to show that:

- the reasons for the exclusion are job-related and consistent with business necessity, or the person is being excluded to avoid a "direct threat" to health or safety; and that
- no reasonable accommodation was available that would enable this person to perform the essential job functions without a significant risk to health or safety, or that such an accommodation would cause undue hardship.

Some examples of post-offer decisions that might be job-related and justified by business necessity, and/or where no reasonable accommodation was possible:

- a medical history reveals that the individual has suffered serious multiple re-injuries to his back doing similar work, which have progressively worsened the back condition. Employing this person in this job would incur significant risk that he would further re-injure himself.
- a workers' compensation history indicates multiple claims in recent years which have been denied. An employer might have a legitimate business reason to believe that the person has submitted fraudulent claims. Withdrawing a job offer for this reason would not violate the ADA, because the decision is not based on disability.
- a medical examination reveals an impairment that would require the individual's frequent lengthy absence from work for medical treatment, and the job requires daily availability for the next 3 months. In this situation, the individual is not available to perform the essential functions of the job, and no accommodation is possible.

Examples of discriminatory use of examination results that are not job related and justified by business

necessity:

- A landscape firm sent an applicant for a laborer's job (who had been doing this kind of work for 20 years) for a physical exam. An x-ray showed that he had a curvature of the spine. The doctor advised the firm not to hire him because there was a risk that he might injure his back at some time in the future. The doctor provided no specific medical documentation that this would happen or was likely to happen. The company provided no description of the job to the doctor. The job actually involved riding a mechanical mower. This unlawful exclusion was based on speculation about future risk of injury, and was not job-related.
- An individual is rejected from a job because he cannot lift more than 50 pounds. The job requires lifting such a weight only occasionally. The employer has not considered possible accommodations, such as sharing the occasional heavy weight lifting with another employee or providing a device to assist lifting.

Risk Cannot be Speculative or Remote

The results of a medical examination may not disqualify persons **currently** able to perform essential job functions because of unsubstantiated **speculation** about future risk.

The results of a medical inquiry or examination may not be used to disqualify persons who are currently able to perform the essential functions of a job, either with or without an accommodation, because of fear or speculation that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers' compensation or insurance costs. An employer may use such information to exclude an individual with a disability where there is specific medical documentation, reflecting current medical knowledge, that this individual would pose a significant, current risk of substantial harm to health or safety. (See Standards for Health and Safety: "Direct Threat" Chapter IV.)

For example:

- An individual who has an abnormal back X-ray may not be disqualified from a job that requires heavy lifting because of fear that she will be more likely to injure her back or cause higher workers' compensation or health insurance costs. However, where there is documentation that this individual has injured and re-injured her back in similar jobs, and the back condition has been aggravated further by injury, and if there is no reasonable accommodation that would eliminate the risk of reinjury or reduce it to an acceptable level, an employer would be justified in rejecting her for this position.
- If a medical examination reveals that an individual has epilepsy and is seizure-free or has adequate warning of a seizure, it would be unlawful to disqualify this person from a job operating a machine because of fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has seizures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation, such as placing a shield over the machine to protect him, should be considered.

The Doctor's Role

A doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability. That responsibility lies with the employer.

The doctor's role should be limited to advising the employer about an individual's functional abilities and

limitations in relation to job functions, and about whether the individual meets the employer's health and safety requirements.

Accordingly, employers should provide doctors who conduct such examinations with specific information about the job, including the type of information indicated in the discussions of "job descriptions" and "job analysis" in Chapter II. (See 2.3.)

Often, particularly when an employer uses an outside doctor who is not familiar with actual demands of the job, a doctor may make incorrect assumptions about the nature of the job functions and specific tasks, or about the ability of an individual with a disability to perform these tasks with a reasonable accommodation. It may be useful for the doctor to visit the job site to see how the job is done.

The employer should inform the doctor that any recommendations or conclusions related to hiring or placement of an individual should focus on only two concerns:

1. Whether this person currently is able to perform this specific job, with or without an accommodation.

This evaluation should look at the individual's specific abilities and limitations in regard to specific job demands.

For example: The evaluation may indicate that a person can lift up to 30 pounds and can reach only 2 feet above the shoulder; the job as usually performed (without accommodation) requires lifting 50 pound crates to shelves that are 6 feet high.

2. Whether this person can perform this job without posing a "direct threat" to the health or safety of the person or others.

The doctor should be informed that the employer must be able to show that an exclusion of an individual with a disability because of a risk to health or safety meets the "direct threat" standard of the ADA, based on "the most current medical knowledge and/or the best available objective evidence about this individual." (See Chapter IV., Standards Necessary for Health and Safety, and **6.2** above.)

For example: If a post-offer medical questionnaire indicates that a person has a history of repetitive motion injuries but has had successful surgery with no further problems indicated, and a doctor recommends that the employer reject this candidate because this medical history indicates that she would pose a higher risk of future injury, the employer would violate the ADA if it acted on the doctor's recommendation based only on the history of injuries. In this case, the doctor would not have considered this person's actual current condition as a result of surgery.

A doctor's evaluation of any future risk must be supported by valid medical analyses indicating a high probability of substantial harm if this individual performed the particular functions of the particular job in question. Conclusions of general medical studies about work restrictions for people with certain disabilities will not be sufficient evidence, because they do not relate to a particular individual and do not consider reasonable accommodation.

The employer should not rely only on a doctor's opinion, but on the best available objective evidence. This may include the experience of the individual with a disability in previous similar jobs, occupations, or non-work activities, the opinions of other doctors with expertise on the particular disability, and the advice of rehabilitation counselors, occupational or physical therapists, and others with direct knowledge of the disability and/or the individual concerned. Organizations such as Independent Living Centers, public and private rehabilitation agencies, and organizations serving people with specific disabilities such as the Epilepsy

Foundation, United Cerebral Palsy Associations, National Head Injury Foundation, and many others can provide such assistance. (See Resource Directory.)

Where the doctor's report indicates that an individual has a disability that may prevent performance of essential job functions, or that may pose a "direct threat" to health or safety, the employer also may seek his/her advice on possible accommodations that would overcome these disqualifications.

6.5 Confidentiality and Limitations on Use of Medical Information

Although the ADA does not limit the nature or extent of post-offer medical examinations and inquiries, it imposes very strict limitations on the use of information obtained from such examinations and inquiries. These limitations also apply to information obtained from examinations or inquiries of employees.

All information obtained from post-offer medical examinations and inquiries must be collected and maintained on separate forms, in separate medical files and must be treated as a confidential medical record. Therefore, an employer should not place any medical-related material in an employee's personnel file. The employer should take steps to guarantee the security of the employee's medical information, including:

- keeping the information in a medical file in a separate, locked cabinet, apart from the location of personnel files; and
- designating a specific person or persons to have access to the medical file.

All medical-related information must be kept confidential, with the following exceptions:

- Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations.
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in the case of fire or other evacuations.
- Government officials investigating compliance with the ADA and other Federal and state laws prohibiting discrimination on the basis of disability or handicap should be provided relevant information on request. (Other Federal laws and regulations also may require disclosure of relevant medical information.)
- Relevant information may be provided to state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws. (See Chapter IX., Workers' Compensation and Work-Related Injury.)
- Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees. (See Health Insurance and Other Benefit Plans, Chapter VII.)

6.6 Employee Medical Examinations and Inquiries

The ADA's requirements concerning medical examinations and inquiries of **employees** are more stringent than those affecting applicants who are being evaluated for employment after a conditional job offer. In order for a medical examination or inquiry to be made of an employee, it must be job related and consistent with business necessity. The need for the examination may be triggered by some evidence of problems related to job performance or safety, or an examination may be necessary to determine whether individuals in physically demanding jobs continue to be fit for duty. In either case, the scope of the examination also must be job-related.

For example:

- An attorney could not be required to submit to a medical examination or inquiry just because her leg

had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related.
- An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his job or to his impairment.

Medical examinations or inquiries may be job related and necessary under several circumstances:

- **When an employee is having difficulty performing his or her job effectively.**

In such cases, a medical examination may be necessary to determine if s/he can perform essential job functions with or without an accommodation.

For example: If an employee falls asleep on the job, has excessive absenteeism, or exhibits other performance problems, an examination may be needed to determine if the problem is caused by an underlying medical condition, and whether medical treatment is needed. If the examination reveals an impairment that is a disability under the ADA, the employer must consider possible reasonable accommodations. If the impairment is not a disability, the employer is not required to make an accommodation.

For example: An employee may complain of headaches caused by noise at the worksite. A medical examination may indicate that there is no medically discernible mental or physiological disorder causing the headaches. This employee would not be "an individual with a disability" under the ADA, and the employer would have no obligation to provide an accommodation. The employer may voluntarily take steps to improve the noise situation, particularly if other employees also suffer from noise, but would have no obligation to do so under the ADA.

- **When An Employee Becomes Disabled**

An employee who is injured on or off the job, who becomes ill, or suffers any other condition that meets the ADA definition of "disability," is protected by the Act if s/he can perform the essential functions of the job with or without reasonable accommodation.

Employers are accustomed to dealing with injured workers through the workers' compensation process and disability management programs, but they have different, although not necessarily conflicting obligations under the ADA. The relationship between ADA, workers' compensation requirements and medical examinations and inquiries is discussed in Chapter IX.

Under the ADA, medical information or medical examinations may be required when an employee suffers an injury on the job. Such an examination or inquiry also may be required when an employee wishes to return to work after an injury or illness, if it is job-related and consistent with business necessity:

- to determine if the individual meets the ADA definition of "individual with a disability," if an accommodation has been requested.
- to determine if the person can perform essential functions of the job currently held, (or held before the injury or illness), with or without reasonable accommodation, and without posing a "direct threat" to health or safety that cannot be reduced or eliminated by reasonable accommodation.
- to identify an effective accommodation that would enable the person to perform essential job functions in the current (previous) job, or in a vacant job for which the person is qualified (with or without accommodation). (See Chapter IX.)
- **Examination Necessary for Reasonable Accommodation**

A medical examination may be required if an employee requests an accommodation on the basis of disability. An accommodation may be needed in an employee's existing job, or if the employee is being transferred or promoted to a different job. Medical information may be needed to determine if the employee has a disability covered by the ADA and is entitled to an accommodation, and if so, to help identify an effective accommodation.

Medical inquiries related to an employee's disability and functional limitations may include consultations with knowledgeable professional sources, such as occupational and physical therapists, rehabilitation specialists, and organizations with expertise in adaptations for specific disabilities.

- **Medical examinations, screening and monitoring required by other laws.**

Employers may conduct periodic examinations and other medical screening and monitoring required by federal, state or local laws. As indicated in Chapter IV, the ADA recognizes that an action taken to comply with another Federal law is job-related and consistent with business necessity; however, requirements of state and local laws do not necessarily meet this standard unless they are consistent with the ADA.

For example: Employers may conduct medical examinations and medical monitoring required by:

- The U.S. Department of Transportation for interstate bus and truck drivers, railroad engineers, airline pilots and air controllers;
- The Occupational Safety and Health Act:
- The Federal Mine Health and Safety Act;
- Other statutes that require employees exposed to toxic or hazardous substances to be medically monitored at specific intervals.

However, if a state or local law required that employees in a particular job be periodically tested for AIDS or the HIV virus, the ADA would prohibit such an examination unless an employer can show that it is job-related and consistent with business necessity, or required to avoid a direct threat to health or safety. (See Chapter IV.)

Voluntary "Wellness" and Health Screening Programs

An employer may conduct voluntary medical examinations and inquiries as part of an employee health program (such as medical screening for high blood pressure, weight control, and cancer detection), providing that:

- participation in the program is voluntary;
- information obtained is maintained according to the confidentiality requirements of the ADA (See 6.5); and
- this information is not used to discriminate against an employee.

Information from Medical Inquiries May Not be Used to Discriminate

An employer may not use information obtained from an employee medical examination or inquiry to discriminate against the employee in any employment practice. (See Chapter VII.)

Confidentiality

All information obtained from employee medical examinations and inquiries must be maintained and used in accordance with ADA confidentiality requirements. (See 6.5 above.)

VII. NONDISCRIMINATION IN OTHER EMPLOYMENT PRACTICES

7.1 Introduction

The nondiscrimination requirements of the ADA apply to all employment practices and activities. The preceding chapters have explained these requirements as they apply to job qualification and selection standards, the hiring process, and medical examinations and inquiries. This chapter discusses the application of nondiscrimination requirements to other employment practices and activities.

In most cases, an employer need only apply the basic nondiscrimination principles already emphasized; however, there are also some special requirements applicable to certain employment activities. This chapter discusses:

- the ADA's prohibition of discrimination on the basis of a relationship or association with an individual with a disability;
- nondiscrimination requirements affecting:
    - promotion, assignment, training, evaluation, discipline, advancement opportunity and discharge;
    - compensation, insurance, leave, and other benefits and privileges of employment; and
    - contractual relationships.

7.2 Overview of Legal Obligations

- An employer may not discriminate against a qualified individual with a disability because of the disability, in any employment practice, or any term, condition or benefit of employment.
- An employer may not deny an employment opportunity because an individual, with or without a disability, has a relationship or association with an individual who has a disability.
- An employer may not participate in a contractual or other arrangement that subjects the employer's qualified applicant or employee with a disability to discrimination.
- An employer may not discriminate or retaliate against any individual, whether or not the individual is disabled, because the individual has opposed a discriminatory practice, filed a discrimination charge, or participated in any way in enforcing the ADA.

7.3 Nondiscrimination in all Employment Practices

The ADA prohibits discrimination against a qualified individual with a disability on the basis of disability in the following employment practices:

- Recruitment, advertising, and job application procedures;
- Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- Rates of pay or any other form of compensation, and changes in compensation;
- Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- Leaves of absence, sick leave, or any other leave;
- Fringe benefits available by virtue of employment, whether or not administered by the covered entity;
- Selection and financial support for training, including: apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- Activities sponsored by a covered entity including social and recreational programs; and

- Any other term, condition, or privilege of employment.

Nondiscrimination, as applied to all employment practices, means that:

- an individual with a disability should have equal access to any employment opportunity available to a similarly situated individual who is not disabled;
- employment decisions concerning an employee or applicant should be based on objective factual evidence about the particular individual, not on assumptions or stereotypes about the individual's disability;
- the qualifications of an individual with a disability may be evaluated on ability to perform all job-related functions, with or without reasonable accommodation. However, an individual may not be excluded from a job because a disability prevents performance of marginal job functions;
- an employer must provide a reasonable accommodation that will enable an individual with a disability to have an equal opportunity in every aspect of employment, unless a particular accommodation would impose an undue hardship;
- an employer may not use an employment practice or policy that screens out or tends to screen out an individual with a disability or a class of individuals with disabilities, unless the practice or policy is job related and consistent with business necessity and the individual cannot be accommodated without undue hardship;
- an employer may not limit, segregate, or classify an individual with a disability in any way that negatively affects the individual in terms of job opportunity and advancement;
- an individual with a disability should not because of a disability be treated differently than a similarly situated individual in any aspect of employment, except when a reasonable accommodation is needed to provide an equal employment opportunity, or when another Federal law or regulation requires different treatment.

These requirements are discussed in this chapter as they apply to various employment practices. The prohibition against retaliation is discussed in Chapter X.

7.4 Nondiscrimination and Relationship or Association with an Individual with a Disability

The ADA specifically provides that an employer or other covered entity may not deny an employment opportunity or benefit to an individual, whether or not that individual is disabled, because that individual has a known relationship or association with an individual who has a disability. Nor may an employer discriminate in any other way against an individual, whether or not disabled, because that individual has such a relationship or association.

The term "relationship or association" refers to family relationships and any other social or business relationship or association. Therefore, this provision of the law prohibits employers from making employment decisions based on concerns about the disability of a family member of an applicant or employee, or anyone else with whom this person has a relationship or association.

For example: An employer may not:

- refuse to hire or fire an individual because the individual has a spouse, child, or other dependent who has a disability. The employer may not assume that the individual will be unreliable, have to use leave time, or be away from work in order to care for the family member with a disability;
- refuse to hire or fire an individual because s/he has a spouse, child or other dependent who has a disability that is either not covered by the employer's current health insurance plan or that may cause future increased health care costs;
- refuse to insure, or subject an individual to different terms or conditions of insurance, solely because

the individual has a spouse, child, or other dependent who has a disability;
- refuse to hire or fire an individual because the individual has a relationship or association with a person or persons who have disabilities.

For example: an employer cannot fire an employee because s/he does volunteer work with people who have AIDS.

This provision of the law prohibits discrimination in employment decisions concerning an individual, whether the individual is or is not disabled, because of a known relationship or association with an individual with a disability. However, an employer is not obligated to provide a reasonable accommodation to a nondisabled individual, because this person has a relationship or association with a disabled individual. The obligation to make a reasonable accommodation applies only to qualified individuals with disabilities.

For example: The ADA does not require that an employer provide an employee who is not disabled with a modified work schedule as an accommodation, to enable the employee to care for a spouse or child with a disability.

7.5 Nondiscrimination and Opportunity 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:

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

7.6 Training

Employees with disabilities must be provided equal opportunities to participate in training to improve job performance and provide opportunity for advancement. Training opportunities cannot be denied because of the need to make a reasonable accommodation, unless the accommodation would be an undue hardship. Accommodations that may be necessary, depending on the needs of particular individuals, may include:

- accessible locations and facilities for people with mobility disabilities;
- interpreters and note-takers for employees who are deaf;
- materials in accessible formats and/or readers for people who are visually impaired, for people with learning disabilities, and for people with mental retardation;
- if audiovisual materials are used, captions for people who are deaf, and voice-overs for people who are visually impaired;
- good lighting on an interpreter, and good general illumination for people with visual impairments and other disabilities;
- clarification of concepts presented in training for people who have reading or other disabilities;
- individualized instruction for people with mental retardation and certain other disabilities.

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 assuring accessibility and other needed accommodations.

It is advisable that any contract with a company or facility used for training include a provision requiring the other party to provide needed accommodations. However, if the contractor does not do so, the employer remains responsible for providing the accommodation, unless it would cause an undue hardship.

For example: Suppose a company with which an employer has contracted proposes to conduct training at an inaccessible location. The employer is responsible for providing an accommodation that would enable an employee who uses a wheelchair to obtain this training. The employer might do this by: requiring the training company to relocate the program to an accessible site; requiring the company to make the site (including all facilities used by trainees) accessible; making the site accessible or providing resources that enable the training company to do so; contracting with another training company that uses accessible sites; or providing any other accommodation (such as temporary ramps) that would not impose an undue hardship. If it is impossible to make an accommodation because the need is only discovered when an employee arrives at the training site, the employer may have to provide accessible training at a later date.

Or, for example: An employer contracts with a hotel to hold a conference for its employees. The employer must assure physical and communications accessibility for employees with disabilities, including accessibility of guest rooms and all meeting and other rooms used by attendees. The employer may assure accessibility by inspecting the site, or may ask a local disability group with accessibility expertise (such as an Independent Living Center) to do so. The employer remains responsible for assuring accessibility. However, if the hotel breaches a contract provision requiring accessibility, the hotel may be liable to the employer under regular (non-ADA) breach of contract law. The hotel also may be liable under Title III of the ADA, which requires accessibility in public accommodations.

7.7 Evaluations, Discipline and Discharge

- 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 job functions, unless the disability affects the ability to perform these 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 (unless to do so would be an undue hardship).
- A disabled employee who needs an accommodation (that is not an undue hardship for an employer) in order to perform a job function should not be evaluated on his/her ability to perform the function without the accommodation, and should not be downgraded because such an accommodation is needed to perform the function.
- An employer should not give employees with disabilities "special treatment." They should not be evaluated on a lower standard or disciplined less severely than any other employee. This is not equal employment opportunity.
- An employer must provide an employee with a disability with reasonable accommodation necessary to enable the employee to participate in the evaluation process (for example, counseling or an interpreter).
- If an employee with a disability is not performing well, an employer may require medical and other professional inquiries that are job-related and consistent with business necessity to discover whether the disability is causing the poor performance, and whether any reasonable accommodation or additional accommodation is needed. (See Chapter VI.)
- An employer may take the same disciplinary action against employees with disabilities as it takes

against other similarly situated employees, if the illegal use of drugs or alcohol use affects job performance and/or attendance. (See Chapter VIII.)
- 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.

7.8 Compensation

- An employer cannot reduce pay to an employee with a disability because of the elimination of a marginal job function or because it has provided a reasonable accommodation, such as specialized or modified equipment. The employer can give the employee with a disability other marginal functions that s/he can perform.
- An employee who is reassigned to a lower paying job or provided a part-time job as an accommodation may be paid the lower amount that would apply to such positions, consistent with the employer's regular compensation practices.

7.9 Health Insurance and Other Employee Benefit Plans

As discussed above, an employer or other covered entity may not limit, segregate or classify an individual with a disability, on the basis of disability, in a manner that adversely affects the individual's employment. This prohibition applies to the provision and administration of health insurance and other benefit plans, such as life insurance and pension plans.

This means that:

- If an employer provides insurance or other benefit plans to its employees, it must provide the same coverage to its employees with disabilities. Employees with disabilities must be given equal access to whatever insurance or benefit plans the employer provides.
- An employer cannot deny insurance to an individual with a disability or subject an individual with a disability to different terms or conditions of insurance, based on disability alone, if the disability does not pose increased insurance risks. Nor may the employer enter into any contract or agreement with an insurance company or other entity that has such effect.
- An employer cannot fire or refuse to hire an individual with a disability because the employer's current health insurance plan does not cover the individual's disability, or because the individual may increase the employer's future health care costs.
- An employer cannot fire or refuse to hire an individual (whether or not that individual has a disability) because the individual has a family member or dependent with a disability that is not covered by the employer's current health insurance plan, or that may increase the employer's future health care costs.

While establishing these protections for employees with disabilities, the ADA permits employers to provide insurance plans that comply with existing Federal and state insurance requirements, even if provisions of these plans have an adverse affect on people with disabilities, provided that the provisions are not used as a subterfuge to evade the purpose of the ADA.

Specifically, the ADA provides that:

- Where an employer provides health insurance through an insurance carrier that is regulated by state law, it may provide coverage in accordance with accepted principles of risk assessment and/or risk classification, as required or permitted by such law, even if this causes limitations in coverage for individuals with disabilities.

- Similarly, self-insured plans which are not subject to state law may provide coverage in a manner that is consistent with basic accepted principles of insurance risk classification, even if this results in limitations in coverage to individuals with disabilities.

In each case, such activity is permitted only if it is not being used as a subterfuge to evade the intent of the ADA. Whether or not an activity is being used as a subterfuge will be determined regardless of the date that the insurance plan or employee benefit plan was adopted.

This means that:

- An employer may continue to offer health insurance plans that contain pre-existing condition exclusions, even if this adversely affects individuals with disabilities, unless these exclusions are being used as a subterfuge to evade the purpose of the ADA.
- An employer may continue to offer health insurance plans that limit coverage for certain procedures, and/or limit particular treatments to a specified number per year, even if these restrictions adversely affect individuals with disabilities, as long as the restrictions are uniformly applied to all insured individuals, regardless of the disability.

For example, an employer can offer a health insurance plan that limits coverage of blood transfusions to five transfusions per year for all employees, even though an employee with hemophilia may require more than five transfusions per year. However, the employer could not deny this employee coverage for another, otherwise covered procedure, because the plan will not pay for the additional blood transfusions that the procedure would require.

· An employer may continue to offer health insurance plans that limit reimbursements for certain types of drugs or procedures, even if these restrictions adversely affect individuals with disabilities, as long as the restrictions are uniformly applied without regard to disability.

For example, an employer can offer a health insurance plan that does not cover experimental drugs or procedures, as long as this restriction is applied to all insured individuals.

7.10 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 if other employees get such leave.
- An employer 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. (See Chapter III.)
- 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.

For example: If an employer has a policy providing 2 weeks paid leave for all employees, with no other provision for sick leave and a "no leave" policy for the first 6 months of employment, an employee with a disability who cannot get leave for needed medical treatment could not successfully charge that the employer's policy is discriminatory on its face. However, this individual could request leave without pay or advance leave as a reasonable accommodation. Such leave should be provided, unless the employer can show undue hardship: For example, an employer might be able to show that it is necessary for the operation of the business that this

employee be available for the time period when leave is requested.

- 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. (See p. 8 above.)

7.11 Contractual or Other Relationships

An employer may not do anything through a contractual relationship that it cannot do directly. This applies to any contracts, including contracts with:

- training organizations (see above);
- insurers (see above);
- employment agencies and agencies used for background checks (see Chapter V);
- labor unions (see below).

7.11(a)Collective Bargaining Agreements

Labor unions are covered by the ADA and have the same obligation as the employer to comply with its requirements. An employer also is prohibited by the ADA from taking any action through a labor union contract that it may not take itself.

For example: If a union contract contained physical requirements for a particular job that screened out people with disabilities who were qualified to perform the job, and these requirements are not job-related and consistent with business necessity, they could be challenged as discriminatory by a qualified individual with a disability.

The terms of a collective bargaining agreement may be relevant in determining whether a particular accommodation would cause an employer undue hardship.

For example: If the collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, this may be considered as a factor in determining whether it would be an undue hardship to reassign an individual with a disability who does not have seniority to a vacant job.

Where a collective bargaining agreement identifies functions that must be performed in a particular job, the agreement, like a job description, may be considered as evidence of what the employer and union consider to be a job's essential functions. However, just because a function is listed in a union agreement does not mean that it is an essential function. The agreement, like the job description, will be considered along with other types of evidence. (See Chapter II.)

The Congressional Committee Reports accompanying the ADA advised employers and unions that they could carry out their responsibilities under the Act, and avoid conflicts between the bargaining agreement and the employer's duty to provide reasonable accommodation, by adding a provision to agreements negotiated after the effective date of the ADA, permitting the employer to take all actions necessary to comply with the Act.

7.12 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 should be held in accessible locations, and interpreters or other accommodation should be provided when necessary.
- Employees with disabilities must have equal access to break rooms, lounges, cafeterias, and any other non-work facilities that are provided by an 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 a disabled employee cannot use certain equipment or amenities because of his/her disability. For example, an employer would not have to remove certain exercise machines simply because an employee who is a paraplegic could not use them.
- Employees with disabilities must be given an equal opportunity to participate in employer-sponsored sports teams, leagues, or recreational activities such as hiking or biking clubs. However, the employer does not have to discontinue such activities because a disabled employee cannot fully participate due to his/her disability. For example, an employer would not have to discontinue the company biking club simply because a blind employee is unable to ride a bicycle.
- 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 or from mass transit and transportation provided on a occasional basis to employer-sponsored events.

VIII. DRUG AND ALCOHOL ABUSE

8.1 Introduction

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. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and for alcoholics.

8.2 Overview of Legal Obligations

- 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 prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- An employer may not discriminate against a drug addict who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction.
- A person who is an alcoholic is an "individual with a disability" under the ADA.
- An employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol impairs job performance or conduct to the extent that s/he is not a "qualified individual with a disability."
- Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.

- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by Federal agencies pertaining to drug and alcohol use in the workplace.

8.3 Illegal Use of Drugs

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. 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 includes the use of illegal drugs and the illegal use of prescription drugs that are "controlled substances".

For example: Amphetamines can be legally prescribed drugs. However, amphetamines, by law, are "controlled substances" because of their abuse and potential for abuse. If a person takes amphetamines without a prescription, that person is using drugs illegally, even though they could be prescribed by a physician.

The illegal use of drugs does not include drugs taken under supervision of a licensed health care professional, including experimental drugs for people with AIDS, epilepsy, or mental illness.

For example: A person who takes morphine for the control of pain caused by cancer is not using a drug illegally if it is taken under the supervision of a licensed physician. Similarly, a participant in a methadone maintenance treatment program cannot be discriminated against by an employer based upon the individual's lawful use of methadone.

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 (epilepsy). An employer can discharge or deny employment to such an individual on the basis of his/her illegal use of drugs.

What does "current" drug use mean?

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 illegal use of a controlled substance.

"Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis.

For example: An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he now is in rehabilitation and is no longer using drugs illegally. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation (see below).

8.4 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 the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of

accommodation, if s/he 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 s/he is not "qualified."

For example: If an individual who has alcoholism often is late to work or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an alcoholic employee more severely than it does other employees for the same performance or conduct.

8.5 Recovering Drug Addicts

Persons addicted to drugs, but who are no longer using drugs illegally and 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 s/he has a history of addiction, or if s/he is "regarded as" being addicted. Similarly, an addict who is rehabilitated or who has successfully completed a supervised rehabilitation program and is no longer illegally using drugs is not excluded from the ADA.

However, a person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on the past drug use. In order for a person to be "substantially limited" because of drug use, s/he must be addicted to the drug.

To ensure that drug use is not recurring, an employer may request evidence that an individual is participating in a drug rehabilitation program or may request the results of a drug test (see below).

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

8.6 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 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 would be protected from discrimination based upon that false assumption. If an employer did not regard the individual as an addict, but simply as a social user of illegal drugs, the individual would not be "regarded as" an individual with a disability and would not be protected by the ADA.

As with other disabilities, an individual who claims that s/he was discriminated against because of past or perceived illegal drug addiction, may be asked to prove that s/he has a record of, or is regarded as having, an addiction to drugs.

8.7 Efforts to Prohibit Drug and Alcohol Use in the Workplace

The ADA does not prevent efforts to combat the use of drugs and alcohol in the workplace

The ADA does not interfere with employers' programs to combat the use of drugs and alcohol in the workplace. The Act specifically provides that an employer may:

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

For example: An employer can require that employees not come to work or return from lunch under the influence of alcohol, or drugs used illegally.

· Require that employees who illegally use drugs or alcohol meet the same qualification and performance standards applied to other employees. Unsatisfactory behavior such as absenteeism, tardiness, poor job performance, or accidents caused by alcohol or illegal drug use need not be accepted nor accommodated.

For example: If an employee is often late or does not show up for work because of alcoholism, an employer can take direct action based on the conduct. However, an employer would violate the ADA if it imposed greater sanctions on such an alcoholic employee than it did on other employees for the same misconduct.

While the ADA permits an employer to discipline or discharge an employee for illegal use of drugs or where alcoholism results in poor performance or misconduct, the Act does not require this. Many employers have established employee assistance programs for employees who abuse drugs or alcohol that are helpful to both employee and employer. However, the ADA does not require an employer to provide an opportunity for rehabilitation in place of discipline or discharge to such employees. The ADA may, however, require consideration of reasonable accommodation for a drug addict who is rehabilitated and not using drugs or an alcoholic who remains a "qualified individual with a disability." For example, a modified work schedule, to permit the individual to attend an ongoing self-help program, might be a reasonable accommodation for such an employee.

An employer can fire or refuse to hire a person with a past history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement, when an employer can show that this policy is job-related and consistent with business necessity.

For example: A law enforcement agency might be able to show that excluding an individual with a history of illegal drug use from a police officer position was necessary, because such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case. However, even in this case, exclusion of a person with a history of illegal drug use might not be justified automatically as a business necessity, if an applicant with such a history could demonstrate an extensive period of successful performance as a police officer since the time of drug use.

An employer also may fire or refuse to hire an individual with a history of alcoholism or illegal drug use if it can demonstrate that the individual poses a "direct threat" to health or safety because of the high probability that s/he would return to the illegal drug use or alcohol abuse. The employer must be able to demonstrate that such use would result in a high probability of substantial harm to the individual or others which could not be reduced or eliminated with a reasonable accommodation. Examples of accommodations in such cases might be to require periodic drug or alcohol tests, to modify job duties or to provide increased supervision.

An employer cannot prove a "high probability" of substantial harm simply by referring to statistics indicating the likelihood that addicts or alcoholics in general have a specific probability of suffering a relapse. A showing of "significant risk of substantial harm" must be based upon an assessment of the particular individual and

his/her history of substance abuse and the specific nature of the job to be performed.

For example: An employer could justify excluding an individual who is an alcoholic with a history of returning to alcohol abuse from a job as a ship captain.

8.8 Pre-Employment Inquiries About Drug and Alcohol Use

An employer may make certain pre-employment, pre-offer inquiries regarding use of alcohol or the illegal use of drugs. An employer may ask whether an applicant drinks alcohol or whether he or she is currently using drugs illegally. However, an employer may not ask whether an applicant is a drug addict or alcoholic, nor inquire whether s/he has ever been in a drug or alcohol rehabilitation program. (See also Pre-Employment Inquiries, Chapter V.)

After a conditional offer of employment, an employer may ask any questions concerning past or present drug or alcohol use. However, the employer may not use such information to exclude an individual with a disability, on the basis of a disability, unless it can show that the reason for exclusion is job-related and consistent with business necessity, and that legitimate job criteria cannot be met with a reasonable accommodation. (For more information on pre-employment medical inquiries, see Chapter VI.)

8.9 Drug Testing

An employer may conduct tests to detect illegal use of drugs. The ADA does not prohibit, require, or encourage drug tests. Drug tests are not considered medical examinations, and an applicant can be required to take a drug test before a conditional offer of employment has been made. An employee also can be required to take a drug test, whether or not such a test is job-related and necessary for the business. (On the other hand, a test to determine an individual's blood alcohol level would be a "medical examination" and only could be required by an employer in conformity with the ADA.)

An employer may refuse to hire an applicant or discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. The employer may take these actions even if an applicant or employee claims that s/he recently stopped illegally using drugs.

Employers may comply with applicable Federal, State, or local laws regulating when and how drug tests may be used, what drug tests may be used, and confidentiality. Drug tests must be conducted to detect illegal use of drugs. However, tests for illegal use of drugs also may reveal the presence of lawfully-used drugs. If a person is excluded from a job because the employer erroneously "regarded" him/her to be an addict currently using drugs illegally when a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA. To avoid such potential liability, the employer would have to determine whether the individual was using a legally prescribed drug. Because the employer may not ask what prescription drugs an individual is taking before making a conditional job offer, one way to avoid liability is to conduct drug tests after making an offer, even though such tests may be given at anytime under the ADA. Since applicants who test positive for illegal drugs are not covered by the ADA, an employer can withdraw an offer of employment on the basis of illegal drug use.

If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential, in the same way as any medical record. If the results reveal information about a disability in addition to information about drug use, the disability-related information is to be treated as a confidential medical record. (See confidentiality requirements regarding medical inquiries and examinations in Chapter VI.)

For example: If drug test results indicate that an individual is HIV positive, or that a person has epilepsy or

diabetes because use of a related prescribed medicine is revealed, this information must remain confidential.

8.10 Laws and Regulations Concerning Drugs and Alcohol

An employer may comply with other Federal laws and regulations concerning the use of drugs and alcohol, including the Drug-Free Workplace Act of 1988; regulations applicable to particular types of employment, such as law enforcement positions; regulations of the Department of Transportation for airline employees, interstate motor carrier drivers and railroad engineers; and regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission. Employers may continue to require that their applicants and employees comply with such Federal laws and regulations.

For example: A trucking company can take appropriate action if an applicant or employee tests positive on a drug test required by Department of Transportation regulations or refuses to take such a drug test.

IX. WORKERS' COMPENSATION AND WORK-RELATED INJURY

9.1 Overview of Legal Obligations

- 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 ask about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category.
- 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. (See Standards Necessary for Health and Safety: A "Direct Threat", Chapter IV.)
- An employer 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.
- 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.

9.2 Is a Worker Injured on the Job Protected by the ADA?

Whether an injured worker is protected by the ADA will depend on whether or not the person meets the ADA definitions of an "individual with a disability" and "qualified individual with a disability." (See Chapter II.) The person must have an impairment that "substantially limits a major life activity," have a "record of" or be "regarded as" having such an impairment. S/he also must be able to perform the essential functions of a job currently held or desired, with or without an accommodation.

Clearly, not every employee injured on the job will meet the ADA definition. 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 non-chronic impairments which heal within a short period of time with little or no long-term or permanent impact. Such injuries, in most circumstances, are not considered disabilities under the ADA.

The fact that an employee is awarded workers' compensation benefits, or is assigned a high workers'

compensation disability rating, does not automatically establish that this person is protected by the ADA. In most cases, the definition of disability under state workers' compensation laws differs from that under the ADA, because the state laws serve a different purpose. Workers' compensation laws are designed to provide needed assistance to workers who suffer many kinds of injuries, whereas the ADA's purpose is to protect people from discrimination on the basis of disability.

Thus, 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 know if a worker is protected by the ADA. Many job injuries are not "disabling" under the ADA, but it also is possible that an impairment which is not "substantially limiting" in one circumstance could result in, or lead to, disability in other circumstances.

For example: Suppose a construction worker falls from a ladder and breaks a leg and the leg heals normally within a few months. Although this worker may be awarded workers' compensation benefits for the injury, he would not be considered a person with a disability under the ADA. The impairment suffered from the injury did not "substantially limit" a major life activity, since the injury healed within a short period and had little or no long-term impact. However, if the worker's leg took significantly longer to heal than the usual healing period for this type of injury, and during this period the worker could not walk, s/he would be considered to have a disability. Or, if the injury caused a permanent limp, the worker might be considered disabled under the ADA if the limp substantially limited his walking, as compared to the average person in the general population.

An employee who was seriously injured while working for a former employer, and was unable to work for a year because of the injury, would have a "record of" a substantially limiting impairment. If an employer refused to hire or promote this person on the basis of that record, even if s/he had recovered in whole or in part from the injury, this would be a violation of the ADA.

If an impairment or condition caused by an on-the-job injury does not substantially limit an employee's ability to work, but the employer regards the individual as having an impairment that makes him/her unable to perform a class of jobs, such as "heavy labor," this individual would be "regarded" by the employer as having a disability. An employer who refused to hire or discharged an individual because of this perception would violate the ADA.

Of course, in each of the examples above, the employer would only be liable for discrimination if the individual was qualified for the position held or desired, with or without an accommodation.

9.3 What Can an Employer Do to Avoid Increased Workers' Compensation Costs and Comply With the ADA?

The ADA allows an employer to take reasonable steps to avoid increased workers' compensation liability while protecting persons with disabilities against exclusion from jobs they can safely perform.

Steps the Employer May Take

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, an employer may not require an applicant to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) discloses a previous on-the-job injury, unless all applicants in the same job category are required to have the examination. (See Chapter V.)

The employer may use information from medical inquiries and examinations for various purposes, such as:

- to verify employment history;
- to screen out applicants with a history of fraudulent workers' compensation claims;
- to provide information to state officials as required by state laws regulating workers' compensation and "second injury" funds;
- to screen out individuals who would pose a "direct threat" to health or safety of themselves or others, which could not be reduced to an acceptable level or eliminated by a reasonable accommodation. (See Chapter IV.)

9.4 What Can an Employer Do When a Worker is Injured on the Job?

Medical Examinations

An employer may only make medical examinations or inquiries of an employee regarding disability if such examinations are job-related and consistent with business necessity. If a worker has an on-the-job injury which appears to affect his/her ability to do essential job functions, a medical examination or inquiry is job-related and consistent with business necessity. A medical examination or inquiry also may be necessary to provide reasonable accommodation. (See Chapter VI.)

When a worker wishes to return to work after absence due to accident or illness, s/he can only be required to have a "job-related" medical examination, not a full physical exam, as a condition of returning to work.

The ADA prohibits an employer from discriminating against a person with a disability who is "qualified" for a desired job. The employer cannot refuse to let an individual with a disability return to work because the worker is not fully recovered from injury, unless s/he: (1) cannot perform the essential functions of the job s/he holds or desires with or without an accommodation; or (2) would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation. (See Chapter IV.) Since reasonable accommodation may include reassignment to a vacant position, an employer may be required to consider an employee's qualifications to perform other vacant jobs for which s/he is qualified, as well as the job held when injured.

"Light Duty" Jobs

Many employers have established "light duty" positions to respond to medical restrictions on workers recovering from job-related injuries, in order to reduce workers' compensation liability. Such positions usually place few physical demands on an employee and may include tasks such as answering the telephone and simple administrative work. An employee's placement in such a position is often limited by the employer to a specific period of time.

The ADA does not require an employer to create a "light duty" position unless the "heavy duty" tasks an injured worker can no longer perform are marginal job functions which may be reallocated to co-workers as part of the reasonable accommodation of job-restructuring. In most cases however, "light duty" positions involve a totally different job from the job that a worker performed before the injury. Creating such positions by job restructuring is not required by the ADA. However, if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period.

When an employer places an injured worker in a temporary "light duty" position, that worker is "otherwise qualified" for that position for the term of that position; a worker's qualifications must be gauged in relation to the position occupied, not in relation to the job held prior to the injury. It may be necessary to provide additional reasonable accommodation to enable an injured worker in a light duty position to perform the essential

functions of that position.

For example: Suppose a telephone line repair worker broke both legs and fractured her knee joints in a fall. The treating physician states that the worker will not be able to walk, even with crutches, for at least nine months. She therefore has a "disability." Currently using a wheelchair, and unable to do her previous job, she is placed in a "light duty" position to process paperwork associated with line repairs. However, the office to which she is assigned is not wheelchair accessible. It would be a reasonable accommodation to place the employee in an office that is accessible. Or, the office could be made accessible by widening the office door, if this would not be an undue hardship. The employer also might have to modify the employee's work schedule so that she could attend weekly physical therapy sessions.

Medical information may be very useful to an employer who must decide whether an injured worker can come back to work, in what job, and, if necessary, with what accommodations. A physician may provide an employer with relevant information about an employee's functional abilities, limitations, and work restrictions. This information will be useful in determining how to return the employee to productive work, but the employer bears the ultimate responsibility for deciding whether the individual is qualified, with or without a reasonable accommodation. Therefore, an employer cannot avoid liability if it relies on a physician's advice which is not consistent with ADA requirements.

9.5 Do the ADA's Pre-Employment Inquiry and Confidentiality Restrictions Prevent an Employer from Filing Second Injury Fund Claims?

Most states have established "second injury" funds designed to remove financial disincentives in hiring employees with a disability. Without a second injury fund, if a worker suffered increased disability from a work-related injury because of a pre-existing condition, the employer would have to pay the full cost. The second injury fund provisions limit the amount the employer must pay in these circumstances, and provide for the balance to be paid out of a common fund.

Many second injury funds require an employer to certify that it knew at the time of hire that the employee had a pre-existing injury. The ADA does not prohibit employers from obtaining information about pre-existing injuries and providing needed information to second injury funds. As discussed in Chapter VI., an employer may make such medical inquiries and require a medical examination after a conditional offer of employment, and before a person starts work, so long as the examination or inquiry is made of all applicants in the same job category. Although the ADA generally requires that medical information obtained from such examinations or inquiries be kept confidential, information may be submitted to second injury funds or state workers' compensation authorities as required by state workers' compensation laws.

9.6 Compliance with State and Federal Workers' Compensation Laws

a. Federal Laws

It may be a defense to a charge of discrimination under the ADA that a challenged action is required by another Federal law or regulation, or that another Federal law prohibits an action that otherwise would be required by the ADA. This defense is not valid, however, if the Federal standard does not require the discriminatory action, or if there is a way that an employer can comply with both legal requirements.

b. State Laws

ADA requirements supersede any conflicting state workers' compensation laws.

For example: Some state workers' compensation statutes make an employer liable for paying additional benefits

if an injury occurs because the employer assigned a person to a position likely to jeopardize the person's health or safety, or exacerbate an earlier workers' compensation injury. Some of these laws may permit or require an employer to exclude a disabled individual from employment in cases where the ADA would not permit such exclusion. In these cases, the ADA takes precedence over the state law. An employer could not assert, as a valid defense to a charge of discrimination, that it failed to hire or return to work an individual with a disability because doing so would violate a state workers' compensation law that required exclusion of this individual.

9.7 Does Filing a Workers' Compensation Claim Prevent an Injured Worker from Filing a Charge Under the ADA?

Filing a workers' compensation claim does not prevent an injured worker from filing a charge under the ADA. "Exclusivity" clauses in state workers' compensation laws bar all other civil remedies related to an injury that has been compensated by a workers' compensation system. However, these clauses do not prohibit a qualified individual with a disability from filing a discrimination charge with EEOC, or filing a suit under the ADA, if issued a "right to sue" letter by EEOC. (See Chapter X.)

9.8 What if an Employee Provides False Information About his/her Health or Physical Condition?

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 workers' compensation history.

Some state workers' compensation laws release an employer from its obligation to pay benefits if a worker falsely represents his/her health or physical condition at the time of hire and is later injured as a result. The ADA does not prevent use of this defense to a workers' compensation claim. The ADA requires only that information requests about health or workers compensation history are made as part of a post-offer medical examination or inquiry. (See Chapter VI.)

X. ENFORCEMENT PROVISIONS

10.1 Introduction

Title I of the ADA is enforced by the Equal Employment Opportunity Commission (EEOC) under the same procedures used to enforce Title VII of the Civil Rights Acts of 1964. The Commission receives and investigates charges of discrimination and seeks through conciliation to resolve any discrimination found and obtain full relief for the affected individual. If conciliation is not successful, the EEOC may file a suit or issue a "right to sue" letter to the person who filed the charge. Throughout the enforcement process, EEOC makes every effort to resolve issues through conciliation and to avoid litigation.

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

10.2 Overview of Enforcement Provisions

- A job applicant or employee who believes s/he has been discriminated against on the basis of disability in employment by a private, state, or local government employer, labor union, employment agency, or joint labor management committee can file a charge with EEOC.
- An individual, whether disabled or not, also may file a charge if s/he believes that s/he has been

discriminated against because of an association with a person with a known disability, or believes that s/he has suffered retaliation because of filing a charge or assisting in opposing a discriminatory practice. (See Retaliation below.) Another person or organization also may file a charge on behalf of such applicant or employee.

- The entity charged with violating the ADA should receive written notification of the charge within 10 days after it is filed.
- EEOC will investigate charges of discrimination. If 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 for remedies.
- If conciliation fails, EEOC will file suit or issue a "right to sue" letter to the person who filed the charge. (If the charge involves a state or local government agency, EEOC will refer the case to the

Department of Justice for consideration of litigation or issuance of a "right to sue" letter.)

- Remedies for violations of Title I of the ADA include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' 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.
- Employers may not retaliate against any applicant or employee who files a charge, participates in an EEOC investigation or opposes an unlawful employment practice.

10.3 Questions and Answers on the ADA Enforcement Process

When do the ADA's employment enforcement provisions become effective?

Charges of discrimination can be filed against employers with 25 or more employees and other covered entities beginning July 26, 1992. The alleged discriminatory act(s) must have occurred on or after July 26, 1992.

Charges can be filed against employers with 15 or more employees beginning July 26, 1994. The alleged discriminatory act(s) must have occurred on or after July 26, 1994, if the charge is against an employer with 15 to 24 employees.

Who can file charges of discrimination?

An applicant or employee who feels that s/he has been discriminated against in employment on the basis of disability can file a charge with EEOC. An individual, group or organization also can file a charge on behalf of another person. An individual, group or organization that files a charge is called the "charging party."

How are charges of discrimination filed?

A person who feels s/he has been discriminated against, or other potential "charging party" should contact the nearest EEOC office. (See Resource Directory listing.) If there is no EEOC office nearby, call, toll free 1-800-669-4000 (voice) or 1-800-800-3302 (TDD).

What are the time limits for filing charges of discrimination?

A charge of discrimination on the basis of disability must be filed with EEOC within **180 days** of the alleged discriminatory act.

If there is a state or local fair employment practices agency that enforces a law prohibiting the same alleged discriminatory practice, it is possible that charges may be filed with EEOC up to **300 days** after the alleged discriminatory act. However, to protect legal rights, it is recommended that EEOC be contacted promptly when discrimination is believed to have occurred.

How is a charge of discrimination filed?

A charge can be filed in person, by telephone, or by mail. If an individual does not live near an EEOC office, the charge can be filed by telephone and verified by mail. The type of information that will be requested from a charging party may include:

- the charging party's name, address, and telephone number (if a charge is filed on behalf of another individual, his/her identity may be kept confidential, unless required for a court action);
- the employer's name, address, telephone number, and number of employees;
- the basis or bases of the discrimination claimed by the individual (e.g., disability, race, color, religion, sex, national origin, age, retaliation);
- the issue or issues involved in the alleged discriminatory act(s) (e.g., hiring, promotion, wages, terms and conditions of employment, discharge);
- identification of the charging party's alleged disability (e.g., the physical or mental impairment and how it affects major life activities, the record of disability the employer relied upon, or how the employer regarded the individual as disabled);
- the date of the alleged discriminatory act(s);
- details of what allegedly happened; and
- identity of witnesses who have knowledge of the alleged discriminatory act(s).

Charging parties also may submit additional oral or written evidence on their behalf.

EEOC has work-sharing agreements with many state and local fair employment agencies. Depending on the agreement, some charges may be sent to a state or local agency for investigation; others may be investigated directly by EEOC. (See also Coordination Procedures to Avoid Duplicate Complaint Processing under the ADA and the Rehabilitation Act, below.)

Can a charging party file a charge on more than one basis?

EEOC also enforces other laws that bar employment discrimination based on race, color, religion, sex, national origin, and age (persons 40 years of age and older). An individual with a disability can file a charge of discrimination on more than one basis.

For example: A cashier who is a paraplegic may claim that she was discriminated against by an employer based on both her sex and her disability. She can file a single charge claiming both disability and sex discrimination.

Can an individual file a lawsuit against an employer?

An individual can file a lawsuit against an employer, but s/he must first file the charge with EEOC. The charging party can request a "right to sue" letter from the EEOC 180 days after the charge was first filed with the Commission. A charging party will then have 90 days to file suit after receiving the notice of right to sue. If the charging party files suit, EEOC will ordinarily dismiss the original charges filed with the Commission. "Right to sue" letters also are issued when EEOC does not believe discrimination occurred or when conciliation attempts fail and EEOC decides not to sue on the charging party's behalf (see below).

Are charging parties protected from retaliation?

It is unlawful for an employer or other covered entity to retaliate against someone who files a charge of discrimination, participates in an investigation, or opposes discriminatory practices. Individuals who believe that they have been retaliated against should contact EEOC immediately. Even if an individual has already filed a charge of discrimination, s/he can file a new charge based on retaliation.

How does EEOC process charges of discrimination?

- A charge of employment discrimination may be filed with EEOC against a private employer, state or local government, employment agency, labor union or joint labor management committee. When a charge has been filed, EEOC calls these covered entities "respondents."
- Within 10 days after receipt of a charge, EEOC sends written notification of receipt to the respondent and the charging party.
- EEOC begins its investigation by reviewing information received from the charging party and requesting information from the respondent. Information requested from the respondent initially, and in the course of the investigation, may include: specific information on the issues raised in the charge;
- the identity of witnesses who can provide evidence about issues in the charge;
- information about the business operation, employment process, and workplace; and
- personnel and payroll records.

(Note: All or part of the data-gathering portion of an investigation may be conducted on-site, depending on the circumstances.)

- A respondent also may submit additional oral or written evidence on its own behalf.
- EEOC also will interview witnesses who have knowledge of the alleged discriminatory act(s).
- EEOC may dismiss a charge during the course of the investigation for various reasons. For example, it may find that the respondent is not covered by the ADA, or that the charge is not timely filed.
- EEOC may request additional information from the respondent and the charging party. They may be asked to participate in a fact-finding conference to review the allegations, obtain additional evidence, and, if appropriate, seek to resolve the charge through a negotiated settlement.
- The charging party and respondent will be informed of the preliminary findings of the investigation -- that is, whether there is cause to believe that discrimination has occurred and the type of relief that may be necessary. Both parties will be provided opportunity to submit further information.
- After reviewing all information, the Commission sends an official "Letter of Determination" to the charging party and the respondent, stating whether it has or has not found "reasonable cause" to believe that discrimination occurred.

What if the EEOC concludes that no discrimination occurred?

If the investigation finds no cause to believe discrimination occurred, EEOC will take no further action. EEOC will issue a "right to sue" letter to the charging party, who may initiate a private suit.

What if the EEOC concludes that discrimination occurred?

If the investigation shows that there is reasonable cause to believe that discrimination occurred, EEOC will attempt to resolve the issue through conciliation and to obtain full relief consistent with EEOC's standards for remedies for the charging party. (See Relief Available to Charging Party, below.) EEOC also can request an employer to post a notice in the workplace stating that the discrimination has been corrected and that it has

stopped the discriminatory practice.

What happens if conciliation fails?

At all stages of the enforcement process, EEOC will try to resolve a charge without a costly lawsuit.

If EEOC has found cause to believe that discrimination occurred, but cannot resolve the issue through conciliation, the case will be considered for litigation. If EEOC decides to litigate, a lawsuit will be filed in federal district court. If the Commission decides not to litigate, it will send the charging party a "right-to-sue" letter. The charging party may then initiate a private civil suit within 90 days, if desired. If conciliation fails on a charge against a state or local government, EEOC will refer the case to the Department of Justice for consideration of litigation or issuance of a "right to sue" letter.

10.4 Coordination Procedures to Avoid Duplicative Complaint Processing Under the ADA and the Rehabilitation Act.

The ADA requires EEOC and the federal agencies responsible for Section 503 and Section 504 of the Rehabilitation Act of 1973 to establish coordination procedures to avoid duplication and to assure consistent standards in processing complaints that fall within the overlapping jurisdiction of both laws. EEOC and the Office of Federal Contract Compliance in the Department of Labor (OFCCP) have issued a joint regulation establishing such procedures for complaints against employers covered by the ADA who are also federal contractors or subcontractors. (Published in the Federal Register of January 24, 1992.) EEOC and the Department of Justice also will issue a joint regulation establishing procedures for complaints against employers covered by the ADA who are recipients of federal financial assistance.

The joint EEOC-OFCCP rule provides that a complaint of discrimination on the basis of disability filed with OFCCP under Section 503 will be considered a charge filed simultaneously under the ADA if the complaint falls within the ADA's jurisdiction. This will ensure that an individual's ADA rights are preserved. OFCCP will process such complaints/charges for EEOC, with certain exceptions specified in the regulation, where OFCCP will refer the charge to EEOC. OFCCP also will refer to EEOC for litigation review any complaint/charge where a violation has been found, conciliation fails, and OFCCP decides not to pursue administrative enforcement.

EEOC will refer to OFCCP ADA charges that fall under Section 503 jurisdiction when the Commission finds cause to believe that discrimination has occurred but decides not to litigate, for any administrative action that OFCCP finds appropriate. Where a charge involves both allegations of discrimination and violation of OFCCP's affirmative action requirements, EEOC generally will refer the charge to OFCCP for processing and resolution.

(**Note:** Procedures established in an EEOC-Department of Justice joint rule on processing complaints that are within ADA and Section 504 jurisdiction will be summarized in a future supplement to this Manual, when a final regulation has been issued.)

10.5 Remedies

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include hiring, reinstatement, promotion, back pay, front pay, reasonable accommodation, or other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination). Remedies also may include payment of attorneys' fees, expert witness fees and court costs.

Compensatory and punitive damages also may be available where intentional discrimination is found. Damages

may be available to compensate for actual monetary losses, for future monetary losses, for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. The total amount of punitive damages and compensatory damages for future monetary loss and emotional injury for each individual is limited, based upon the size of the employer, using the following schedule:

Number of employees Damages will not exceed

- 15-100 $50,000
- 101-200 $100,000
- 201-500 $200,000
- 500 and more $300,000

Punitive damages are not available against state or local governments.

In cases concerning reasonable accommodation, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

What are EEOC's obligations to make the charge process accessible to and usable by individuals with disabilities?

EEOC is required by Section 504 of the Rehabilitation Act of 1973, as amended, to make all of its programs and activities accessible to and usable by individuals with disabilities. EEOC has an obligation to provide services or devices necessary to enable an individual with a disability to participate in the charge filing process. For example, upon request, EEOC will provide an interpreter when necessary for a charging party who is hearing impaired. People with visual or manual disabilities can request on-site assistance in filling out a "charge of discrimination" form and affidavits. EEOC will provide access to the charge process as needed by each individual with a disability, on a case-by-case basis.

APPENDICES

ADA TECHNICAL ASSISTANCE MANUAL
ADDENDUM

Since *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* was published, the Supreme Court has issued three rulings that necessitate changes in this document.

First, the Supreme Court has ruled that the determination of whether a person has an ADA "disability" must take into consideration whether the person is substantially limited in performing a major life activity when using a mitigating measure. This means that if a person has little or no difficulty performing any major life activity because s/he uses a mitigating measure, then that person will not meet the ADA's first definition of "disability." The Supreme Court's rulings were in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), and Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999).

As a result of these two Supreme Court cases, this document's guidance on mitigating measures, found at page II-2 and Appendix B, pages 7 and 10, section 1630.2(h) and (j), is superseded. Following the Supreme Court's ruling, whether a person has an ADA "disability" is determined by taking into account the positive and negative effects of mitigating measures used by the individual.

Second, the Supreme Court has ruled that an accommodation is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases." US Airways, Inc. v. Barnett, 535 US ____, 122 S. Ct. 1516 (2002). The Court also ruled in Barnett that while it will generally be "unreasonable" for an employer to violate a seniority system in order to provide a reassignment, there may be "special circumstances" that would nevertheless make it "reasonable" to provide such an accommodation.

As a result of Barnett, this document's guidance regarding the meaning of "reasonable accommodation," has been superseded in part. This document's guidance on potential conflicts between reassignment and seniority systems has been superseded. In accordance with the Barnett decision, the following changes are made:

I. Section 3.4 Some Basic Principles of Reasonable Accommodation (page III-3)

Delete "A reasonable accommodation must be an effective accommodation." Substitute: "A modification or adjustment must be "reasonable" and effective."

II. Section 3.9 The Undue Hardship Limitation

The second example on page III-16, dealing with seniority and reassignment, is deleted.

III. Section 3.10 Examples of Reasonable Accommodations

5. Reassignment to a Vacant Position (page III-25)

The following paragraph becomes the final paragraph of this subsection:

Generally, it will be "unreasonable" for an employer to violate a seniority system in order to provide a reassignment. However, there may be "special circumstances" that undermine employee expectations

about the uniform application of the seniority system, and thus it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. There is not an exhaustive list of what constitutes "special circumstances," but examples may include where a seniority system contains exceptions such that one more is unlikely to matter, or where an employer retains the right to alter unilaterally the seniority system and has done so fairly frequently.

IV. Section 7.11 Contractual or Other Relationships 7.11(a) Collective Bargaining Agreements

The example on page VII-12, dealing with seniority and reassignment, is deleted.

The Supreme Court's rulings in Sutton, Murphy, and Barnett do not change anything else in this document.

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Note: *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* is not available on this web site. Print copies can be ordered from our publications page.

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