Overview of the Americans with Disabilities Act

District of Columbia Bar Association

Understanding the Americans with Disabilities Act: ADA Employment Law and Litigation for Beginners

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA"), Pub. L. 101-336, 42 U.S.C. § 121.01, *et seq.,* was signed into law by President Bush on July 26, 1990.

Heralded by Congress and the President as long overdue legislation, the ADA generally extends to persons with disabilities the same rights afforded to minorities under the Civil Rights Act of 1964. The purpose of the Act is no less than to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." ADA § 2(b)(1).

The ADA consists of four substantive titles:

- Title I bars discrimination in employment.
- Title II prohibits discrimination in services provided by state and local governments.
- Title III requires that businesses open to the public, such as hotels, restaurants, bars, movie theaters, and lawyers offices, to reasonably accommodate persons with disabilities. Title III also requires that newly constructed commercial facilities and alterations to existing facilities be readily accessible to and usable by individuals with disabilities.
- Title IV requires telephone companies to make "non-voice" services available to individuals with hearing or speaking disabilities.

Depending on the title, various government agencies have authority to enforce the ADA. The Equal Employment Opportunity Commission ("EEOC") has enforcement authority with respect to Title I. On July 26, 1991, the EEOC issued final regulations implementing Title I. 56 Fed. Reg. 35726, *et seq*. (29 C.F.R. Part 1630). In addition to publishing regulations, the EEOC also has published an Interpretive Guidance to its regulations, 56 Fed. Reg. 35739, *et seq.* (July 26, 1991), and a Technical Assistance Manual.

The ADA Amendments Act of 2008 ("ADAAA") and the regulations of the EEOC issued on March 25, 2011 represent the most significant changes to the ADA since the original statute was passed in 1990. The ADAAA and the EEOC's implementing regulations dramatically have expanded the definition of "disability" under the statute and, in essence, reverse at least ten years of court decisions that had significantly narrowed the scope of the Act's protections. As a result of these changes, the focus of ADA law and litigation under the statute no longer is focused on who is covered by the statute, but rather on the issue of whether the employer has complied with its statutory obligations, including the obligation to reasonably accommodate disabled job applicants and employees.

This outline focuses on the employment provisions of the AA and addresses the following questions:

- What is a disability?
- Who is a qualified individual with a disability?
- What constitutes discrimination against a qualified individual with a disability?
- What constitutes a reasonable accommodation?
- What constitutes an undue hardship?

II. COVERAGE AND EFFECTIVE DATES OF TITLE I

A. Covered Entities

Title I of the ADA regulates the conduct of the following entities:

- employers
- employment agencies
- labor organizations
- joint-labor management committees

ADA § 101(2).

B. Definition of "Employer" and Other Entities

The ADA defines an "employer" as a person – including an agent of that person – engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year.

The ADA specifically adopts Title VII's definition of a "person" which includes:

- one or more individuals
- governments
- government agencies
- political subdivisions
- labor unions
- partnerships
- associations
- corporations
- unincorporated organizations

The definitions of the terms "commerce," "industry affecting commerce," "labor organization," and "employment agency" are the same as the definitions used in Title VII. ADA § 101(7).

C. Exclusions

The term "employer" does not include the following:

- The Executive Agencies of the United States government or any corporation owned by the federal government (**NOTE:** Executive agencies are covered by the nondiscrimination and affirmative employment requirements of Section 501 of the Rehabilitation Act.)
- Indian tribes
- A *bona fide* private membership club, other than a labor organization, that is exempt from taxation under the Internal Revenue Code.

ADA § 101(5)(B).

These exclusions from the term "employer" are consistent with the exclusions found in Title VII. S. Rep. 101-116 at 25 (1989) ("Senate Report").

NOTE: The legislative branch of the federal government is not excluded from ADA coverage, but is governed by different enforcement procedures.

III. DEFINITION AND INTERPRETATION OF THE TERM "DISABILITY"

A. Statutory Definition

The ADA incorporates a wide-ranging and far-reaching definition of the term "disability." The Act defines the term "disability" with respect to an individual as:

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

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.

ADA, § 3 (2) .

This definition mirrors the definition of the term "individual with handicaps" as used in Section 504 in the 1973 Rehabilitation Act, 29 U.S.C. § 706(8)(B).

Under the ADA, as amended by the ADAAA, there are three ways in which a person can come within the definition of being disabled:

(1) the person has an actual disability, in that the individual has a physical or mental impairment that substantially limits a major life activity;

(2) the person has a record of an actual disability; or

(3) the person is regarded as disabled by virtue of the employer taking a prohibited action because of an actual or perceived impairment that is not minor or transitory.

42 U.S.C. § 12112(1)(A)-(C), (3).

In order to be actually disabled or have a record of a disability under the ADAAA definition, an individual must be (or have been) substantially limited in a major life activity. In providing guidance on how the definition should now be interpreted, the EEOC's regulations address both the term "major life activities" and what constitutes a "substantial limitation."

First Prong: Physical or Mental Impairment
Substantially Limiting One or More Major Life Activities

A. What is a "Physical or Mental Impairment?"

The EEOC regulations implementing the ADA defined "physical or mental impairment" as follows:

- Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems:
  - ✓ neurological
  - ✓ musculoskeletal

- ✓ special sense organs
- ✓ respiratory
- ✓ speech organs
- ✓ cardiovascular
- ✓ reproductive
- ✓ digestive
- ✓ genitourinary
- ✓ hemic and lymphatic
- ✓ skin
- ✓ endocrine

- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, specific learning disabilities

29 C.F.R. § 1630.3.

While quite broad, the term "physical or mental impairment" is not all encompassing. The term does not include physical characteristics that are within the "normal" range and are not the result of a psychological disorder. Examples of characteristics that the EEOC has deemed not to be impairments are the following:

- eye color
- hair color
- left handedness
- weight
- muscular tone
- pregnancy
- personality traits, such as poor judgment or quick temper.

29 C.F.R. Part 1630, App.

Environmental, cultural or economic disadvantages also are not "impairments." Likewise, neither homosexuality or bisexuality constitute impairments. ADA Section 5ll(a).

B. Defining Major Life Activities

In conformity with the ADAAA, the EEOC's regulations address the concept of "major life activities" in terms of activities in which individuals engage as well as in terms of a person's internal bodily functions.

1. Activities Constituting "Major Life Activities"

a. ADAAA Major Life Activities

The ADAAA, itself, includes a non-exclusive list of major life activities that encompass the following:

- Caring for oneself,
- Performing manual tasks,
- Seeing,
- Hearing,
- Eating,
- Sleeping,
- Walking,
- Standing,
- Lifting,
- Bending,
- Speaking,
- Breathing
- Learning,
- Reading,
- Concentrating,
- Thinking,
- Communicating, and
- Working.

ADAAA, § 4(a), amending 42 U.S.C. § 12102(2)(A).

b. EEOC's Added Activities

The EEOC's regulations go beyond the statutory list to add the following:

- sitting,
- reaching, and
- interacting with others.

29 C.F.R. §1630.2(i).

Importantly, the Commission has emphasized that the examples of various major life activities set forth in its regulations are "non-exhaustive" and that other activities may well be deemed major life activities for purposes of the ADA analysis. 76 Fed. Reg. at 16978, 16980 (2011). As pointed out by the Commission in its Interpretive Guidance, "the regulations provide that in determining other examples of major life activities, the term 'major' shall not be interpreted strictly to create a demanding standard for disability" and the regulations specifically "reject the notion that major life activities are 'activities that are of central importance to most peoples' daily lives.'" 29 C.F.R. Part 1630 App. § 1630.2(i).

1. Bodily Functions as "Major Life Activities"

In addition to setting forth examples of actions that would constitute major life activities, the EEOC's regulations also address "major bodily functions," which are considered "major life activities" for purposes of the ADA analysis.

a. ADA Amendments Act Bodily Functions

The ADA Amendments Act sets forth a non-exclusive list of bodily functions as being the following:

- Functions of the immune system,
- Normal cell growth,
- Digestive,
- Bowel,
- Bladder,
- Neurological,
- Brain,
- Respiratory,
- Circulatory,
- Endocrine, and
- Reproductive functions.

ADAAA, § 4(a), amending 42 U.S.C. § 12102(2)(B).

b. EEOC's Added Bodily Functions

The EEOC's regulations include these statutory examples, but also add the following major bodily functions:

- special sense organs and skin,
- genitourinary,
- muscular skeletal,
- cardiovascular,
- lymphatic, and
- hemic.

29 C.F.R. § 1630.2(i)(ii).

In the Interpretive Guidance to its new regulations, the Commission explains that these added examples "further illustrate the non-exhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act." 29 C.F.R. Part 1630, App. § 1630.2(i).

By including these additional major bodily functions in its regulations, the EEOC has increased the number of medical conditions that will be covered as disabilities under the ADA. The following examples from the EEOC's Interpretive Guidance emphasized this point: sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions. *Id*.

With the inclusion of major bodily functions as a major life activity for purposes of the ADA analysis, an individual may be disabled even if the person is not outwardly limited in activities in which the person may be engaged. For example, under the ADAAA and the EEOC's new regulations, an individual who has diabetes will be disabled if the disease substantially limits that person's endocrine system, even if he or she is not substantially limited in the ability to engage in any outward activities such as seeing, hearing, walking, or lifting.

C. Interpreting Substantially Limited

In enacting the ADA Amendments Act, Congress specifically stated that it was rejecting the standards enunciated by the Supreme Court that the term "substantially" should be "interpreted strictly to create a demanding standard for qualifying as disabled." ADAAA § 2(a)(4), quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

Instead, the ADAAA expresses Congress' intent "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADAAA, § 2(a)(5).

In carrying out Congress' instruction, the EEOC's regulations set forth the following nine rules of construction to apply when determining whether an impairment substantially limits a major life activity:

(1) The term "substantially limits" shall be construed broadly in favor of expansive coverage and to the maximum extent permitted by the terms of the ADA.

(2) One should look to whether a person is substantially limited as compared to "most people," and the impairment need not prevent or significantly restrict the individual from performing a major life activity.

(3) The analysis should not be an extensive one.

(4) The degree of functional limitation required to satisfy the standard of substantially limited is lower than that applied prior to the enactment of the ADAAA.

(5) There is no need for medical, scientific, or statistical analysis in making the determination of whether an impairment is substantially limiting.

(6) The determination of whether an impairment substantially limits a major life activity is made without considering the ameliorative effects of mitigating measures (except ordinary eyeglasses or contact lenses).

(7) Episodic impairments or diseases in remission are disabilities if they would substantially limit a major life activity when active.

(8) A substantially limiting impairment need limit only one major life activity.

(9) An impairment lasting or expected to last less than six months can still be substantially limiting.

29 C.F.R. § 1630.2(j)(1)(i) – (ix).

Additionally, the regulations specify that the focus for determining whether an impairment substantially limits a major life activity should be on the limitations, rather than on the outcomes an individual can achieve. Thus, an individual with a learning disability who has achieved a high level of academic success still may be disabled by being substantially limited in the major life activity of learning because of the additional time or effort that the person must spend to read, write, or learn compared to "most people" in the general population. 29 C.F.R. § 1630.2(j)(4)(iii).

D. Condition, Manner, or Duration of Impairment

The "condition, manner, or duration" of the impairment may be considered in assessing whether an impairment is substantially limiting. Nonetheless, the EEOC points out that given the more straightforward manner in which "disability" is to be analyzed, "the concepts may often be unnecessary to conduct the analysis of whether an impairment 'substantially limits' a major life activity." 76 Fed. Reg. at 16984.

In undertaking such an analysis, an impairment may substantially limit the "condition" or "manner" under which a major life activity can be performed. Thus, for a person with an amputated hand, the condition or manner in which the individual performs manual tasks likely will be more cumbersome than the way that someone with two hands would perform the same tasks. Similarly, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited under the EEOC's analysis, if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without such adverse effects. 29 C.F.R. § 1630 App. § 1630.2(j)(4).

The term "duration" refers to the length of time an individual can perform a major life activity. The EEOC's Interpretive Guidance to the final regulations gives the example of an individual whose back impairment precludes him from standing for more than two hours without significant pain. According to the EEOC, this individual would be substantially limited in standing since most people can stand for more than two hours without significant pain. *Id.*

E. Impact of Mitigating Measures

As set forth in the EEOC's rules of construction, the ameliorative effects of mitigating measures are not to be considered when assessing the condition, manner or duration of an individual's ability to perform a major life activity. This rule is in conformity with the ADA Amendments Act, which specifically states "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," ADAAA, § 4(a), amending 42 U.S.C. § 12102(4)(E)(i), and represents a dramatic departure from prior ADA law in which mitigating measures were to be considered.

1. ADA Amendments Act List of Mitigating Measures

The original ADA did not define the term "mitigating measures," nor give any examples of what the term means. The ADAAA, however, includes a non-exclusive list of mitigating measures:

- medication,
- medical supplies, equipment, or appliances,
- low vision devices (except for ordinary eyeglasses or contact lenses),
- prosthetics, hearing aids and cochlear implants,
- mobility devices,
- oxygen therapy, equipment and supplies, and use of assistive technology,
- reasonable accommodations or auxiliary aids and services,
- learned behavioral or adaptive neurological modifications.

ADAAA, § 4(a), amending 42 U.S.C. § 12102(4)E(i).

2. EEOC Additional Mitigating Measures

In addition to the statutory list, the EEOC's regulations include as examples of mitigating measures:

- psychotherapy,
- behavioral therapy, and
- physical therapy.

29 C.F.R. § 1630.2(j)(5)(v).

3. Negative Impact of Mitigating Measures

Importantly, although the ameliorative effects of mitigating measures are not to be considered in determining whether someone is substantially limited in a major life activity, the negative impact of mitigating measures remains part of the ADA calculus. Also, for those individuals who do not use mitigating measures even though such measures exist, the availability

of such measures, according to the EEOC, "has no bearing on whether the impairment substantially limits a major life activity. 29 C.F.R. App. § 1630.2(j)(1)(vi).

The EEOC's Interpretive Guidance notes that the negative effect of mitigating measures, including medication, may be relevant not only in assessing whether someone is disabled, but in determining whether the individual is qualified to do the job or poses a direct threat to safety. *Id*. Thus, if an individual takes pain medication to alleviate the effects of a back injury and that pain medication causes the person to become drowsy or lack mental focus, these adverse effects could impact whether the individual is qualified to perform his or her job, especially if the job requires the employee to be focused and pay close attention to details.

F. Predictable Assessments

In its regulations implementing the ADAAA, the Commission reaffirmed that "the determination of whether an impairment substantially limits a major life activity requires an individualized assessment." 29 C.F.R. App. § 1630.2(j)(1)(4).

The Commission's regulations, however, explain that the "inherent nature" of certain types of medical conditions "will in virtually all cases give rise to a substantial limitation of a major life activity." 29 C.F.R. Part 1630 App. § 1630.2(j)(3). Thus, the EEOC states that by applying its rules of construction "it should easily be concluded" that the following types of impairments will be disabilities under the ADA:

- deafness,
- blindness,
- intellectual disability,
- partially or completely missing limbs,
- mobility impairments requiring the use of a wheelchair,
- autism,
- cancer,
- cerebral palsy,
- diabetes,
- epilepsy,
- HIV infection,
- multiple sclerosis,
- muscular dystrophy,
- major depressive disorder,
- bipolar disorder,
- post-traumatic stress disorder,
- obsessive compulsive disorder, and
- schizophrenia.

29 C.F.R. § 1630.2(j)(3)(iii).

As examples, the regulations explain that deafness substantially limits hearing, blindness substantially limits seeing, autism substantially limits brain function, diabetes substantially limits endocrine function, and major depressive disorder substantially limits brain function. *Id*.

Those impairments that a predictable assessment indicates would substantially limit a major life activity, for all practical purposes, constitute *per se* disabilities under the ADA. Although it may be within the realm of possibility that an individual diagnosed with cancer, for example, is not substantially limited in the major bodily function of normal cell growth, or that an individual diagnosed with diabetes is not substantially limited in endocrine function, it is hard to imagine how this could occur medically because the very diagnosis of cancer or diabetes is predicated upon an impairment of the bodily function itself. It, therefore, is safe to say that in interpreting and implementing the ADA, all of the impairments that the EEOC has identified as constituting disabilities following a predictable assessment will be covered under the statute unless the employer can establish a remarkable set of medical circumstances.

G. Diseases in Remission

1. Coverage Under ADA and ADAAA

Under the original ADA as interpreted by the courts, if an employee's impairment went into remission or was episodic, the employee often times would not qualify as being "disabled" under the ADA. Thus, the courts held that individuals with epilepsy who suffered short-term seizures, or persons diagnosed with cancer, but whose cancer was in remission, were not disabled. See, e.g., *Todd v. Academy Corporation*, 57 F. Supp. 488, 453 (S.D. Tx. 1999) (individual's epilepsy not a disability); *Pimentel v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182-183 (D. N.H. 2002) (plaintiff's cancer was too "short-lived" to constitute a disability).

The ADA Amendments Act changed this rule by providing that if an impairment is episodic or in remission, it still may constitute a disability if it would substantially limit a major life active. ADAAA, § 4(a), amending 42 U.S.C. § 12102(4)(D).

2. EEOC Regulations

The EEOC's regulations follow the provisions of the ADAAA by specifically providing that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 29 C.F.R. § 1630.2(j)(1)(vii).

In addition to cancer and epilepsy, other impairments that are episodic or in remission now will be covered under the statute if the episodic impairment when active substantially limits a major life activity. These include:

- hypertension,
- diabetes,
- asthma,
- major depressive disorder,
- bipolar disorder and schizophrenia.

29 C.F.R. App. § 1630.2(j)(1)(vii). Similarly, as explained in the EEOC's Interpretive Guidance, an individual with post-traumatic stress disorder who experiences intermittent flashbacks due to traumatic events would be "substantially limited in brain function and thinking" and, hence, covered under the ADA. *Id.*

H. Substantially Limited In Working

1. Working as a Major Life Activity

The ADA Amendments Act makes clear that "working" should be considered a major life activity for purposes of the ADA analysis. See ADAAA, § 4(a), amending 42 U.S.C. § 12102(2)(A) (listing "working" as a major life activity among others). The EEOC's final regulations, likewise, include working as a major life activity. See 29 C.F.R. § 1630.2(i)(1)(i).

2. Substantial Limitation Analysis.

According to the EEOC, the major life activity of "working" will be used in only very targeted circumstances." 29 C.F.R. App. § 1630.2(j)(4). As the Commission's Interpretive Guidance explains, impairments that substantially limit a person's ability to work "usually substantially limit one or more other major life activities." *Id*.

In those "rare cases" where an individual has a need to demonstrate that an impairment substantially limits the major life activity of working, the EEOC explains that the person can do so by showing that the impairment substantially limits "his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills and abilities." 29 C.F.R. App. § 1630.2(j)(4). According to the EEOC, if a person's back impairment prevents the individual from lifting more than 50 pounds and that individual's job requires heavy lifting the person would be substantially limited in performing "the class of jobs that require heavy lifting" and, hence, disabled under the statute. *Id.*

Although the EEOC's analysis of what constitutes being substantially limited in working is a broad one, the Commission's Interpretive Guidance does recognize that a substantial limitation in performing the "unique aspects of a single specific job" will not be sufficient to establish that the person is disabled. *Id.*

I. Qualification Standards Related to Uncorrected Vision

Mitigating measures do not include ordinary eyeglasses and contact lenses, and, hence, are to be considered in determining whether a person's vision impairment is substantially limiting, therefore, most individuals who have normal eye impairments, such as near or farsightedness, will not be deemed disabled under the ADAAA or the EEOC's regulations.

Nonetheless, both the ADAAA and the EEOC's regulations include a provision pertaining to qualification standards and tests relating to uncorrected vision which may be enforced by non-disabled individuals. Thus, the ADAAA specifically provides that an employer may not use qualification standards based on uncorrected vision unless the standard is shown to

be job-related for the position and consistent with business necessity. ADAAA, § 5(a), amending 42 U.S.C. § 12113(c).

In conformity with the statute, the EEOC's regulations contain a similar provision and, additionally, specifically provide that "[a] individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability." The regulations do require that the individual have been "adversely affected" by the application of the standard. 29 C.F.R. § 1630.10(b). Thus, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct the person's vision impairment still may challenge an employer's qualification standard that requires all employees to have uncorrected vision of a certain acuity. In the face of such a challenge, the employer would need to establish that the standard is job-related and consistent with business necessity. See 29 C.F.R. App. § 1630.10(b).

Second Prong: Record of an Impairment

A person need not presently have an impairment in order to be deemed an individual with a disability. If a person has a record of an impairment that has substantially limited a major life activity, that person is covered under the ADA. ADA, § 3(2)(b). A person may have a record of an impairment in one of two situations:

- someone who had a physiological or mental disorder that substantially limited him or her in a major life activity, but no longer has that impairment or
- someone who is misclassified as having such an impairment.

29 C.F.R. § 1630.2(k), 56 Fed. Reg. at 35735.

Examples from the Committee reports on the ADA of individuals with a record of an impairment include persons with histories of mental or emotional illness, heart disease, cancer, or persons who have been misclassified as mentally retarded. Senate Report at 2 3; House Labor. Report at 52-53.

Third Prong: Being Regarded as Having an Impairment

A. ADAAA Changes to Regarded As Prong

The ADAAA made a fundamental alteration in the third prong of the three-prong definition of disability – being regarded as disabled. When the ADA was originally passed in 1990, the statutory language specified that an individual was regarded as disabled if he or she was regarded as having an impairment that substantially limited one or more major life activities. The requirement that the impairment be substantially limiting was emphasized by the Supreme Court in its *Sutton v. United Airlines* decision, where the Court said that being regarded as having merely an impairment – without that impairment being substantially limiting – was not sufficient. See, *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999). See also *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (being regarded as being unable to work only in a specific job did not constitute evidence that employer regarded employee as being substantially limited in working).

The ADA Amendments Act changes this analysis. The ADAAA specifically provides that "an individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." ADAAA, § 4(a), amending 42 U.S.C. § 12102(3). The only limitation upon this definition is that it does not apply to impairments that are transitory and minor. ADAAA, § 4(a), amending 42 U.S.C. § 12102(3)(B). The statute defines a transitory impairment as one with an actual or expected duration of six months or less. *Id.*

B. EEOC Regulations Implementing New Regarded As Definition

The EEOC hews to this broad language in its regulations implementing the regarded as prong of the ADA definition. 29 C.F.R. § 1630.2(1). The regulations further define prohibited actions quite broadly as including:

- refusal to hire,
- demotion,
- placement on involuntary leave,
- termination,
- exclusion for failure to meet a qualifications standard,
- harassment, or
- denial of any other "term, condition, or privilege of employment."

29 C.F.R. § 1630.2.

Importantly, establishing that an individual is regarded as having an impairment does not, by itself, establish liability. An individual still must show that the employer discriminated against him on the basis of disability. 29 C.F.R. § 1630.2(1)(3).

EXAMPLE

> John Jones sustained a back injury in a car accident, and his doctor imposed a permanent 40-pound lifting restriction. As a consequence, John's employer, ABC Co., terminates him because ABC contends John's job requires lifting objects weighing 50 pounds. Being unable to lift 40 pounds, in all likelihood, would not substantially limit any major life activity (including lifting). Therefore, John would not actually be disabled under the ADA, nor would John have a record of a disability. Nonetheless, because ABC terminated John due to his back impairment, John would be regarded as disabled. Now, whether ABC discriminated against John will turn on whether the job actually required lifting 50 pounds and, if so, whether John could have lifted 50 pounds with an accommodation.

The importance of the change in the regarded as prong of the ADA definition of disability cannot be emphasized too greatly. Indeed, in its Interpretive Guidance to its ADA

final regulations, the EEOC opines that where reasonable accommodation is not an issue, the analysis of whether the person is disabled should proceed under the regarded as prong because it "provides a more straight forward framework for analyzing whether discrimination occurred." 29 C.F.R. App. § 1630.2.

C. Impairments that Are "Transitory and Minor"

If an employer takes a prohibited job action against an individual due to an actual or perceived impairment that is transitory and minor, the employer will not have regarded the person as disabled. Importantly, the EEOC's regulations place the burden on the employer to prove as a defense to a regarded as claim that the impairment is "transitory and minor" as a matter of objective fact. According to the Commission, "[t]he relevant inquiry is whether the actual or perceived impairment on which the employer's action was based is objectively 'transitory and minor,' not whether the employer claims it subjectively believed the impairment was transitory and minor." 29 C.F.R. App. § 1630.2.

Thus, an employer who terminates an employee whom it believes has bipolar disorder will not be able to establish the "transitory and minor" defense by asserting that it believed the employee's impairment was transitory and minor. Bipolar disorder by its very nature is not transitory nor minor.

D. No Requirement to Accommodate Perceived Disabilities

In conformity with the ADAAA, the EEOC's regulations make clear that there is no requirement that an employer reasonably accommodate perceived disabilities. However, reasonable accommodation obligations continue to apply to actual disabilities and persons with a record of a disability. 29 C.F.R. § 1630.9(e).

IV. TREATMENT OF ALCOHOLICS AND DRUG ADDICTS UNDER THE ADA

Alcoholism and drug addiction are generally treated as disabilities under the ADA. Senate Report at 21; House Labor Report at 50. An individual who is no longer using drugs would be considered "disabled" for purposes of the ADA if the person meets one of the following three requisites:

- has successfully completed a supervised drug rehabilitation program, or
- is participating in a rehabilitation program, or
- is erroneously regarded as engaging in drug use. ADA, § 510(a), (b).

However, an individual who is "currently engaging in the illegal use of drugs" is not a disabled person under the Act. *Id.*

The ADA does not specifically provide that an alcoholic currently abusing alcohol is not subject to the Act's protections.

However, the ADA does provide that an employer has the authority to prohibit the use of alcohol at the workplace and to take disciplinary action for such use. ADA, § 104(c).

V. IMPAIRMENTS SPECIFICALLY EXCLUDED

The ADA specifically excludes 11 impairments and disorders that medically would be considered disabilities. The statutory exclusions involve primarily sexual and antisocial disorders:

- transvestites,
- transsexuals,
- pedophiles,
- exhibitionists,
- voyeurists,
- persons with general identity disorders not resulting from physical impairments,
- persons with sexual behavior disorders,
- gamblers,
- kleptomaniacs,
- pyromaniacs, and
- psychoactive substance use disorders resulting from current illegal use of drugs.

ADA, § 511(b).

Also, the Act excludes persons who are homosexuals and bisexuals inasmuch as these conditions are not considered to be disorders by the Americans Psychiatric Association. ADA, § 511(a).

VI. WHO IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY?

If an individual comes within the definition of having a "disability" under the ADA, that person is not automatically entitled to the non-discrimination protections in employment guaranteed by the Act.

The "disabled" person must, in addition, satisfy the requirement of being a "qualified individual." As defined by the Act, the term "qualified individual with a disability means"

An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

ADA,§ 101(8).

The EEOC's regulations expand upon the statutory definition by explaining that a "qualified individual with a disability" is a person "who satisfies the requisite skills, 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 the position." 29 C.F.R. § 1630.2(m).

The EEOC has identified two basic questions for an employer to ask in determining whether an individual is "qualified" under the ADA:

First,does the person meet the necessary prerequisites for the job in terms of education, work experience, training, skills, licenses, certificates, and other job related requirements?

Second,can the individual perform the essential functions of the job, with or without reasonable accommodation?

EEOC Technical Assistance Manual § 2.3.

A. What Are the "Essential Functions" of the Job?

The EEOC defines the term "essential functions" as the "fundamental job duties of the employment position the individual with a disability holds or desires to hold." 29 C.F.R.§ 1630.2(n). The term does not include the "marginal functions" of the position. *Id.*

A job function may be considered essential for a variety of reasons including the following:

- The function may be essential because the reason the position exists is to perform that function;
- The function may be essential because there are a limited number of employees available among whom the performance of that job function can be distributed;

or

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

Id.

Evidence of whether a particular function is "essential" includes the following:

- the employer's judgment as to what functions are essential;
- the employer's written job description, prepared before advertising or interviewing applicants for the job;
- the amount of time spent by employees performing the particular job function;
- the consequences of not requiring the employee to perform the particular job function;
- the work experience of past incumbents in the job;
- the current work experience of those holding similar jobs;

and

- the terms of a collective bargaining agreement.

29 C.F.R. § 1630.2 (n).

Note: The above list should not be considered exhaustive; other evidence also may be presented as part of the "essential functions" inquiry. The EEOC has advised that "greater weight will not be granted to the types of evidence included on the list than the types of evidence not listed."

B. Qualification Standards

In determining the qualification standards for a job, an employer may devise various physical and aptitude criteria or tests provided the standards are "job related for the position in question" and are "consistent with business necessity." ADA, § 102(b)(6). To be job related, a qualification or standard must be a legitimate measure or qualification for the specific job in question. To be consistent with business necessity, the qualification or standard must relate to the performance of the essential functions of the job. EEOC Technical Manual 4.3.

For example, an employer may adopt a physical requirement that an applicant be able to lift 70 pounds as long as that ability is necessary to an individual's performance of the essential functions of the job. Similarly, a retail store could adopt a requirement that security officers be able to run in order to prevent "snatch and run" thefts. House Judiciary Report at 56.

In determining the standards for a job, an employer may set both qualitative and quantitative production standards. There is nothing in the ADA that would require employers to lower their production standards. As stated by the EEOC, "an employer's

business judgment with regard to production standards, whether qualitative or quantitative" is not to be "second guess[ed]." EEOC Interpretive Guidance 56 Fed. Reg. at 35743.

C. Statutory Exception: Illegal Use of Drugs

As with the definition of "disability," the ADA specifically exempts from the definition of "qualified individual with a disability" an applicant or employee who is "currently engaging in the illegal use of drugs." ADA § 104(a). Illegal drugs are those that are unlawful under the Controlled Substances Act, 21 U.S.C. § 812, but do not include those drugs taken under the supervision of a healthcare provider.

D. With or Without Reasonable Accommodation

Simply because an individual with a disability may not be able to perform the essential functions of the job does not necessarily mean that that individual is not "qualified." The ADA definition takes into account that an individual with a disability may require reasonable accommodation from the employer in order to perform the essential functions of the job.A qualified individual is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position." ADA, § 101(8).

In determining whether a person can perform the essential job functions with reasonable accommodation, the issue is not whether the employer would have to provide the accommodation under the Act or whether providing the accommodation would constitute an "undue hardship." All that is necessary is that the person be able to set forth a plausible reason to believe that he or she can perform the job with an accommodation.

E. Direct Threat to Health or Safety of the Individual or to Others

1. Direct Threat Standard

An employer's qualification standard may include a requirement that an individual "not pose a direct threat to the health or safety of other individuals in the workplace." ADA, § 103(b). (Technically, the direct threat standard is a defense to the assertion that the qualification standard discriminates against individuals with disabilities.)

"Direct threat" is defined by the statute as a "significant risk to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation." ADA,§ 101(3).

Ostensibly, the standard pertains only to other employees or to members of the public, not to the person with a disability. The EEOC's regulations, however, expand upon the ADA

definition and provide that the "direct threat" exception may apply not only to others, but also to the individual employees. 29 C.F.R. § 1630.2(r).

2. Requirements for Establishing the Direct Threat Standard

The EEOC has specified five requirements that an employer must show to establish that an individual with a disability poses a direct threat to himself or to others:

- 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.

EEOC Technical Assistance Manual § 4.5.

VII. ADA's PROHIBITION OF DISCRIMINATION AGAINST A QUALIFIED INDIVIDUAL WITH A DISABILITY

A. General Rule

Title I of the ADA prohibits discrimination against a qualified individual with a disability because of that person's disability. This prohibition extends to all aspects of the employment relationship, including:

- training;
- advancement and promotion; and
- compensation.

ADA, § 102(a).

B. Discriminatory Actions in the Employment Relationship

Under Section 102 of the ACT, the following types of actions are deemed to be discriminatory:

- Limiting, segregating, or classifying a job applicant or an employee with a disability in a manner that adversely affects the opportunities or status of the individual;
- Participating in a contractual or other arrangement that results in discrimination against a qualified applicant or employee with a disability;
- Utilizing standards, criteria, or other methods of administration which have the effect of discriminating or perpetuating discrimination on the basis of disability and which are not job related and consistent with business necessity;
- Discriminating against a non-disabled applicant or employee because of that person's association with an individual with a disability'
- Not making a reasonable accommodation to a known physical or mental impairment of an otherwise qualified applicant or employee with a disability, unless the accommodation would impose an undue hardship;
- Using qualification standards, tests, or other selection criteria that screen out or tend to screen out individuals with disabilities, unless the tests are job related and consistent with business necessity;
- Failing to administer tests in the most effective manner to ensure that the test accurately measures the skills or aptitude of the individual with a disability rather than reflecting that person's impairment;
- Retaliating, coercing, or interfering with an individual's lawful actions or exercise of rights under the ADA;
- Engaging in prohibited medical examinations or inquiries with respect to job applicants and employees.

Not only is "discrimination" broadly defined under the ADA, but the scope of the employment relationship where discrimination is banned also is given an expansive reading. According to the EEOC's regulations, an employer may not discriminate on the basis of disability against a "qualified individual with a disability" in regard to any term, condition, or privilege of employment, including:

- job application procedures, recruitment, and advertising;
- hiring, rehiring, and the right to return from layoff;
- upgrading, promotion, and award of tenure;
- demotion, transfer, layoff, and termination;
- rates of pay or any other form of compensation and changes in compensation;

- job assignments, job classifications, organizational structure, position, descriptions, lines of progression, and seniority lists;
- leaves of absence, sick leave, or other leave;
- fringe benefits available by virtue of the employment relationship, whether or not administered by the employer;
- selection and financial support for training, including apprenticeships/professional meetings, conferences, and other related activities, as well as the selection for leaves of absence to perform training;

and

- activities sponsored by an employer, such as social and recreational programs.

29 C.F.R. § 1630.4.

C. Exemption for Religious Organizations

The ADA allows religious organizations, which are covered generally by the employment provisions of the Act, to give preference in employment to individuals of a particular religion even if giving a preference discriminates against individuals with disabilities. ADA § 103(c)(1).

D. Adversely Affecting Job Opportunities

The ADA specifically prohibits adversely affecting the opportunities or status of an applicant or employee with a disability because of that disability through any of the following employment actions:

- limiting,
- segregating,

or

- classifying a job applicant or employee.

The EEOC has enumerated the following additional types of actions that are prohibited as adversely affecting the job opportunities of individuals with disabilities:

- segregating qualified employees with disabilities into separate work areas;
- segregating employees with disabilities into separate lines of advancement;

- limiting the duties of an employee with a disability based on a presumption of what is best for that individual or on the presumption that the individual with a disability cannot perform certain types of duties;
- adopting a separate track of job promotion or progression for employees with disabilities based on a presumption that such employees are not interested in, or cannot perform, certain types of jobs;
- assigning or reassigning employees with disabilities to one particular office or job facility;
- requiring that employees with disabilities use only certain employer-provided non-work facilities such as segregated break rooms, lunch rooms, or lounges.

29 C.F.R. § 1630.16.

E. Qualification Standards and Employment Tests

In assessing the abilities of job applicants and employees with disabilities, an employer may utilize only those standards that accurately reflect the employer's legitimate requirements for the specific job.In addition, an employer may administer only those tests that accurately measure the actual skills and aptitudes of the applicant or employee.

Employment criteria and tests that have a discriminatory impact unrelated to demonstrable business requirements are not permitted. Unlawful discrimination may occur even where a facially neutral employment standard or policy has the effect of segregating or discriminating against qualified individuals with disabilities. ADA, § 102(b)(3). See also, House Labor Report at 61 (Section 102(b)of the ADA intended to establish disparate impact requirement).

1. Qualification Standards

The ADA prohibits the utilization of standards, criteria or methods of administration that:

- have the effect of discrimination on the basis of disability; or
- perpetuate the discrimination of others who are subject to common administration control.

ADA, § 102(b)(3).

The EEOC regulations clarify that standards having a discriminatory effect or perpetuating discrimination of others still may be lawful as long as

- the criteria are job related to the position to which they are being applied; and

- the criteria are consistent with business necessity.

29 C.F.R. § 1630.7, Fed. Reg. at 35737.

An employer may not fire or refuse to hire an individual with a disability either because:

- the employer's current health insurance plan does not cover the person's disability; or
- the employer is afraid the individual may increase the employer's future health care costs; or
- 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.

EEOC Technical Assistance Manual § 7.9.

2. Employment Tests

Employment tests must satisfy three requirements:

- the test must actually measure what they purport to measure;
- the skills measured by the test must be job related;
- the tests must be given in a non-discriminatory fashion.

An employer has the affirmative obligation to ensure that tests are administered in formats that do not require an individual with a disability to use his or her impaired skill. The only exception is where the skills that are required in order to take the test are also those that the test is to measure.

Example: In testing the job skills of an applicant with dyslexia who is unable to read easily/ administering a written employment test would be discriminatory under the ADA unless being able to read written material is an essential element of the job. If reading is not an essential job function/ an employer would be required to administer an oral test to the dyslexic individual in order to satisfy its non-discrimination obligation.

Alternative Test Formats

Types of adjustments in the administration of employment tests include the following:

- using large print or Braille on the test form;
- using a reader for applicants who are blind;
- employing a sign interpreter for deaf applicants;
- allowing more time to complete the test;
- ensuring that the test site is accessible to individuals with disabilities; and

- evaluating an applicant's skills in a manner other than administering a traditional employment test.

29 C.F.R. § 1630, App.

Notice to the Employer

Generally, an employer is required to provide an alternative test format only if it knows prior to the administration of the test

- that the individual is disabled

and

- the disability impairs sensory or speaking skills.

29 C.F.R. Part 1630, App.

An employer may state on a test announcement or employee application form that individuals with disabilities who require reasonable accommodation in order to take a test should inform the employer within a "reasonable established time" prior to the administration of the examination. An employer also may require that the documentation of the need for an accommodation accompany the request. *Id.*

F. Medical Inquiries and Examinations

1. Pre-Offer Inquiries and Examinations

The ADA prohibits any identification of a disability by inquiry or examination at the pre-offer stage. ADA, § 102(c)(2). Thus, any questions related to physical or mental disabilities must be eliminated from all job application forms. EEOC Technical Assistance Manual 5/5)b). However,an employer may make pre-employment inquiries into the ability of an applicant to perform job related functions. ADA,§ 102(c)(2)(B).

An employer may describe or demonstrate a particular job function and inquire whether the applicant can perform the function with or without reasonable accommodation. 29 C.F.R. Part 1630, App. Physical agility tests are not considered to be medical examinations and may be given at any point in the application or employment process. *Id.*

2. Conditional Offer Medical Examinations

An employer may condition offer of employment on the results of a medical examination as long as the following three requisites are satisfied:

- the examination is given to all entering employees;
- the results are kept confidential;

and

- the examination is not used to discriminate against individuals with disabilities, unless the results make the individual unqualified for the particular job.

ADA, § 102(c)(3).

NOTE:A conditional offer medical examination does not have to be given to all entering employees in all jobs. It need be given only to those applicants in the same job category. EEOC Technical Assistance Manual § 6.4.

A conditional offer medical examination does not have to be job related and consistent with business necessity. EEOC Technical Assistance Manual §6.2. However, if the results of the examination are used to screen out certain individuals with disabilities, the exclusionary criteria "must be job related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation." 29 C.F.R. Part 1630, App.

3. Inquiries and Examinations During Employment

The ADA's requirements concerning medical examinations and inquiries of employees are more stringent than those affecting job applicants. EEOC Technical Assistance Manual § 6.6.

After an employee is hired, the ADA prevents an employer from

- requiring a medical examination;
- inquiring as to whether an employee has a disability;

or

- inquiring as to the nature or severity of any disability,

unless

- the inquiry or examination is "job related an consistent with business necessity."

ADA, § 102(c)(4)(A).

However, where an employer has legitimate concerns about the fitness of an employee to perform the essential functions of a job, an employer may

- ask the employee about his or her ability to continue to perform the essential job functions

or

- require the employee to take a medical examination that is designed to test the employee's ability to perform the essential job functions.

See 29 C.F.R. Part 1630, App.

An employer may also follow medical standards or requirements established by federal, state or local law. *Id.*

4. Voluntary Disclosure of Disabilities

The ADA authorizes federal contractors, governed by the affirmative action requirements of Section 503 of the Rehabilitation Act, to act in compliance with that Act by inviting "all applicants and employees who believe themselves covered by the [Rehabilitation] Act and who wish to benefit under the [contractor's] affirmative action program to identify themselves." 41 C.F.R. § 60-741.5(c)(1).

Also, an employer may initiate voluntary wellness programs that include the taking of a medical history or a medical examination. EEOC Technical Assistance Manual § 6.6.

5. Confidentiality

In general, all medical records obtained by an employer must be kept confidential. EEOC Technical Assistance Manual § 6.6. The ADA requires that this medical information must be

- collected and maintained in separate forms

and

- kept in files segregated from general personnel information.

The Act, however, allows confidential medical information to be shared with the following persons:

- selected supervisors and managers who need to arrange necessary restrictions on the work of the employee and to make necessary accommodations;
- first aid and safety personnel if emergency treatment is required; and
- government officials investigating compliance with the ADA.

6. Drug Testing

The ADA does not consider testing for the illegal use of drugs to be a "medical examination." ADA, § 04(d)(1). Hence, the Act's limitations on the giving of medical examinations and using the results of medical tests does not apply to drug testing. The EEOC regulations do not encourage, prohibit or authorize employers to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based upon those test results. ADA, § 104(d)(2).

G. Discriminating Through Third Party Arrangements

An employer may be liable not only for its own discrimination, but also for the discrimination of third parties. EEOC Technical Assistance Manual § 7.11. An employer commits discrimination if the employer participates in a contractual or other relationship that has the effect of discriminating against a qualified applicant or employee with a disability. ADA, § 102(b)(2). Prohibited relationships may encompass contractual dealings with the following types of entities:

- employment agencies
- labor unions
- organizations providing fringe benefits to employees

and

- firms providing training and apprenticeship programs.

29 C.F.R. § 1630.6(b).

The EEOC noted that labor unions are covered by the ADA and have the same obligations as the employer to comply with the requirements. In addition, an employer is prohibited from taking any action through a labor contract that the employer may not itself take. In order to fulfill the ADAA obligations, employers and unions are advised to include in any collective bargaining agreement a provision permitting the employer to take all actions necessary to comply with the Act. EEOC Technical Assistance Manual § 1.11(a).

H. Persons Who Associate with Individuals with Disabilities

The ADA's protections are not limited solely to individuals with disabilities. The Act also protects an individual with no physical or mental impairments but who is discriminated against because of that person's association with someone who has a disability. ADA, § 102(b)(4).

The prohibition on discrimination against those associating with disabled individuals extends beyond persons with familial relationships to include "any relationship or association." The EEOC's regulations specifically list "business" and "social" relationships as coming within the Act's provisions. 29 C.F.R. § 1630.8.

NOTE:The ADA only prevents adverse actions against a non-disabled person because of his or her association with an individual with a disability; the Act does not require the employer to provide reasonable accommodation to a non-disabled employee.Also, the ADA's prohibition applies only where the employer knows of the association between the non-disabled and disabled person. 29 C.F.R. § 1630.8, App.

I. Insurance and Other Benefit Plans

1. General Rule

In general, the ADA does not affect the manner in which the insurance industry does business in accordance with state laws. ADA, § 501(c).Companies that administer benefit plans may underwrite risks, classify risks or administer risks that are based on and are not inconsistent with state laws. The EEOC's regulations, however, expressly require employers to afford employees with disabilities "equal access" to whatever health insurance or other benefits coverage the employer provides to other employees. 29 C.F.R. § 1630.5.

An employer may not fire or refuse to hire an individual with a disability because

- the employer's current health insurance plan does not cover the person's disability; or
- the employer is afraid the individual may increase the employer's future healthcare costs; or
- 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 healthcare costs.

EEOC Technical Assistance Manual § 7.9.

2. Pre-Existing Conditions

Pre-existing condition clauses do not violate the ADA so long as they are no used to exclude employees with disabilities from insurance coverage altogether. S. Rep. 101-485 at 85(1989).

3. Benefit Reductions and Differentials

Benefit reductions for discriminatory reasons violate the Act; however,in appropriate circumstances employers and insurers may treat individuals with disabilities differently under an insurance or benefit plan if those individuals present an increased risk of illness or death. A benefit plan may charge a higher rate for medical coverage for an individual with a disability where the rate differential "is based on sound actuarial principles or is related to actual or reasonably anticipated experience."House Labor Report at 137; House Judiciary Report at 71; Senate Report at 85.

4. Subterfuge Exception

Health insurance classifications and limitations are permitted only to the extent that they are not being used as a subterfuge to evade the purposes of the ACT. ADA, § 501(c).

According to the EEOC, "if it can be shown that the discriminatory restrictions [in an insurance policy] are a subterfuge to evade the purposes of the ADA, and not just the result of the application of valid risk assessment principles," then the employer or insurance company may be liable under the Act. See EEOC Policy Guidelines in Enforcement of ADA Title I, August 14, 1990.

The term "subterfuge" is not defined in the ADA nor in the regulations. The Supreme Court, however, has defined the term in the context of the Age Discrimination in Employment Act as being a "scheme, plan, stratagem, or artifice of evasion" and connoting a specific "intent to evade a statutory requirement. . . " *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 167 (1989). See also *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 203 (1977).

J. Food Handling Positions

The ADA contains a specific provision allowing an employer in the food industry to discriminate against individuals with communicable diseases which can be passed on by the handling of food. Those employees with infectious or communicable diseases for which the risk of transmittance cannot be eliminated by reasonable accommodation, may be reassigned from food handling positions. ADA, § 103(d)(2).

The Secretary of Health and Human Services is authorized to create an annual list, based on valid scientific and medical analysis, of the diseases that actually are transmitted through the handling of food. ADA, § 103(d)(1). The Secretary promulgated this list on May 16, 1991(56 Fed. Reg. 22726). AIDS and the HIV virus were not included on the list, signifying that HHS at the present time does not consider AIDS to be communicable through food handling.

VIII. WHAT IS A "REASONABLE ACCOMMODATION?"

A. General Rule

The ADA defines discrimination to include "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."ADA,§ 102(b)(5)(A).

A 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." EEOC Technical Assistance Manual fl 3.1.

The duty to make reasonable accommodation lies at the heart of the statute.Under the Act, an employer must do more than merely refrain from discriminating against job applicants or employees with disabilities.An employer, in appropriate circumstances, may need to take affirmative steps to accommodate a person with a disability in order to provide equal opportunity in all aspects of the employment relationship.

B. Who Is Entitled to a Reasonable Accommodation?

The obligation to make a reasonable accommodation is owed only to an "otherwise qualified individual with a disability."ADA, § 102(b)(5).An individual with a disability is otherwise qualified if the person is qualified for the job "except that ... he or she needs a reasonable accommodation to be able to perform the job's essential functions." 29 C.F.R. Part 1630, App.

In other words, the duty to provide a reasonable accommodation is triggered only if the person with a disability meets all job criteria, except for those criteria that the individual is unable to perform because of his or her disability.

C. What Types of "Reasonable Accommodations" May Be Required?

The ADA does not set forth any exclusive list of what may constitute a reasonable accommodation. Every reasonable accommodation must be determined on an individual basis. Rather, the Act and the EEOC regulations set forth illustrations of accommodations that may be required. These accommodations include:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- job restructuring;

- part-time or modified work schedules;
- reassignment;
- acquisition or modification of equipment or devices;
- appropriate adjustment or modifications of examinations and training materials;
- adoption or modification of procedures or protocols;

and

- the provision of qualified readers or interpreters.

ADA, § 101(9).

In accommodating individuals with disabilities, the following actions may be required of an employer:

- for an individual with a disability who must use public transportation available only during certain hours: assigning constant shifts, rather than rotating shifts from day to night
- for an individual with a disability that needs periodic medical attention at a hospital: providing additional unpaid leave days
- for employees who are visually impaired: supplying Braille or large print versions of training manuals or the employee handbook
- for a secretary who is deaf: redefining the job position to eliminate the need to answer the telephone.

D. What Is Not Required?

Although reasonable accommodation is a very broad concept, certain actions are not required by the ADA:

- bumping of another employee to create a vacancy
- establishing or providing a rehabilitation program for drug addicts or alcoholics
- redesigning a job to eliminate essential job functions

E. Process of Supplying a Reasonable Accommodation

The reasonable accommodation requirement of the ADA is best understood as establishing a process of decision making, rather than enunciating the decision itself. At base, reasonable accommodation is a "problem solving approach." Senate Report at 34.

A reasonable accommodation should take into consideration two factors:

- the specific abilities and functional limitations of a particular applicant or employee with a disability

and

- the specific functional requirements of a specific job. EEOC Technical Assistance Manual § 3.5.

The EEOC's Interpretive Guidance suggests four informal steps that an employer should take to consider these factors and provide appropriate accommodations to an otherwise qualified individual with a disability:

> Step One-Job Analysis: Analyze the particular job involved to determine both the purpose of the job and the essential job functions.
>
> Step Two- Identify Barriers to Performance: In consultation with the individual with a disability, identify the barriers that make it difficult for the person to have an equal opportunity to perform the job.
>
> Step Three –Identify Potential Accommodations: Identify possible accommodations to help overcome the barriers to performance identified in step two.
>
> Step Four -- Assessing Reasonableness in Choosing Among the Potential Accommodations: Assess the merits of various accommodations in terms of their effectiveness, reliability and capability of being provided in a timely manner.

An employer need not provide the "best accommodation" as long as the accommodation offered provides a "meaningful employment opportunity." This means an opportunity to allow the individual with a disability "to attain the same level of performance, or enjoy the same level of benefits and privileges of employment, as are available to the similarly situated employee without a disability." 29 C.F.R. § 1630.9.

While preference is to be given to the choice of the person with a disability, the employer has "the ultimate discretion to choose between effective accommodations." 29 C.F.R. § 1630.9, App.

NOTE: In choosing which accommodation to utilize, those accommodations that impose an "undue hardship" upon the employer need not be provided. See discussion, *infra.*

An otherwise qualified individual with a disability is not required to accept any accommodation offered. If an individual rejects an accommodation, however, and, as a consequence, cannot perform the essential functions of the job provision, that individual would not be considered a qualified individual with a disability and, hence, not entitled to the protections of the ADA. 29 C.F.R. § 1630.9.

IX. WHAT CONSTITUTES AN "UNDUE HARDSHIP?"

An employer need not make a reasonable accommodation to an otherwise qualified individual with a disability if the employer can demonstrate that the accommodation would impose an "undue hardship" on the operation of the employer's business.EEOC Technical Assistance Manual § 3.9.

Undue hardship is defined as "an action requiring significant difficulty or expense. ADA, § 101(10)(a). The Congressional Committee reports on the ADA expand upon the statutory definition by referring to undue hardship as an action that is "unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the job or employment program at issue." Senate Report at 35; House Labor Report at 67. See also EEOC Technical Assistance Manual § 3.9.

A. Factors in Undue Hardship Analysis

Whether a particular accommodation will impose an undue hardship is to be determined on a case-by-case basis. In making this assessment, the ADA sets forth four separate factors to be considered:

- the nature and cost of the accommodation needed;
- the nature of the specific facility involved in providing the reasonable accommodation, including
  - ✓ the overall financial resources of the facility;
  - ✓ the number of persons employed at the facility;
  - ✓ the effect on expenses and resources;
  - ✓ the impact of the accommodation upon the operation of the facility.
- the nature and type of the employer, including
  - ✓ the overall financial resources;
  - ✓ the overall size of the business in terms of the number of employees;
  - ✓ the number, type, and location of employer facilities.
- the type of operation or operations of the employer, including
  - ✓ the composition, structure, and functions of the workforce;
  - ✓ the geographic separateness of the operations of the employer;
  - ✓ the administrative or fiscal relationship of the facility or facilities in question to the other operations of the employer.

29 C.F.R. Part 1630, App.

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. This approach was rejected by Congress during deliberations on the ADA. The focus for determining undue hardship is on the resources available to the employer. ADA Technical Assistance Manual § 3.9.

B. Non-Cost Considerations

The concept of "undue hardship" is not limited solely to financial difficulty. In addition to cost, undue hardship refers to any accommodation that

- would be extensive, substantial or disruptive;
- would fundamentally alter the nature or operation of the employer's business.

Senate Report at 35; House Labor Report at 67 (1989).

Example: An individual with a disability requests an employer to upwardly adjust the thermostat in the employer's offices. If this adjustment would cause the premises to become unduly hot for other employees or business patrons or customers, this adjustment would constitute a non-cost "undue hardship" and the employer would not have to provide this accommodation. 29 C.F.R. Part 1630, App.

NOTE: The negative effect on employee morale in and of itself is not sufficient to constitute a non-cost justification under the undue hardship standard. Adverse moral must also have "a negative impact on the ... ability of ...[the employer's other] employees to perform their job." *Id.*

C. Other Undue Hardship Considerations

1. Outside Funding

An employer has an affirmative obligation to investigate outside funding and services that may be available to eliminate the expense of accommodating an individual with a disability. If outside funding is available, the cost of an accommodation for the undue hardship analysis is the final net cost to the employer. 29 C.F.R. Part 1630, App. If outside funding is not available, the employee or job applicant may agree to pay for all or a portion of the accommodation. Should this occur, only the net cost to the employer is considered in the undue hardship analysis. *Id.*

Sources of outside funding include:

- Tax credit for small businesses (Section 44 of the Internal Revenue Code)
- Tax deduction for Architectural and Transportation Barrier Removal (Section 190 of the Internal Revenue Code)

2. Collective Bargaining Agreements

Implementing certain types of accommodations may conflict with the terms of an existing collective bargaining agreement between the employer and the union representing its employees. This conflict may be a factor in determining whether making an accommodation would impose an undue hardship, but the fact that a conflict exists does not mean that the accommodation need not be provided.A collective bargaining agreement simply is relevant evidence in determining whether providing a particular accommodation "would be unduly disruptive ... to other employees or to the functioning of [the employer's] business." 29 C.F.R. Part 1630, App.

A collective bargaining agreement cannot override the requirements of the ADA and where the two conflict, the statutory provisions control. House Labor Report at 63. In order to avoid a conflict between an employer's obligation to abide by a collective bargaining agreement and its statutory obligations to comply with the ADA, the legislative reports recommend that employers seek to include a provision in future collective bargaining agreements permitting the employer to take all actions necessary to comply with the ADA. House Labor Report at 63; Senate Report at 32. The EEOC also advises that the employer should consult with the union to work out an acceptable accommodation.EEOC Technical Assistance Manual § 3.9.

X. ENFORCEMENT OF TITLE I OF THE ADA

A. Administrative Enforcement

Employees who believe they have been discriminated against on the basis of disability first must exhaust the available administrative remedies before proceeding to court.

In those jurisdictions where the EEOC has certified a state or local human rights commission or agency as having jurisdiction over charges of disability discrimination, a complainant is to file with the state agency and, within 300 days of the discriminatory action, file a charge with the EEOC.

If no state agency has jurisdiction over complaints of disability discrimination a complainant must file a charge with the EEOC within 180 days of the discriminatory action.

B. Judicial Enforcement

After 180 days, the charging party is entitled to a right to sue letter from the EEOC or the state agency, allowing the party to sue individually in court. Suit must be filed within 90 days after receiving the letter. The EEOC also can file suit on behalf of a charging party.

C. Remedies

The remedies for violations of Title I of the ADA parallel the remedies available under Title VII of the Civil Rights Act of 1964. ADA, § 107(a). As amended by the Civil Rights Act of 1991, Title VII remedies include:

- Injunctive relief prohibiting the employer's discriminatory practices;
- Reinstatement;
- Backpay, front pay, and restoration of fringe benefits;
- Attorney fees, litigation expenses and costs;
- Compensatory and punitive damages.

Where an employer has engaged in unlawful intentional discrimination, compensatory and punitive damages may be awarded. Compensatory damages include compensation not only for future pecuniary losses, but also for non-pecuniary losses, such as pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

In cases involving the failure of an employer to make a reasonable accommodation, damages may not be awarded if the employer demonstrates a good faith effort to identify and make a reasonable accommodation.

Compensatory and punitive damages are subject to the following statutory limits depending upon the size of the employer:

15 to 100 employees -	$ 50,000
101 to 200 employees -	$ 100,000
201 to 500 employees -	$200,000
More than 500 employees -	$300,000

If a complaining party seeks compensatory or punitive damages, either party may demand a trial by jury.

XI. COORDINATION OF THE ADA WITH FEDERAL AND STATE LAWS

A. The ADA expressly provides that it shall not be construed "to invalidate or limit the remedies, rights, and procedures of any federal law or law of any state or political subdivision of any state or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities that are afforded" by the ADA. 42 U.S.C. § 12,201(a).

B. It is a defense to a charge of discrimination under the ADA that a challenged action is required by another federal law or regulations, or that another federal law prohibits an action that otherwise would be required by the ADA. 29 C.F.R. § 1630.15(e). This defense is not valid if the federal standard does not require the discriminatory action, or if there is another way that an employer can comply with both legal requirements.

C. Relationship to FMLA

1. Coverage under the federal Family and Medical Leave Act ("FMLA") and the ADA will sometimes overlap. A key aspect of the ADA is its requirement that employers reasonably accommodate people with disabilities; often a reasonable accommodation will be time off for treatment of the disability or recovery from a disabling condition.

2. Under the FMLA, eligible employees are entitled to up to 12 weeks per year of time off due to the employee's serious medical condition. Compliance with FMLA in this instance, therefore, may constitute compliance with the ADA's reasonable accommodation requirements. However, under the ADA, an employer may be required to provide more than 12 weeks of unpaid leave, unless this would constitute an undue hardship.

D. State Worker's Compensation Laws

1. The ADA and its requirements supersede any conflicting state worker's compensation laws. Filing a worker's compensation claim does not prevent an injured worker from filing a charge under the ADA despite worker's compensation "exclusivity" clauses. Although a state's workers' compensation law contains an "exclusivity" clause barring all other civil remedies relating to an injury that has been compensated by worker's compensation, this clause does not prohibit a qualified individual with a disability from filing a discrimination charge. EEOC Technical Assistance Manual, § 9.7.

2. There is an important difference in focus between the treatment of disabled persons under a state Workers' Compensation Law and the ADA:

- workers' compensation measures the factors of impairment and an employee's ability to work; the focus is on what employees cannot do;
- the focus under the ADA is on the abilities of employees, i.e., what employees can do;

- the workers' compensation is generally determined by a treating physician, an insurance rater and a workers' compensation board judge based on a pre-set schedule;
- ADA is determined by the employer on a case-by-case basis determined by input from a variety of sources.

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