ADA Amendments Act Compliance Guide

A comprehensive guide to understanding disabilities in the workplace and the legal implications of the ADA Amendments Act (ADAAA).

personnel concepts
EMPLOYER KNOWLEDGE SERIES

ADA Amendments Act Compliance Guide

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Introduction

About this Guidebook / Disclaimer

In 1990, Congress passed the Americans with Disabilities Act into law to provide protection for individuals with disabilities in private employment, public employment, and places of reasonable accommodation. Title I of the Act specifically prohibited employers from discriminating against covered individuals in hiring, firing, promotions, demotions, and other employment actions. The law also required employers to accommodate an individual's disability in the workplace (i.e. the reasonable accommodation obligation) unless such accommodation posed an "undue hardship" on the business.

Since the ADA's enactment, confusion has reigned among affected employers due to the law's oblique definitions of "disability," "reasonable accommodation," and "undue hardship," allowing courts to change the application of the law via judicial interpretation. The agency that enforces Title I of the ADA, the U.S. Equal Employment Opportunity Commission (EEOC), issued numerous guidance documents and outreach materials to help employers navigate the perilous maze of ADA compliance. In recent years, the Supreme Court issued a series of decisions that narrowed the scope of the ADA, making it more difficult for individuals with disabilities or individuals regarded as having disabilities to prevail in lawsuits. (Employers have prevailed over 90% of the time).

Congress took action with the ADA Amendments Act (ADAAA), which was signed into law by President George W. Bush on September 25th, 2008. The EEOC's regulations to implement the equal employment provisions of the ADA Amendments Act are effective as of May 24th, 2011. Among other provisions, the amendment expands the scope of the ADA by overturning the Supreme Court decisions that narrowed the definition of "disability." Under the new law, the definition should be interpreted broadly in order to ensure protection for as many affected individuals as possible. As a result of the changes brought about by the new law, employers are likely to receive more requests for job accommodation and are more vulnerable to court decisions favoring the plaintiff in ADA-related cases.

The purpose of this guidebook is to inform business owners in detail of the changes made by the new amendment so that affected employers can take action to implement the new law into their employment practices. This publication is also intended to summarize recent clarifications and guidance documents released by the EEOC in the last few years addressing such topics as cancer, blindness, deafness, and epilepsy.

Implementation Procedures

The following implementation procedures are intended to provide specific instructions for correctly utilizing the various components of our ADAAA Compliance Kit to meet your obligations under the new amendments. (The amendments took effect January 1st, 2009 and the EEOC's regulations to implement the equal employment provisions of the ADA Amendments Act are effective as of May 24th, 2011.)

1. Read the overview of the Americans with Disabilities Act included in this chapter to review the major provisions of the ADA, which will help you understand the intent and context of the recent amendments to the law.

2. Review the Overview of the ADA Amendments Act included in this chapter to gain a clear understanding of the legal changes made by Congress and signed by the President.

3. Post the "Disability Discrimination" Poster, which was included in this kit, in a conspicuous place where employees can view it during the workday (or wherever notices and employee posters are customarily posted). This exclusive poster is intended to notify employees, supervisors, and managers about their rights and obligations under the ADA, as amended by the ADAAA.

4. Read the EEOC Fact Sheet and FAQs in Chapter 2 to find answers to your basic questions about the new amendments. (Note: You may want to make copies of the Fact Sheet and FAQ for inclusion in the recommended training referenced in step #6 below).

5. Review the "Implications for Employers" overview in Chapter 2 to gain a greater understanding of how the new amendments affect your ADA compliance obligations.

6. Meet with supervisors and managers to train them on the basic provisions of the ADA and the new amendments using the training handouts included with this kit. Emphasize the revised definition of "disability" as included in the Act and make sure they understand the reasonable accommodation obligation under the law.

7. If your workplace anti-discrimination policy or employee handbook makes specific reference to the ADA, review it to determine if it needs to be revised to reflect the new amendment, and make the necessary changes as needed.

8. Refer to the regulatory text of the ADAAA as needed to properly enforce the law in your workplace.

9. When an employee or job applicant requests an accommodation, document the request on the "Request for Accommodation" Forms (EZ-423) included with this kit.

10. As needed, when confronted with an accommodation request, refer to the "Customized Employment Q&A" and the "Information on Reasonable Accommodations" sections of this guidebook, both found in Chapter 5 (Additional Resources). Note: Since "Request

for Accommodation Forms" may include sensitive, protected information about an individual's physical or mental health condition, file these forms separately from your standard personnel records or file them with other confidential medical records.

11. Refer to Chapter 3, "Recent EEOC Guidance Updates," and immediately read any of the topics that may apply to your current workforce, then revisit the section to review the other topics as needed. Also refer back to these guidance updates when you encounter any one of specific physical / mental impairments addressed in this chapter.

12. When a question about an ADA compliance issue arises, refer to the regulatory text of the complete ADA, as amended, in Chapter 4. This section includes the text of the ADA relevant to employment.

13. Read the "Additional Resources" section to understand federal tax incentives and government compliance assistance available to employers covered by the ADA.

14. If you encounter an ADA compliance issue, seek legal advice from a qualified attorney or call your local EEOC district office at 1-800-669-4000. Additionally, you can obtain necessary information by visiting the EEOC's website at www.eeoc.gov.

15. In the event of an EEOC investigation of an alleged case of disability discrimination, ask your legal counsel whether you should provide copies of the training materials and the "Disability Discrimination" poster referenced in step #3 to demonstrate that you made a good faith effort to comply with the law.

An Introduction to the Americans with Disabilities Act (ADA)

The ADA prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.

The ADA prohibits discrimination against qualified individuals with a disability in all employment practices. A qualified individual with a disability is:

- an individual 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.

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA" or "Act"). The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways.

An individual with a disability is a person who:

- has a physical or mental impairment that substantially limits at least one major life activity. The Act expands the definition of "major life activities" by including two non-exhaustive lists:
    - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
    - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- has a record of such an impairment; or
- is believed to have such an impairment.

The Act states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability. This means that people who have successfully managed disabilities, through medication, prosthesis or other means, will still be covered by the ADA. The person must be evaluated as if untreated for their disability.

The Act also clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Reasonable accommodation is a critical component of the ADA. An employer must make a reasonable accommodation for an individual with a disability who is otherwise qualified unless it can show that the accommodation would cause an undue hardship on the operation of its business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Accommodations may include any change in the work environment or in the way things are usually done that result in equal employment opportunity for an individual with a disability. This may include, but is not limited to:

- making existing facilities used by employees readily accessible to and usable by persons with disabilities
- job restructuring
- modification of work schedules
- providing additional unpaid leave
- reassignment to a vacant position
- acquiring or modifying equipment or devices
- adjusting or modifying examinations, training materials, or policies
- providing qualified readers or interpreters

Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation and is generally is not obligated to provide personal use items such as eyeglasses or hearing aids.

Under the Act, employers do not need to provide reasonable accommodations for individuals that are regarded as impaired, who are not actually impaired. Therefore, just because an employee has been regarded as disabled under someone else’s myths or fears, does not make that individual eligible for an accommodation.

Since the definition of the term "disability" under the ADA is tailored to the purpose of eliminating discrimination prohibited by the ADA, it may differ from the definition of "disability" in other laws drafted for other purposes. For example, the definition of a "disabled veteran" is not the same as the definition of an individual with a disability under the ADA. Similarly, an individual might be eligible for disability retirement but not be an individual with a disability under the ADA. Conversely, a person who meets the ADA definition of "disability" might not meet the requirements for disability retirement.

The Act provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor. In other words, if a person is treated adversely because of an actual perceived impairment, that is a violation of the law, regardless of whether the impairment actually limits or is perceived to limit a major life activity.

When analyzing the degree of limitation, the determination of whether an impairment substantially limits a major life activity can be made only with reference to a specific individual.

The issue is whether an impairment substantially limits any of the major life activities of the person in question, not whether the impairment is substantially limiting in general.

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

(1) The nature and severity of the impairment;

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

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

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

- satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The ADA does not interfere with an employer's right to hire the best qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits from discriminating against a qualified applicant or employee because of their disability. 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. The employer must also consider if the individual could meet the standard with a reasonable accommodation and whether the job function that the disabled individual cannot perform is a marginal function or an essential function.

The ADA does not restrict an employer's authority to establish needed job qualifications such as education, skills, physical or mental abilities, or other job related requirements such as judgment, ability to work under pressure and interpersonal skills. However, as with other job qualification standards, if a physical or mental qualification standard screens out and individual with a disability or a class of individuals with disabilities, the employer must be prepared to show that the standard is:

1. Job related

2. Consistent with business necessity

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination 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.

An employer may require that an individual not pose a “direct threat” to the health or safety of themselves or others. A health or safety risk can only be considered if it is “a significant risk of substantial harm.” An assessment of direct threat must be based strictly on valid medical analysis and/or objective evidence, 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.

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

ADA Amendments Act and Final EEOC Regulations

Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. The law made a number of significant changes to the definition of "disability" under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The EEOC issued a Notice of Proposed Rulemaking (NPRM) on September 23, 2009. The final regulations were approved by a bipartisan vote and were published in the Federal Register on March 25, 2011.

In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, and epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

The EEOC regulations implement the ADAAA -- in particular, Congress's mandate that the definition of disability be construed broadly. Following the ADAAA, the regulations keep the ADA's definition of the term "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the regulations implement the significant changes that Congress made regarding how those terms should be interpreted.

The regulations implement Congress's intent to set forth predictable, consistent, and workable standards by adopting "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction are derived directly from the statute and legislative history and include the following:

- **The term "substantially limits" requires a lower degree of functional limitation than the standard previously applied by the courts**. An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.
- **The term "substantially limits" is to be construed broadly** in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity **requires an individualized assessment**, as was true prior to the ADAAA.
- With one exception ("ordinary eyeglasses or contact lenses"), the determination of whether an impairment substantially limits a major life activity shall be made **without regard to the ameliorative effects of mitigating measures**, such as medication or hearing aids.
- **An impairment that is episodic or in remission is a disability** if it would substantially limit a major life activity when active.

- In keeping with Congress's direction that the primary focus of the ADA is on whether discrimination occurred, **the determination of disability should not require extensive analysis**.

As required by the ADAAA, the regulations also make it easier for individuals to establish coverage under the "regarded as" part of the definition of "disability." As a result of court interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than on what an employer may have believed about the nature of the person's impairment.

The regulations clarify, however, that an individual must be covered under the first prong ("actual disability") or second prong ("record of disability") in order to qualify for a reasonable accommodation . The regulations clarify that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer's failure to provide a reasonable accommodation.

The final regulations differ from the NPRM in a number of ways. The final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC. For example:

- Instead of providing a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying those principles, **there will be some impairments that virtually always constitute a disability.** The regulations also provide examples of impairments that should easily be concluded to be disabilities, **including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder**.
- **Language in the NPRM describing how to demonstrate that an individual is substantially limited in "working" has been deleted from the final regulations and moved to the appendix** (consistent with how other major life activities are addressed). The final regulations also retain the existing familiar language of "class or broad range of jobs" rather than introducing a new term, and they provide examples of individuals who could be considered substantially limited in working.
- **The final regulations retain the concepts of "condition, manner, or duration"** that the NPRM had proposed to delete and explain that while consideration of these factors may be unnecessary to determine whether an impairment substantially limits a major life activity, they may be relevant in certain cases.

Questions and Answers on the Final Rule Implementing the ADA Amendments Act

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of "disability." It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The final regulations were published in the Federal Register on March 25, 2011.

The EEOC is making changes to both the Title I ADA regulations and to the Interpretive Guidance (also known as the Appendix) that was published with the original ADA regulations. The Appendix provides further explanation on how the regulations should be interpreted.

The questions and answers below provide information on the changes made to the regulations as a result of the ADAAA and identify certain regulations that remain the same. The answers below also note where the final regulations differ from what appeared in the Notice of Proposed Rulemaking (NPRM) that was published September 23, 2009. Finally, answers to certain questions provide citations to specific sections of the final regulations and the corresponding section of the Appendix (29 C.F.R. section 1630).

1. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?

No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

2. What is the purpose of the ADAAA?

Among the purposes of the ADAAA is the reinstatement of a "broad scope of protection" by expanding the definition of the term "disability." Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA's definition of "disability." Yet, Congress thought that individuals with these and other impairments should be covered. The ADAAA explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the EEOC regulations that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA and EEOC's final regulations, it will be much easier for individuals seeking the law's protection to demonstrate that they meet the definition of "disability." As a result, many more ADA claims will focus on the merits of the case.

3. Do all of the changes in the ADAAA apply to other titles of the ADA and provisions of the Rehabilitation Act prohibiting disability discrimination by federal agencies, federal contractors, and recipients of federal financial assistance?

Yes. The ADAAA specifically states that all of its changes also apply to:

- section 501 of the Rehabilitation Act (federal employment),
- section 503 of the Rehabilitation Act (federal contractors), and
- section 504 of the Rehabilitation Act (recipients of federal financial assistance and services and programs of federal agencies).

The changes to the definition of disability also apply to all of the ADA's titles, including Title II (programs and activities of State and local government entities) and Title III (private entities that are considered places of public accommodation). A few provisions of the ADAAA affect only the portions of the ADA and the Rehabilitation Act concerning employment, such as a provision that requires covered entities to show that qualification standards that screen out individuals based on uncorrected vision are job-related and consistent with business necessity, and changes to the general prohibition of discrimination in § 102 of the ADA.

The EEOC's final regulations apply to Title I of the ADA and section 501 of the Rehabilitation Act, but they do not apply to Titles II and III of the ADA, or sections 503 and 504 of the Rehabilitation Act.

4. Who is required to comply with these regulations?

These regulations apply to all private and state and local government employers with 15 or more employees, employment agencies, labor organizations (unions), and joint labor-management committees. [Section 1630.2(b)] Additionally, section 501 of the Rehabilitation Act applies to federal executive branch agencies regardless of the number of employees they have. The use of the term "covered entity" in this Q&A and the Appendix refers to all such entities.

5. How does the ADAAA define "disability?"

The ADAAA and the final regulations define a disability using a three-pronged approach:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"), or
- a record of a physical or mental impairment that substantially limited a major life activity ("record of"), or
- when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as"). [Section 1630.2(g)]

6. Must individuals use a particular prong of the definition of disability when challenging a covered entity's actions?

Not necessarily. Claims for denial of reasonable accommodation must be brought under one or both of the first two prongs of the definition of disability (i.e., an actual disability and/or a record of a disability) since the ADAAA specifically states that those covered under only the "regarded as" definition are not entitled to reasonable accommodation. While other types of allegations (e.g., failure to hire or promote, termination, harassment) may be brought under any of the definitions, an individual may find it easier to claim coverage under the "regarded as" definition of disability. An individual only has to meet one of the three prongs of the definition of "disability." [Section 1630.2(g)(3) and Appendix Section 1630.2(g)]

7. How do the regulations define the term "physical or mental impairment"?

The regulations define "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. They also cover any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. [Section 1630.2(h)]

The definition of "impairment" in the new regulations is almost identical to the definition in EEOC's original ADA regulations, except that the immune and circulatory systems have been added to the list of body systems that may be affected by an impairment, because these systems are specifically mentioned in the ADAAA's examples of major bodily functions. (See Question 8.)

8. What are "major life activities?"

The final regulations provide a non-exhaustive list of examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Most of these examples are taken from the ADAAA, which in turn adopted them from the original ADA regulations and EEOC guidances, or from ADA and Rehabilitation Act case law.

The final regulations also state that major life activities include the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Although not specifically stated in the NPRM, the final regulations state that major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

As a result of the ADAAA's recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability. (For examples

of impairments affecting major bodily functions that should easily be concluded to meet the first or second part of the definition of "disability," see Question 19.)

9. When does an impairment "substantially limit" a major life activity?

To have an "actual" disability (or to have a "record of" a disability) an individual must be (or have been) substantially limited in performing a major life activity as compared to most people in the general population. Consistent with the ADAAA, the final regulations adopt "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction include the following:

- An impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.
- The term "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
- In keeping with Congress' direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.
- Although determination of whether an impairment substantially limits a major life activity as compared to most people will not usually require scientific, medical, or statistical evidence, such evidence may be used if appropriate.
- An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of "disability."

Other rules of construction are discussed in more detail in Questions 10-17. [Section 1630.2(j)(1)(i-v) and (viii)]

10. Do the final regulations require that an impairment last a particular length of time to be considered substantially limiting?

No. As discussed in Question 25, the ADAAA excludes from "regarded as" coverage an actual or perceived impairment that is both transitory (i.e., will last fewer than six months) and minor. However, neither the ADAAA nor the final regulations apply this exception found in the "regarded as" definition of disability to the other two definitions of disability. One of the "rules of construction" states that the effects of an impairment lasting fewer than six months can be substantially limiting. [Section 1630.2(j)(1)(ix)]

11. Can impairments that are episodic or in remission be considered disabilities?

Yes. The ADAAA and the final regulations specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only

substantially limit a major life activity when the impairment is active. The Appendix provides examples of impairments that may be episodic, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the final regulations. [Section 1630.2(j)(1)(vii) and corresponding Appendix section]

12. What are mitigating measures?

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA and the final regulations provide a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications. In addition, the final regulations add psychotherapy, behavioral therapy, and physical therapy to the ADAAA's list of examples. [Section 1630.2(j)(5)]

13. May the positive effects of mitigating measures in limiting the impact of an impairment on performance of a major life activity be considered when determining whether someone has a disability?

No, except for ordinary eyeglasses or contact lenses (see Question 14). The ADAAA and the final regulations direct that the positive (or ameliorative) effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using a mitigating measure. [Section 1630.2(j)(1)(vi) and corresponding Appendix section]

14. Does the rule concerning mitigating measures apply to people whose vision is corrected with ordinary eyeglasses or contact lenses?

No. "Ordinary eyeglasses or contact lenses" – defined in the ADAAA and the final regulations as lenses that are "intended to fully correct visual acuity or to eliminate refractive error" – must be considered when determining whether someone has a disability. For example, a person who wears ordinary eyeglasses for a routine vision impairment is not, for that reason, a person with a disability under the ADA. The regulations do not establish a specific level of visual acuity for determining whether eyeglasses or contact lenses should be considered "ordinary." This determination should be made on a case-by-case basis in light of current and objective medical evidence. [Sections 1630.2(j)(1)(vi) and (j)(6) and corresponding Appendix sections]

15. May the negative effects of a mitigating measure be taken into account in determining whether an individual meets the definition of "disability?"

Yes. The ADAAA allows consideration of the negative effects of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity. However, it will often be unnecessary to consider the non-ameliorative effects of mitigating measures in order to determine whether an individual has a disability. For example, it is unnecessary to consider the burdens associated with receiving dialysis treatment for someone whose kidney function would be substantially limited without this treatment. [Section 1630.2(j)(4)(ii)]

16. May the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to reasonable accommodation or poses a direct threat?

Yes. The ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." All other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat – can take into account both the positive and negative effects of a mitigating measure. The negative effects of mitigating measures may include side effects or burdens that using a mitigating measure might impose. For example, someone with diabetes may need breaks to take insulin and monitor blood sugar levels, and someone with kidney disease may need a modified work schedule to receive dialysis treatments. On the other hand, if an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, a covered entity will have no obligation to provide one.

17. Can a covered entity require that an individual use a mitigating measure?

No. A covered entity cannot require an individual to use a mitigating measure. However, failure to use a mitigating measure may affect whether an individual is qualified for a particular job or poses a direct threat. [Appendix Section 1630.2(j)(1)(vi)]

18. After an individualized assessment is done, are there certain impairments that will virtually always be found to result in substantial limitation in performing certain major life activities?

Yes. Certain impairments, due to their inherent nature and the extensive changes Congress made to the definitions of "major life activities" and "substantially limits," will virtually always be disabilities. (See Questions 8-11 and 13.) For these impairments, the individualized assessment should be particularly simple and straightforward.

19. Do the regulations give any examples of specific impairments that will be easily concluded to substantially limit a major life activity?

Yes. The regulations identify examples of specific impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the

impairments substantially limit. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring 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. [Section 1630.2(j)(3)]

20. May the condition, manner, or duration under which a major life activity can be performed be considered in determining whether an impairment is a disability?

Yes. The Commission did not include the concepts of "condition, manner, or duration" (used in the original ADA regulations published in 1991) in the NPRM, believing that use of the terms might lead to the kind of excessive focus on the definition of "disability" that Congress sought to avoid. In response to comments on behalf of both employers and individuals with disabilities, however, we have included the concepts of condition, manner, or duration (where duration refers to the length of time it takes to perform a major life activity or the amount of time the activity can be performed) in the final regulations as facts that may be considered if relevant. But, with respect to many impairments, including those that should easily be concluded to be disabilities (see Question 19), it may be unnecessary to use these concepts to determine whether the impairment substantially limits a major life activity.

Assessing the condition, manner, or duration under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. [Section 1630.2(j)(4)(i) and (ii) and corresponding Appendix section]

21. When is someone substantially limited in the major life activity of working?

In certain situations, an impairment may limit someone's ability to perform some aspect of his or her job, but otherwise not substantially limit any other major life activity. In these situations, the individual may be substantially limited in working. However, with all of the changes made by the ADAAA, in particular the inclusion of major bodily functions as major life activities and revisions to the "regarded as" prong of the definition of "disability," it should generally be unnecessary to determine whether someone is substantially limited in working. [Appendix Section 1630.2(j)]

The final regulations, unlike the NPRM, do not mention the major life activity of working other than by its inclusion in the list of major life activities (see Question 8). However, the Appendix discusses how to determine substantial limitation in a number of major life activities, including working. The Appendix discussion of working, unlike the NPRM, states that substantial limitation in this major life activity will be made with reference to difficulty performing either a "class or broad range of jobs in various classes" rather than a "type of work." The Appendix also notes that a "class" of work may be determined by reference to the nature of the work (e.g., commercial truck driving or assembly line jobs), or by reference to job-related requirements that an individual is limited in meeting (e.g., jobs requiring extensive walking, prolonged standing, and repetitive or heavy lifting). Demonstrating a substantial limitation in performing

the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.

22. Does the ADA still exclude from coverage a person who is illegally using drugs?

Yes. The ADAAA did not make changes to the part of the ADA that excludes from coverage a person who currently engages in the illegal use of drugs when a covered entity acts on the basis of such use. However, the ADA also still says that a person who no longer engages in the illegal use of drugs may be an individual with a disability if he or she:

- has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or
- is participating in a supervised rehabilitation program (e.g., Alcoholics Anonymous or Narcotics Anonymous). [Section 1630.3(a)-(b)]

23. Is pregnancy a disability under the ADAAA?

No. Pregnancy is not an impairment and therefore cannot be a disability. Certain impairments resulting from pregnancy (e.g., gestational diabetes), however, may be considered a disability if they substantially limit a major life activity, or if they meet one of the other two definitions of disability discussed below. [Appendix Section 1630.2(h)]

24. When does an individual have a "record of" a disability?

An individual who does not currently have a substantially limiting impairment but who had one in the past meets this definition of "disability." An individual also can meet the "record of" definition of disability if she was once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not).

All of the changes to the first definition of disability discussed in the questions above – including the expanded list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic impairments or those in remission may be disabilities, and the requirement to disregard the positive effects of mitigating measures – will apply to evaluating whether an individual meets the "record of" definition of disability. [Section 1630.2(k) and corresponding Appendix section]

25. What does it mean for a covered entity to "regard" an individual as having a disability?

Under the ADAAA and the final regulations, a covered entity "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the covered entity believes the individual has, unless the impairment is transitory (lasting or expected to last for six months or less) and minor. This new formulation of "regarded as" having a disability is different from the original ADA formulation, which required an individual seeking coverage under this part of the definition to show that a covered entity believed the individual's impairment (or perceived impairment) substantially limited performance of a major life activity. [Section 1630.2(*l*)(1)]

A covered entity will regard an individual as having a disability any time it takes a prohibited action against the individual because of an actual or perceived impairment, regardless of whether the covered entity asserts, or even ultimately establishes, a defense for its action. As discussed in Question 26, the legality of the covered entity's actions is a separate inquiry into the merits of the claim. [Section 1630.2(*l*)(2)]

The final regulations state that a covered entity may challenge a claim under the "regarded as" prong by showing that the impairment in question, whether actual or perceived, is both transitory and minor. In other words, whether the impairment in question is transitory and minor is a defense available to covered entities. However, a covered entity may not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not the case. For example, an employer that fires an employee because he has bipolar disorder, or an employment agency that refuses to refer an applicant because he has bipolar disorder, cannot assert that it believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and minor. [Section 1630.15(f) and corresponding Appendix section]

26. If a covered entity regards an individual as having a disability, does that automatically mean the covered entity has discriminated against the individual?

No. The fact that a covered entity's action may have been based on an impairment does not necessarily mean that a covered entity engaged in unlawful discrimination. For example, an individual still needs to be qualified for the job he or she holds or desires. Additionally, in some instances, a covered entity may have a defense to an action taken on the basis of an impairment, such as where a particular individual would pose a direct threat or where the covered entity's action was required by another federal law (e.g., a law that prohibits individuals with certain impairments from holding certain kinds of jobs). As under current law, a covered entity will be held liable only when an individual proves that the entity engaged in unlawful discrimination under the ADA. [Sections 1630.2(*l*)(3) and 1630.2(o)(4), and Appendix Sections 1630.2(*l*) and (o)]

27. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?

Yes. Individuals must meet either the "actual" or "record of" definitions of disability to be eligible for a reasonable accommodation. Individuals who *only* meet the "regarded as" definition are not entitled to receive reasonable accommodation. Of course, coverage under the "actual" or "record of" definitions does not, alone, entitle a person to a reasonable accommodation. An individual must be able to show that the disability, or past disability, requires a reasonable accommodation. [Sections 1630.2(k)(3), 1630.2(o)(4), 1630.9(e)]

28. What do the final regulations say about qualification standards based on uncorrected vision?

The ADAAA and the final regulations require that a covered entity show that a challenged qualification standard based on uncorrected vision is job-related and consistent with business necessity. An individual challenging the legality of an uncorrected vision standard need not be a person with a disability, but the individual must have been adversely affected by the standard.

The Appendix notes that individuals who are screened out of a job because they cannot meet an uncorrected vision standard will usually meet the "regarded as" definition of disability. [Section 1630.10(b) and corresponding Appendix section]

29. Does the ADAAA change the definitions of "qualified," "direct threat," "reasonable accommodation," and "undue hardship," or does it change who has the burden of proof in demonstrating any of these requirements?

No. Nearly all of the ADAAA's changes only affect the definition of "disability." None of the key ADA terms listed in this Question, or the burdens of proof applicable to each one, have changed. The only provision in the ADAAA affecting the reasonable accommodation obligation is that a covered entity does not have to provide one to an individual who only meets the "regarded as" definition of disability.

30. Why do the regulations no longer refer to a "qualified individual with a disability"?

Consistent with the ADAAA, the final regulations now refer to "individual with a disability" and "qualified individual" as separate terms. They also now prohibit discrimination "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." The changes to the regulations reflect changes made by the ADAAA itself, which are intended to make the primary focus of an ADA inquiry whether discrimination occurred, not whether an individual meets the definition of "disability." However, an individual must still establish that he or she is qualified for the job in question. [Section 1630.4 and the Introduction to the Appendix]

31. Do any of the ADAAA's changes affect workers' compensation laws or Federal and State disability benefit programs?

No. The ADAAA and the final regulations specifically state that no changes alter the standards for determining eligibility for benefits under State workers' compensation laws or under Federal and State disability benefit programs. [Section 1630.1(c)(3) and corresponding Appendix section]

32. May a non-disabled individual bring an ADA claim of discrimination for being denied an employment opportunity or a reasonable accommodation because of lack of a disability?

No. The ADA does not protect an individual who is denied an employment opportunity or a reasonable accommodation because she does not have a disability. [Section 1630.4(b) and corresponding Appendix section]

33. Will the EEOC be updating all of the ADA-related publications on its website to be consistent with the final ADAAA regulations?

Yes. When EEOC updates a particular document, we will note this on our website and explain what changes were made to the document. To avoid misunderstanding, all of these documents currently contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law. It should be noted that because the ADAAA focused

almost exclusively on changing the definition of "disability," content in these documents unrelated to the definition of "disability" – including the meaning of qualified, essential functions, reasonable accommodation, and direct threat – remains unaffected by the ADAAA and the final regulations. Therefore, individuals can continue to rely on these parts of the documents as reflecting current law.

Summary of Key Provisions

Basic Definition of "Disability"

- The basic three-part ADA definition is retained: a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. However, the meaning of these terms has changed.

Rules Used to Determine Whether Someone Has a "Disability"

- An impairment need not prevent, or significantly or severely restrict, performance of a major life activity to be "substantially limiting."
- Disability "shall be construed in favor of broad coverage" and "should not require extensive analysis."
- An individual's ability to perform a major life activity is compared to "most people in the general population," often using a common-sense analysis without scientific or medical evidence.
- An impairment need not substantially limit more than one major life activity.

Major Life Activities (MLAs)

- MLAs include "major bodily functions," such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.
- MLAs also include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working.

Mitigating Measures

- Positive effects of mitigating measures (except for ordinary eyeglasses and contact lenses) are ignored in determining whether an impairment is substantially limiting.
- Examples of mitigating measures include medication, medical equipment and devices, prosthetics, hearing aids, cochlear implants and other implantable hearing devices, low vision devices, mobility devices, oxygen therapy, use of assistive technology, reasonable accommodations and auxiliary aids or services, behavioral or neurological modifications, and surgical interventions that do not permanently eliminate an impairment.
- Ordinary eyeglasses and contact lenses are lenses "intended to fully correct visual acuity or eliminate refractive error."

Impairments that Are Episodic or in Remission

- An impairment that is "episodic" or "in remission" is a disability if it would substantially limit a major life activity when active. Examples of impairments that are episodic or in remission

include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia, and cancer.

Examples Illustrating Definition of Disability

- *Impairments for which an individualized assessment "can be conducted quickly and easily, and that **will consistently result in a determination that the person is substantially limited in a major life activity**"*: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.
- *Impairments that **may be substantially limiting for some individuals but not for others**, and therefore may require somewhat more, though still not extensive, analysis:* asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism.
- *Temporary, non-chronic impairments of short duration with little or no residual effects that **usually will not substantially limit** a major life activity*: common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies.
- However, an impairment may still be substantially limiting even if it lasts or is expected to last fewer than 6 months, such as a 20-pound lifting restriction lasting several months.

Substantially Limited in Working

- An individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working.
- Replaces "class" or "broad range" of jobs with the concept of a "type of work."
- A type of work may be identified by the nature of the work (e.g., commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs).
- A type of work may also be defined by reference to job-related requirements (e.g., jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing).

"Regarded As"

- Employer regards an individual as having a disability if it takes a prohibited action based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor. For example, taking an adverse employment action based on a sprained wrist and broken leg expected to heal normally does not amount to regarding an individual as having a disability, because these impairments are transitory and minor. Taking an adverse action based on carpal tunnel syndrome or Hepatitis C, or on a 2-day virus that an employer perceived to be heart disease, would amount to regarding an individual as having a disability.
- Actions taken on the basis of an impairment's symptoms (e.g., a facial tic related to Tourette's Syndrome) or an individual's use of mitigating measures (anti-seizure medication for epilepsy) are actions taken on the basis of an impairment.

- Reasonable accommodation is not available to someone only covered under the "regarded as" prong of the definition of "disability."

Uncorrected Vision Standards

- Employer must show challenged uncorrected vision qualification standards are job-related and consistent with business necessity, regardless of whether the person challenging the standard has a disability.

Implications for Employers

The passage of the ADA Amendments Act of 2008 (ADAAA) carries significant implications for employers, as the amended law protects more individuals and makes it easier for covered individuals to successful sue their employers for violations of the law. As the protections afforded to employees are significantly expanded under the ADAAA, more requests for reasonable accommodations are likely to follow, as a broader segment of the affected population now has the right to request job accommodations.

Under the ADAAA, litigation will no longer favor the employer as heavily as it has in the past with more than 90% of past ADA lawsuits settling in their favor. The emphasis of ADA cases will shift away from whether plaintiffs are disabled and lean toward questions of whether employers have complied with the law. Employers can anticipate litigation of more challenging issues such as defending their compliance with provisions relating to "reasonable accommodation," "undue hardship" and "essential job functions". Employers can also expect to see an increase in "regarded as" claims in light of the ADAAA's lower evidentiary standard for proving these claims.

Now that the final regulations have been approved and published in the Federal Register (March 25, 2011), employers should take the following steps:

- Review and revise their EEO policies and procedures to ensure compliance with the Act.
- Consider training for supervisors and HR professionals on the changes in law.
- Develop a new awareness of the expanded group of workers protected by the ADA and promote increased understanding the interactive process required for considering and reacting to requests for reasonable accommodations.
- Document compliance actions, including any accommodations made or those requests that were rejected under the "undue hardship" defense.
- Implement standardized forms and template response to ensure consistency and fairness.
- Reassess their job descriptions, as these are generally a focus point of discerning an employee's ability to perform a job function.
- Implement a formalized process for employees to request accommodations and a procedure for reviewing and responding to such requests.
- Develop processes to evaluate the effectiveness of job accommodations and make changes where necessary. Forms and template responses may aid the employer in consistency and fairness. As always, it is important to keep detailed records should the need arise to mitigate claims of discrepancy.
- Consider the Act's implications on related workplace policies and laws, including FMLA leave and workers' compensation.
- Consult with an attorney or contact the EEOC for guidance when confronting a difficult ADA-related issue.

ADA Amendments Act of 2008

Regulatory Text

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

1. Revise the authority citation for 29 CFR part 1630 to read as follows:

Authority: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

2. Revise Sec. 1630.1 to read as follows:

Sec. 1630.1 Purpose, applicability, and construction.

(a) Purpose. The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101, et seq., requiring equal employment opportunities for individuals with disabilities. The ADA as amended, and these regulations, are intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination.

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

(c) Construction--(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790-794a, as amended), or the regulations issued by Federal agencies pursuant to that title.

(2) Relationship to other laws. This part does not 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 than is afforded by this part.

(3) State workers' compensation laws and disability benefit programs. Nothing in this part alters the standards for determining eligibility for benefits under State workers' compensation laws or under State and Federal disability benefit programs.

(4) Broad coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

3. Amend Sec. 1630.2 as follows:

a. Revise paragraphs (g) through (m).
b. In paragraph (o)(1)(ii), remove the words "a qualified individual with a disability" and add, in their place, "an individual with a disability who is qualified".
c. In paragraph (o)(3), remove the words "the qualified individual with a disability" and add, in their place, "the individual with a disability".
d. Add paragraph (o)(4).

The revisions and additions read as follows:

Sec. 1630.2 Definitions.

* * * * *

(g) Definition of "disability."

(1) In general. Disability means, with respect to an individual--

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

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Note to paragraph (g): See Sec. 1630.3 for exceptions to this definition.

(h) Physical or mental impairment means--

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major life activities--(1) In general. Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA Section 2(b)(4) (Findings and Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

(j) Substantially limits--

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in Sec. 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) Non-applicability to the "regarded as" prong. Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Predictable assessments--(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder,

bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) Condition, manner, or duration--

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the “actual disability” or “record of” prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) Examples of mitigating measures--Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services” (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) Ordinary eyeglasses or contact lenses--defined. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(k) Has a record of such an impairment--

(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

(3) Reasonable accommodation. An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past

disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider.

(l) "Is regarded as having such an impairment." The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in Sec. 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

(2) Except as provided in Sec. 1630.15(f), an individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

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

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

* * * * *

4. Revise Sec. 1630.4 to read as follows:

Sec. 1630.4 Discrimination prohibited.

(a) In general--(1) It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual in regard to:

(i) Recruitment, advertising, and job application procedures;

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(iii) Rates of pay or any other form of compensation and changes in compensation;

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(v) Leaves of absence, sick leave, or any other leave;

(vi) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(vii) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(viii) Activities sponsored by a covered entity, including social and recreational programs; and

(ix) Any other term, condition, or privilege of employment.

(2) The term discrimination includes, but is not limited to, the acts described in Sec. Sec. 1630.4 through 1630.13 of this part.

(b) Claims of no disability. Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an

individual with a disability was granted an accommodation that was denied to an individual without a disability.

5. Amend Sec. 1630.9 as follows:
a. Revise paragraph (c).
b. In paragraph (d), in the first sentence, remove the words “A qualified individual with a disability” and add, in their place, the words “An individual with a disability”.
c. In paragraph (d), in the last sentence, remove the words “a qualified individual with a disability” and add, in their place, the word “qualified”.
d. Add paragraph (e).
The revisions and additions read as follows:

Sec. 1630.9 Not making reasonable accommodation.

* * * * *

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 507 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

* * * * *

(e) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong (Sec. 1630.2(g)(1)(i)), or “record of” prong (Sec. 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (Sec. 1630.2(g)(1)(iii)).

6. Revise Sec. 1630.10 to read as follows:

Sec. 1630.10 Qualification standards, tests, and other selection criteria.

(a) In general. It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.
(b) Qualification standards and tests related to uncorrected vision. Notwithstanding Sec. 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An 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, but must be adversely affected by the application of the standard, test, or other criterion.

7. Amend Sec. 1630.15 by redesignating paragraph (f) as paragraph (g), and adding new paragraph (f) to read as follows:

Sec. 1630.15 Defenses.

* * * * *

(f) Claims based on transitory and minor impairments under the “regarded as” prong. It may be a defense to a charge of discrimination by an individual claiming coverage under the “regarded as” prong of the definition of disability that the impairment is (in the case of an

actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor." Whether the impairment at issue is or would be "transitory and minor" is to be determined objectively. A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.

* * * * *

8. Amend Sec. 1630.16(a) by removing from the last sentence the word "because" and adding, in its place, the words "on the basis".

* * * * *

9. Amend the Appendix to Part 1630 as follows:
A. Remove the "Background."
B. Revise the "Introduction."
C. Add "Note on Certain Terminology Used" after the "Introduction."
D. Revise Sec. 1630.1.
E. Revise Sections 1630.2(a) through (f).
F. Revise Sec. 1630.2(g).
G. Revise Sec. 1630.2(h).
H. Revise Sec. 1630.2(i).
I. Revise Sec. 1630.2(j).
J. Add Sec. 1630.2(j)(1), 1630.2(j)(3), 1630.2(j)(4), and 1630.2(j)(5) and (6).
K. Revise Sec. 1630.2(k).
L. Revise Sec. 1630.2(l).
M. Amend Sec. 1630.2(m) by revising the heading and first sentence.
N. Amend Sec. 1630.2(o) as follows:
i. Remove the first paragraph and add, in its place, three new paragraphs.
ii. Remove the words "a qualified individual with a disability" wherever they appear and add, in their place, "an individual with a disability".
iii. Remove the words "the qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".
O. Revise Sec. 1630.4.
P. Amend Sec. 1630.5 by revising the first paragraph.
Q. Amend Sec. 1630.9 as follows:
i. Remove the words "a qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".
ii. Remove the words "the qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".
iii. Add new Sec. 1630.9(e) after existing Sec. 1630.9(d).
R. Revise Sec. 1630.10.
S. Amend Sec. 1630.15 by adding new Sec. 1630.15(f) after existing Sec. 1630.15(e).
T. Amend Sec. 1630.16(a) by removing, in the last sentence, the words "qualified individuals with disabilities" and adding, in their place, "individuals with disabilities who are qualified and".
U. Amend Sec. 1630.16(f) by removing, in the last paragraph, the words "a qualified individual with a disability" and adding, in their place, "an individual with a disability who is qualified".

The revisions and additions read as follows:

Appendix to Part 1630--Interpretive Guidance on Title I of the Americans With Disabilities Act

Introduction

The Americans with Disabilities Act (ADA) is a landmark piece of civil rights legislation signed into law on July 26, 1990, and amended effective January 1, 2009. See 42 U.S.C. 12101 et seq., as amended. In passing the ADA, Congress recognized that "discrimination against individuals with disabilities continues to be a serious and pervasive social problem" and that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. 12101(a)(2), (8). Discrimination on the basis of disability persists in critical areas such as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, access to public services, and employment. 42 U.S.C. 12101(a)(3). Accordingly, the ADA prohibits discrimination in a wide range of areas, including employment, public services, and public accommodations.

Title I of the ADA prohibits disability-based discrimination in employment. The Equal Employment Opportunity Commission (the Commission or the EEOC) is responsible for enforcement of title I (and parts of title V) of the ADA. Pursuant to the ADA as amended, the EEOC is expressly granted the authority and is expected to amend these regulations. 42 U.S.C. 12205a. Under title I of the ADA, covered entities may not discriminate against qualified individuals on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. 42 U.S.C. 12112(a). For these purposes, "discriminate" includes (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicants or employees to discrimination; (3) utilizing standards, criteria, or other methods of administration that have the effect of discrimination on the basis of disability; (4) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity; (5) denying employment opportunities to a job applicant or employee who is otherwise qualified, if such denial is based on the need to make reasonable accommodation; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criterion is shown to be job related for the position in question and is consistent with business necessity; and (7) subjecting applicants or employees to prohibited medical inquiries or examinations. See 42 U.S.C. 12112(b), (d).

As with other civil rights laws, individuals seeking protection under these anti-discrimination provisions of the ADA generally must allege and prove that they are members of the "protected class." \1\ Under the ADA, this typically means they have to show that they meet the statutory definition of "disability." 2008 House Judiciary Committee Report at 5. However, "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." Id.

\1\ Claims of improper disability-related inquiries or medical examinations, improper disclosure of confidential medical information, or retaliation may be brought by any applicant or employee, not just individuals with disabilities. See, e.g., Cossette v. Minnesota Power & Light, 188 F.3d 964, 969-70 (8th Cir. 1999); Fredenburg v. Contra Costa County Dep't of Health Servs., 172 F.3d 1176, 1182 (9th Cir. 1999); Griffin v. Steeltek, Inc., 160 F.3d 591, 594 (10th Cir. 1998). Likewise, a nondisabled applicant or employee may challenge an employment action that is based on the disability of an individual with whom the applicant or employee is known to have a relationship or association. See 42 U.S.C. 12112(b)(4).

In the original ADA, Congress defined "disability" as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12202(2). Congress patterned these three parts of the definition of disability--the "actual," "record of," and "regarded as" prongs--after the definition of "handicap" found in the Rehabilitation Act of 1973. 2008 House Judiciary Committee Report at 6. By doing so, Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term "disability" as used in the ADA. H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 27 (1990) (1990 House Judiciary Report or House Judiciary Report); see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) (1989 Senate Report or Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50 (1990) (1990 House Labor Report or House Labor Report). Congress expected that the definition of disability and related terms, such as "substantially limits" and "major life activity," would be interpreted under the ADA "consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act"--i.e., expansively and in favor of broad coverage. ADA Amendments Act of 2008 (ADAAA or Amendments Act) at Section 2(a)(1)-(8) and (b)(1)-(6) (Findings and Purposes); see also Senate Statement of the Managers to Accompany S. 3406 (2008 Senate Statement of Managers) at 3 ("When Congress passed the ADA in 1990, it adopted the functional definition of disability from section 504 of the Rehabilitation Act of 1973, in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred."); 2008 House Judiciary Committee Report at 6 & n.6 (noting that courts had interpreted this Rehabilitation Act definition "broadly to include persons with a wide range of physical and mental impairments").

That expectation was not fulfilled. ADAAA Section 2(a)(3). The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect. Id. For example, in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In Sutton, the Court also adopted a restrictive reading of the meaning of being "regarded as" disabled under the ADA's definition of disability. Subsequently, in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), the Court held that the terms "substantially" and "major" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled" under the ADA, and that to be substantially limited in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA. See 2008 Senate Statement of Managers at 3 ("After the Court's decisions in Sutton that impairments must be considered in their mitigated state and in Toyota that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred."). Congress concluded that these rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and coupled with the EEOC's 1991 ADA regulations which had defined the term "substantially limits" as "significantly restricted," unduly precluded many individuals from being covered under the ADA. Id.--("[t]hus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard" and "[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA").

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators and stakeholders, including representatives of the disability, business, and education communities. See Statement of Representatives Hoyer and Sensenbrenner, 154 Cong. Rec. H8294-96 (daily ed. Sept. 17, 2008) (Hoyer-Sensenbrenner Congressional Record Statement); Senate Statement of Managers at 1. The express purposes of the ADAAA are, among other things:

(1) To carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection under the ADA;
(2) To reject the requirement enunciated in Sutton and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
(3) To reject the Supreme Court's reasoning in Sutton with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
(4) To reject the standards enunciated by the Supreme Court in Toyota that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
(5) To convey congressional intent that the standard created by the Supreme Court in Toyota for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA;
(6) To convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
(7) To express Congress' expectation that the EEOC will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with the ADA as amended.

ADAAA Section 2(b). The findings and purposes of the ADAAA "give[] clear guidance to the courts and * * * [are] intend[ed] to be applied appropriately and consistently." 2008 Senate Statement of Managers at 5.

The EEOC has amended its regulations to reflect the ADAAA's findings and purposes. The Commission believes that it is essential also to amend its appendix to the original regulations at the same time, and to reissue this interpretive guidance as amended concurrently with the issuance of the amended regulations. This will help to ensure that individuals with disabilities understand their rights, and to facilitate and encourage compliance by covered entities under this part.

Accordingly, this amended appendix addresses the major provisions of this part and explains the major concepts related to disability-based employment discrimination. This appendix represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by this appendix when resolving charges of employment discrimination.

Note on Certain Terminology Used

The ADA, the EEOC's ADA regulations, and this appendix use the term "disabilities" rather than the term "handicaps" which was originally used in the Rehabilitation Act of 1973, 29 U.S.C. 701-796. Substantively, these terms are equivalent. As originally noted by the House Committee on the Judiciary, "[t]he use of the

term ‘disabilities' instead of the term ‘handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than ‘handicapped' as used in previous laws, such as the Rehabilitation Act of 1973 * * *.” 1990 House Judiciary Report at 26-27; see also 1989 Senate Report at 21; 1990 House Labor Report at 50-51.

In addition, consistent with the Amendments Act, revisions have been made to the regulations and this Appendix to refer to “individual with a disability” and “qualified individual” as separate terms, and to change the prohibition on discrimination to “on the basis of disability” instead of prohibiting discrimination against a qualified individual “with a disability because of the disability of such individual.” “This ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.' “ 2008 Senate Statement of Managers at 11.

The use of the term “Americans” in the title of the ADA, in the EEOC's regulations, or in this Appendix as amended is not intended to imply that the ADA only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality, from discrimination by a covered entity.

Finally, the terms “employer” and “employer or other covered entity” are used interchangeably throughout this Appendix to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The express purposes of the ADA as amended are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing the standards articulated in the ADA on behalf of individuals with disabilities; and to invoke the sweep of congressional authority to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. 12101(b). The EEOC's ADA regulations are intended to implement these Congressional purposes in simple and straightforward terms.

Section 1630.1(b) Applicability

The EEOC's ADA regulations as amended apply to all “covered entities” as defined at Sec. 1630.2(b). The ADA defines “covered entities” to mean an employer, employment agency, labor organization, or joint labor-management committee. 42 U.S.C. 12111(2). All covered entities are subject to the ADA's rules prohibiting discrimination. 42 U.S.C. 12112.

Section 1630.1(c) Construction

The ADA must be construed as amended. The primary purpose of the Amendments Act was to make it easier for people with disabilities to obtain protection under the ADA. See Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 (reviewing provisions of H.R. 3195 as revised following negotiations between representatives of the disability and business communities) (Joint Hoyer-Sensenbrenner Statement) at 2. Accordingly, under the ADA as amended and the EEOC's regulations, the definition of “disability” “shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA].” 42 U.S.C. 12102(4)(A); see

also 2008 Senate Statement of Managers at 3 (“The ADA Amendments Act * * * reiterates that Congress intends that the scope of the [ADA] be broad and inclusive.”). This construction is also intended to reinforce the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose. Id. at 2; see also 2008 House Judiciary Committee Report at 19 (this rule of construction “directs courts to construe the definition of ‘disability' broadly to advance the ADA's remedial purposes” and thus “brings treatment of the ADA's definition of disability in line with treatment of other civil rights laws, which should be construed broadly to effectuate their remedial purposes”).

The ADAAA and the EEOC's regulations also make clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, not--whether the individual meets the definition of disability. ADAAA Section 2(b)(5). This means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a “reasonable accommodation” to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation “interactive process.” See also 2008 Senate Statement of Managers at 4 (“[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory.”); 2008 House Judiciary Committee Report at 6 (“An individual who does not qualify as disabled * * * does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment.”).

Further, the question of whether an individual has a disability under this part “should not demand extensive analysis.” ADAAA Section 2(b)(5). See also House Education and Labor Committee Report at 9 (“The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult. * * *”).

In addition, unless expressly stated otherwise, the standards applied in the ADA are intended to provide at least as much protection as the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any State or local law that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to prepare and maintain an affirmative action program under section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. See 1990 House Labor Report at 135; 1990 House Judiciary Report at 69-70.

This also means that an individual with a disability could choose to pursue claims under a State discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to charges brought under this part. 1990 House Judiciary Report at 69-70.

The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part and designed to protect the public health from individuals who pose a direct threat to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation. However, the ADA does preempt inconsistent requirements established by State or local law for safety or security sensitive positions. See 1989 Senate Report at 27; 1990 House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any State or local law that imposes prohibitions or limitations on the eligibility of individuals with disabilities who are qualified to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with dormant tuberculosis challenges a private school's refusal to hire him or her on the basis of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA.

Paragraph (c)(3) is consistent with language added to section 501 of the ADA by the ADA Amendments Act. It makes clear that nothing in this part is intended to alter the determination of eligibility for benefits under state workers' compensation laws or Federal and State disability benefit programs. State workers' compensation laws and Federal disability benefit programs, such as programs that provide payments to veterans with service-connected disabilities and the Social Security Disability Insurance program, have fundamentally different purposes than title I of the ADA.

Section 1630.2 Definitions

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

The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are “Commission,” “Person,” “State,” and “Employer.” These terms are to be given the same meaning under the ADA that they are given under title VII. In general, the term “employee” has the same meaning that it is given under title VII. However, the ADA's definition of “employee” does not contain an exception, as does title VII, for elected officials and their personal staffs. It should further be noted that all State and local governments are covered by title II of the ADA whether or not they are also covered by this part. Title II, which is enforced by the Department of Justice, became effective on January 26, 1992. See 28 CFR part 35.

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

Section 1630.2(g) Disability

In addition to the term “covered entity,” there are several other terms that are unique to the ADA as amended. The first of these is the term “disability.” “This definition is of critical importance because as a threshold issue it determines whether an individual is covered by the ADA.” 2008 Senate Statement of Managers at 6.

In the original ADA, “Congress sought to protect anyone who experiences discrimination because of a current, past, or perceived disability.” 2008 Senate Statement of Managers at 6. Accordingly, the definition of the term “disability” is divided into three prongs: An individual is considered to have a “disability” if that individual (1) has a physical or mental impairment that substantially limits one or more of that person's major life activities (the “actual disability” prong); (2) has a record of such an impairment (the “record of” prong); or (3) is regarded by the covered entity as an individual with a disability as defined in Sec. 1630.2(l) (the “regarded as” prong). The ADAAA retained the basic structure and terms of the original definition of disability. However, the Amendments Act altered the interpretation and application of this critical statutory term in fundamental ways. See 2008 Senate Statement of Managers at 1 (“The bill maintains the ADA's inherently functional definition of disability” but “clarifies and expands the definition's meaning and application.”).

As noted above, the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. See Joint Hoyer-Sensenbrenner Statement at 2. Accordingly, the ADAAA

provides rules of construction regarding the definition of disability. Consistent with the congressional intent to reinstate a broad scope of protection under the ADA, the ADAAA's rules of construction require that the definition of "disability" "shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." 42 U.S.C. 12102(4)(A). The legislative history of the ADAAA is replete with references emphasizing this principle. See Joint Hoyer-Sensenbrenner Statement at 2 ("[The bill] establishes that the definition of disability must be interpreted broadly to achieve the remedial purposes of the ADA"); 2008 Senate Statement of Managers at 1 (the ADAAA's purpose is to "enhance the protections of the [ADA]" by "expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability"); id. (stressing the importance of removing barriers "to construing and applying the definition of disability more generously"); id. at 4 ("The managers have introduced the [ADAAA] to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA."); id. ("It is our expectation that because the bill makes the definition of disability more generous, some people who were not covered before will now be covered."); id. (warning that "the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections"); id. (this principle "sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently"); 2008 House Judiciary Committee Report at 5 ("The purpose of the bill is to restore protection for the broad range of individuals with disabilities as originally envisioned by Congress by responding to the Supreme Court's narrow interpretation of the definition of disability.").

Further, as the purposes section of the ADAAA explicitly cautions, the "primary object of attention" in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations. As noted above, this means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a "reasonable accommodation" to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation "interactive process." ADAAA Section 2(b)(5); see also 2008 Senate Statement of Managers at 4 ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory."); 2008 House Judiciary Committee Report (criticizing pre-ADAAA court decisions which "prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case"). Accordingly, the threshold coverage question of whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." ADAAA Section 2(b)(5).

Section 1630.2(g)(2) provides that an individual may establish coverage under any one or more (or all three) of the prongs in the definition of disability. However, to be an individual with a disability, an individual is only required to satisfy one prong. As Sec. 1630.2(g)(3) indicates, in many cases it may be unnecessary for an individual to resort to coverage under the "actual disability" or "record of" prongs. Where the need for a reasonable accommodation is not at issue--for example, where there is no question that the individual is "qualified" without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation--it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the "regarded as" prong of the definition. In fact, Congress expected the first and second prongs of the definition of disability "to be used only by people who are affirmatively seeking reasonable accommodations * * *" and that "[a]ny individual who has been discriminated against because of an impairment--short of being granted a reasonable accommodation * * *--should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 4. An individual may choose, however, to proceed

under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodation or requires a reasonable accommodation.

To fully understand the meaning of the term “disability,” it is also necessary to understand what is meant by the terms “physical or mental impairment,” “major life activity,” “substantially limits,” “record of,” and “regarded as.” Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms “physical or mental impairment.” However, the legislative history of the Amendments Act notes that Congress “expect[s] that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change.” 2008 Senate Statement of Managers at 6. The definition of “physical or mental impairment” in the EEOC's regulations remains based on the definition of the term “physical or mental impairment” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC's regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within “normal” range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment,” or may be covered under the “regarded as” prong if it is the basis for a prohibited employment action and is not “transitory and minor.”

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See 1989 Senate Report at 22-23; 1990 House Labor Report at 51-52; 1990 House Judiciary Report at 28-29.

Section 1630.2(i) Major Life Activities

The ADAAA provided significant new guidance and clarification on the subject of “major life activities.” As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities. See 2008 Senate Statement of Managers at 8 n.17.

For purposes of clarity, the Amendments Act provides an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive, and the regulations include sitting, reaching, and interacting with others as additional examples. Many of these major life activities listed in the ADA Amendments Act and the regulations already had been included in the EEOC's 1991 now-superseded regulations implementing title I of the ADA and in sub-regulatory documents, and already were recognized by the courts.

The ADA as amended also explicitly defines “major life activities” to include the operation of “major bodily functions.” This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of “major life activities” under the ADA. 2008 House Judiciary Committee Report at 16; see also 2008 Senate Statement of Managers at 8 (“for the first time [in the ADAAA], the category of ‘major life activities' is defined to include the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting”).

The regulations include all of those major bodily functions identified in the ADA Amendments Act's non-exhaustive list of examples and add a number of others that are consistent with the body systems listed in the regulations' definition of “impairment” (at Sec. 1630.2(h)) and with the U.S. Department of Labor's nondiscrimination and equal employment opportunity regulations implementing section 188 of the workforce Investment Act of 1998, 29 U.S.C. 2801, et seq. Thus, special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions are major bodily functions not included in the statutory list of examples but included in Sec. 1630.2(i)(1)(ii). The Commission has added these examples to 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. The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs.

The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

In the legislative history of the ADAAA, Congress expressed its expectation that the statutory expansion of “major life activities” to include major bodily functions (along with other statutory changes) would lead to more expansive coverage. See 2008 Senate Statement of Managers at 8 n.17 (indicating that these changes will make it easier for individuals to show that they are eligible for the ADA's protections under the first prong of the definition of disability). The House Education and Labor Committee explained that the inclusion of major bodily functions would “affect cases such as U.S. v. Happy Time Day Care Ctr. in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that ‘there is something inherently illogical about inquiring whether' a five-year-old's ability to procreate is substantially limited by his HIV infection; Furnish v. SVI Sys., Inc, in which the court found that an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function--unlike eating, working, or reproducing--’is not integral to one's daily existence;' and Pimental v. Dartmouth-Hitchcock Clinic, in which the court concluded that the plaintiff's stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a [substantial limitation] on major bodily functions that would qualify them for protection under the ADA.” 2008 House Education and Labor Committee Report at 12.

The examples of major life activities (including major bodily functions) in the ADAAA and the EEOC's regulations are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the examples does not create a negative implication as to whether an omitted activity or function constitutes a major life activity under the statute. See 2008 Senate Statement of Managers at 8; see also 2008 House Committee on Educ. and Labor Report at 11; 2008 House Judiciary Committee Report at 17.

The Commission anticipates that courts will recognize other major life activities, consistent with the ADA Amendments Act's mandate to construe the definition of disability broadly. As a result of the ADA Amendments Act's rejection of the holding in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life." See Toyota, 534 U.S. at 197 (defining "major life activities" as activities that are of "central importance to most people's daily lives"). Indeed, this holding was at odds with the earlier Supreme Court decision of Bragdon v. Abbott, 524 U.S. 624 (1998), which held that a major life activity (in that case, reproduction) does not have to have a "public, economic or daily aspect." Id. at 639.

Accordingly, 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. Cf. 2008 Senate Statement of Managers at 7 (indicating that a person is considered an individual with a disability for purposes of the first prong when one or more of the individual's "important life activities" are restricted) (citing 1989 Senate Report at 23). The regulations also reject the notion that to be substantially limited in performing a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing "activities that are of central importance to most people's daily lives." Id.; see also 2008 Senate Statement of Managers at 5 n.12.

Thus, for example, lifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting. Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in Toyota) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks.

Section 1630.2(j) Substantially Limits

In any case involving coverage solely under the "regarded as" prong of the definition of "disability" (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is "substantially limited" in any major life activity. See 2008 Senate Statement of Managers at 10; id. at 13 ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."). Indeed, Congress anticipated that the first and second prongs of the definition of disability would "be used only by people who are affirmatively seeking reasonable accommodations * * * " and that "[a]ny individual who has been discriminated against because of an impairment--short of being granted a reasonable accommodation * * *--should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 4. Of course, an individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation. The concept of "substantially limits" is only relevant in cases involving coverage under the "actual disability" or "record of" prong of the definition of disability. Thus, the information below pertains to these cases only.

Section 1630.2(j)(1) Rules of Construction

It is clear in the text and legislative history of the ADAAA that Congress concluded the courts had incorrectly construed "substantially limits," and disapproved of the EEOC's now-superseded 1991 regulation defining the term to mean "significantly restricts." See 2008 Senate Statement of Managers at 6 ("We do not believe that the courts have correctly instituted the level of coverage we intended to establish with the term 'substantially limits' in the ADA" and "we believe that the level of limitation, and the intensity of focus, applied by the Supreme Court in Toyota goes beyond what we believe is the appropriate standard to create coverage under this law."). Congress extensively deliberated over whether

a new term other than “substantially limits” should be adopted to denote the appropriate functional limitation necessary under the first and second prongs of the definition of disability. See 2008 Senate Statement of Managers at 6-7. Ultimately, Congress affirmatively opted to retain this term in the Amendments Act, rather than replace it. It concluded that “adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act.” Id. Instead, Congress determined “a better way * * * to express [its] disapproval of Sutton and Toyota (along with the current EEOC regulation) is to retain the words ‘substantially limits,' but clarify that it is not meant to be a demanding standard.” Id. at 7. To achieve that goal, Congress set forth detailed findings and purposes and “rules of construction” to govern the interpretation and application of this concept going forward. See ADAAA Sections 2-4; 42 U.S.C. 12102(4).

The Commission similarly considered whether to provide a new definition of “substantially limits” in the regulation. Following Congress's lead, however, the Commission ultimately concluded that a new definition would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress. Therefore, the regulations simply provide rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity. These are each discussed in greater detail below.

Section 1630.2(j)(1)(i): Broad Construction; not a Demanding Standard

Section 1630.2(j)(1)(i) states: “The term ‘substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits' is not meant to be a demanding standard.”

Congress stated in the ADA Amendments Act that the definition of disability “shall be construed in favor of broad coverage,” and that “the term ‘substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.” 42 U.S.C. 12101(4)(A)-(B), as amended. “This is a textual provision that will legally guide the agencies and courts in properly interpreting the term ‘substantially limits.' “ Hoyer-Sensenbrenner Congressional Record Statement at H8295. As Congress noted in the legislative history of the ADAAA, “[t]o be clear, the purposes section conveys our intent to clarify not only that ‘substantially limits' should be measured by a lower standard than that used in Toyota, but also that the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections.” 2008 Senate Statement of Managers at 5 (also stating that “[t]his rule of construction, together with the rule of construction providing that the definition of disability shall be construed in favor of broad coverage of individuals sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently”). Put most succinctly, “substantially limits” “is not meant to be a demanding standard.” 2008 Senate Statement of Managers at 7.

Section 1630.2(j)(1)(ii): Significant or Severe Restriction Not Required; Nonetheless, Not Every Impairment Is Substantially Limiting

Section 1630.2(j)(1)(ii) states: “An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a ‘disability' within the meaning of this section.”

In keeping with the instruction that the term “substantially limits” is not meant to be a demanding standard, the regulations provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. However, to be substantially limited in performing a major life activity an individual need not have an

impairment that prevents or significantly or severely restricts the individual from performing a major life activity. See 2008 Senate Statement of Managers at 2, 6-8 & n.14; 2008 House Committee on Educ. and Labor Report at 9-10 (“While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity to qualify as a disability.”); 2008 House Judiciary Committee Report at 16 (similarly requiring an “important” limitation). The level of limitation required is “substantial” as compared to most people in the general population, which does not require a significant or severe restriction. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability. Nonetheless, not every impairment will constitute a “disability” within the meaning of this section. See 2008 Senate Statement of Managers at 4 (“We reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA.”)

Section 1630.2(j)(1)(iii): Substantial Limitation Should Not Be Primary Object of Attention; Extensive Analysis Not Needed

Section 1630.2(j)(1)(iii) states: “The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment ‘substantially limits' a major life activity should not demand extensive analysis.”

Congress retained the term “substantially limits” in part because it was concerned that adoption of a new phrase--and the resulting need for further judicial scrutiny and construction--would not “help move the focus from the threshold issue of disability to the primary issue of discrimination.” 2008 Senate Statement of Managers at 7.

This was the primary problem Congress sought to solve in enacting the ADAAA. It recognized that clearing the initial [disability] threshold is critical, as individuals who are excluded from the definition ‘never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they [are] ‘otherwise qualified.' ' “ 2008 House Judiciary Committee Report at 7; see also id. (expressing concern that “[a]n individual who does not qualify as disabled does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment”); 2008 Senate Statement of Managers at 4 (criticizing pre-ADAAA lower court cases that “too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory”).

Accordingly, the Amendments Act and the amended regulations make plain that the emphasis in ADA cases now should be squarely on the merits and not on the initial coverage question. The revised regulations therefore provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population and deletes the language to which Congress objected. The Commission believes that this provides a useful framework in which to analyze whether an impairment satisfies the definition of disability. Further, this framework better reflects Congress's expressed intent in the ADA Amendments Act that the definition of the term “disability” shall be construed broadly, and is consistent with statements in the Amendments Act's legislative history. See 2008 Senate Statement of Managers at 7 (stating that “adopting a new, undefined term” and the “resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination,” and finding that “ ‘substantially limits' as construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test of determining whether an individual has a disability” and that “using the correct standard--one that is lower than the strict or demanding standard created by the Supreme Court in Toyota--will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications”).

Consequently, this rule of construction makes clear that the question of whether an impairment substantially limits a major life activity should not demand extensive analysis. As the legislative history explains, “[w]e expect that courts interpreting [the ADA] will not demand such an extensive analysis over whether a person's physical or mental impairment constitutes a disability.” Hoyer-Sensenbrenner Congressional Record Statement at H8295; see id. (“Our goal throughout this process has been to simplify that analysis.”)

Section 1630.2(j)(1)(iv): Individualized Assessment Required, But With Lower Standard Than Previously Applied

Section 1630.2(j)(1)(iv) states: “The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ‘substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits' applied prior to the ADAAA.”

By retaining the essential elements of the definition of disability including the key term “substantially limits,” Congress reaffirmed that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. See 2008 Senate Statement of Managers at 4. To be covered under the first prong of the definition, an individual must establish that an impairment substantially limits a major life activity. That has not changed--nor will the necessity of making this determination on an individual basis. Id. However, what the ADAAA changed is the standard required for making this determination. Id. at 4-5.

The Amendments Act and the EEOC's regulations explicitly reject the standard enunciated by the Supreme Court in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), and applied in the lower courts in numerous cases. See ADAAA Section 2(b)(4). That previous standard created “an inappropriately high level of limitation necessary to obtain coverage under the ADA.” Id. at Section 2(b)(5). The Amendments Act and the EEOC's regulations reject the notion that “substantially limits” should be interpreted strictly to create a demanding standard for qualifying as disabled. Id. at Section 2(b)(4). Instead, the ADAAA and these regulations establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended. 2008 Senate Statement of Managers at 7. This will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking to prove discrimination under the ADA. Id.

Section 1630.2(j)(1)(v): Scientific, Medical, or Statistical Analysis Not Required, But Permissible When Appropriate

Section 1630.2(j)(1)(v) states: “The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.”

The term “average person in the general population,” as the basis of comparison for determining whether an individual's impairment substantially limits a major life activity, has been changed to “most people in the general population.” This revision is not a substantive change in the concept, but rather is intended to conform the language to the simpler and more straightforward terminology used in the legislative history to the Amendments Act. The comparison between the individual and “most people” need not be exacting, and usually will not require scientific, medical, or statistical analysis. Nothing in this subparagraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees. This does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual's aptitude and that individual's actual versus expected achievement, taking into account the person's chronological age, measured intelligence, and age-appropriate education. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.

Section 1630.2(j)(1)(vi): Mitigating Measures

Section 1630.2(j)(1)(vi) 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. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”

The ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity. Thus, “[w]ith the exception of ordinary eyeglasses and contact lenses, impairments must be examined in their unmitigated state.” See 2008 Senate Statement of Managers at 5.

This provision in the ADAAA and the EEOC's regulations “is intended to eliminate the catch-22 that exist[ed] * * * where individuals who are subjected to discrimination on the basis of their disabilities [we]re frequently unable to invoke the ADA's protections because they [we]re not considered people with disabilities when the effects of their medication, medical supplies, behavioral adaptations, or other interventions [we]re considered.” Joint Hoyer-Sensenbrenner Statement at 2; see also 2008 Senate Statement of Managers at 9 (“This provision is intended to eliminate the situation created under [prior] law in which impairments that are mitigated [did] not constitute disabilities but [were the basis for discrimination].”). To the extent cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. See 2008 House Judiciary Committee Report at 9 & nn.25, 20-21 (citing, e.g., McClure v. General Motors Corp., 75 F. App'x 983 (5th Cir. 2003) (court held that individual with muscular dystrophy who, with the mitigating measure of “adapting” how he performed manual tasks, had successfully learned to live and work with his disability was therefore not an individual with a disability); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (court held that Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), required consideration of the ameliorative effects of plaintiff's careful regimen of medicine, exercise and diet, and declined to consider impact of uncontrolled diabetes on plaintiff's ability to see, speak, read, and walk); Gonzales v. National Bd. of Med. Examiners, 225 F.3d 620 (6th Cir. 2000) (where the court found that an individual with a diagnosed learning disability was not substantially limited after considering the impact of self-accommodations that allowed him to read and achieve academic success); McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004) (individual fired because of clinical depression not protected because of the successful management of the condition with medication for fifteen years); Eckhaus v. Consol. Rail Corp., 2003 WL 23205042 (D.N.J. Dec. 24, 2003) (individual fired because of a hearing impairment was not protected because a hearing aid helped correct that impairment); Todd v. Academy Corp., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (court held that because medication reduced the frequency and intensity of plaintiff's seizures, he was not disabled)).

An individual who, because of the use of a mitigating measure, has experienced no limitations, or only minor limitations, related to the impairment may still be an individual with a disability, where there is

evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting. For example, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system.

Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types. However, we expect that consistent with the Amendments Act's command (and the related rules of construction in the regulations) that the definition of disability “should not demand extensive analysis,” covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence.

The Amendments Act provides an “illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered.” See 2008 Senate Statement of Managers at 9. Section 1630.2(j)(5) of the regulations includes all of those mitigating measures listed in the ADA Amendments Act's illustrative list of mitigating measures, including reasonable accommodations (as applied under title I) or “auxiliary aids or services” (as defined by 42 U.S.C. 12103(1) and applied under titles II and III).

Since it would be impossible to guarantee comprehensiveness in a finite list, the list of examples of mitigating measures provided in the ADA and the regulations is non-exhaustive. See 2008 House Judiciary Committee Report at 20. The absence of any particular mitigating measure from the list in the regulations should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. See 2008 Senate Statement of Managers at 9.

For example, the fact that mitigating measures include “reasonable accommodations” generally makes it unnecessary to mention specific kinds of accommodations. Nevertheless, the use of a service animal, job coach, or personal assistant on the job would certainly be considered types of mitigating measures, as would the use of any device that could be considered assistive technology, and whether individuals who use these measures have disabilities would be determined without reference to their ameliorative effects. See 2008 House Judiciary Committee Report at 20; 2008 House Educ. & Labor Rep. at 15. Similarly, adaptive strategies that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities, are mitigating measures and also would not be considered in determining whether an impairment is substantially limiting. Id.

The determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including for example medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures used determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.

The ADA Amendments Act and the regulations state that “ordinary eyeglasses or contact lenses” shall be considered in determining whether someone has a disability. This is an exception to the rule that the ameliorative effects of mitigating measures are not to be taken into account. “The rationale behind this exclusion is that the use of ordinary eyeglasses or contact lenses, without more, is

not significant enough to warrant protection under the ADA." Joint Hoyer-Sensenbrenner Statement at 2. Nevertheless, as discussed in greater detail below at Sec. 1630.10(b), if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the plaintiffs in the Sutton case were), and the applicant or employee who is adversely affected by the standard brings a challenge under the ADA, an employer will be required to demonstrate that the qualification standard is job related and consistent with business necessity. 2008 Senate Statement of Managers at 9.

The ADAAA and the EEOC's regulations both define the term "ordinary eyeglasses or contact lenses" as lenses that are "intended to fully correct visual acuity or eliminate refractive error." So, if an individual with severe myopia uses eyeglasses or contact lenses that are intended to fully correct visual acuity or eliminate refractive error, they are ordinary eyeglasses or contact lenses, and therefore any inquiry into whether such individual is substantially limited in seeing or reading would be based on how the individual sees or reads with the benefit of the eyeglasses or contact lenses. Likewise, if the only visual loss an individual experiences affects the ability to see well enough to read, and the individual's ordinary reading glasses are intended to completely correct for this visual loss, the ameliorative effects of using the reading glasses must be considered in determining whether the individual is substantially limited in seeing. Additionally, eyeglasses or contact lenses that are the wrong prescription or an outdated prescription may nevertheless be "ordinary" eyeglasses or contact lenses, if a proper prescription would fully correct visual acuity or eliminate refractive error.

Both the statute and the regulations distinguish "ordinary eyeglasses or contact lenses" from "low vision devices," which function by magnifying, enhancing, or otherwise augmenting a visual image, and which are not considered when determining whether someone has a disability. The regulations do not establish a specific level of visual acuity (e.g., 20/20) as the basis for determining whether eyeglasses or contact lenses should be considered "ordinary" eyeglasses or contact lenses. Whether lenses fully correct visual acuity or eliminate refractive error is best determined on a case-by-case basis, in light of current and objective medical evidence. Moreover, someone who uses ordinary eyeglasses or contact lenses is not automatically considered to be outside the ADA's protection. Such an individual may demonstrate that, even with the use of ordinary eyeglasses or contact lenses, his vision is still substantially limited when compared to most people.

Section 1630.2(j)(1)(vii): Impairments That Are Episodic or in Remission

Section 1630.2(j)(1)(vii) states: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state. "This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions--such as epilepsy or post traumatic stress disorder--were not protected by the ADA because their conditions were episodic or intermittent." Joint Hoyer-Sensenbrenner Statement at 2-3. The legislative history provides: "This * * * rule of construction thus rejects the reasoning of the courts in cases like Todd v. Academy Corp. [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as Pimental v. Dartmouth-Hitchock Clinic, 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity." 2008 House Judiciary Committee Report at 19-20. Other examples of impairments that may be episodic include, but are not limited to, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. See 2008 House Judiciary Committee Report at 19-20. The fact that the

periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

Section 1630.2(j)(1)(viii): Substantial Limitation in Only One Major Life Activity Required

Section 1630.2(j)(1)(viii) states: "An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."

The ADAAA explicitly states that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. See ADAAA Section 4(a); 42 U.S.C. 12102(4)(C). "This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity." 2008 Senate Statement of Managers at 8. In addition, this rule of construction is "intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA." Id. To the extent cases pre-dating the applicability of the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. Id. (citing Holt v. Grand Lake Mental Health Ctr., Inc., 443 F. 3d 762 (10th Cir. 2006) (holding an individual with cerebral palsy who could not independently perform certain specified manual tasks was not substantially limited in her ability to perform a "broad range" of manual tasks)); see also 2008 House Judiciary Committee Report at 19 & n.52 (this legislatively corrects court decisions that, with regard to the major life activity of performing manual tasks, "have offset substantial limitation in the performance of some tasks with the ability to perform others" (citing Holt)).

For example, an individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong of the definition. He need not also show that he is substantially limited in eating to qualify for coverage under the first prong. An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function. And an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction.

In addition, an individual whose impairment substantially limits a major life activity need not additionally demonstrate a resulting limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability under Sec. 1630.2(g)(1)(i) or Sec. 1630.2(g)(1)(ii), as cases relying on the Supreme Court's decision in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), had held prior to the ADA Amendments Act.

Thus, for example, someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting. Similarly, someone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing.

Section 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting

Section 1630.2(j)(1)(ix) states: "The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in Sec. 1630.2(l) does not apply to the definition of 'disability' under Sec. 1630.2(g)(1)(i) or Sec. 1630.2(g)(1)(ii). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

The regulations include a clear statement that the definition of an impairment as transitory, that is, "lasting or expected to last for six months or less," only applies to the "regarded as" (third) prong of the definition of "disability" as part of the "transitory and minor" defense to "regarded as" coverage. It does not apply to the first or second prong of the definition of disability. See Joint Hoyer-Sensenbrenner Statement at 3 ("[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.").

Therefore, an impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, as noted above, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." Joint Hoyer-Sensenbrenner Statement at 5.

Section 1630.2(j)(3) Predictable Assessments

As the regulations point out, disability is determined based on an individualized assessment. There is no "per se" disability. However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability. The inherent nature of these types of medical conditions will in virtually all cases give rise to a substantial limitation of a major life activity. Cf. Heiko v. Columbo Savings Bank, F.S.B., 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADAAA, that "certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness"). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

This result is the consequence of the combined effect of the statutory changes to the definition of disability contained in the Amendments Act and flows from application of the rules of construction set forth in Sec. Sec. 1630.2(j)(1)(i)-(ix) (including the lower standard for "substantially limits"; the rule that major life activities include major bodily functions; the principle that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active; and the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability).

The regulations at Sec. 1630.2(j)(3)(iii) provide examples of the types of impairments that should easily be found to substantially limit a major life activity. The legislative history states that Congress modeled the ADA definition of disability on the definition contained in the Rehabilitation Act, and said it wished to return courts to the way they had construed that definition. See 2008 House Judiciary Committee Report at 6. Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition "broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental disabilities * * * even where a mitigating measure--like medication or a hearing aid--might lessen their impact on the individual." Id.; see also id. at 9 (referring to individuals with disabilities that had been covered under the Rehabilitation Act and that Congress intended to include under the ADA--"people with serious health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities"); id. at n.6 (citing cases also finding that cerebral palsy, hearing impairments, mental retardation, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); id. at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that "we could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental

illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability"); 2008 Senate Statement of Managers at 3 (explaining that "we [we]re faced with a situation in which physical or mental impairments that would previously [under the Rehabilitation Act] have been found to constitute disabilities [we]re not considered disabilities" and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Of course, the impairments listed in subparagraph 1630.2(j)(3)(iii) may substantially limit a variety of other major life activities in addition to those listed in the regulation. For example, mobility impairments requiring the use of a wheelchair substantially limit the major life activity of walking. Diabetes may substantially limit major life activities such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

By using the term "brain function" to describe the system affected by various mental impairments, the Commission is expressing no view on the debate concerning whether mental illnesses are caused by environmental or biological factors, but rather intends the term to capture functions such as the ability of the brain to regulate thought processes and emotions.

Section 1630.2(j)(4) Condition, Manner, or Duration

The regulations provide that facts such as the "condition, manner, or duration" of an individual's performance of a major life activity may be useful in determining whether an impairment results in a substantial limitation. In the legislative history of the ADAAA, Congress reiterated what it had said at the time of the original ADA: "A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 23). According to Congress: "We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard--one that is lower than the strict or demanding standard created by the Supreme Court in Toyota--will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations * * *. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." 2008 Senate Statement of Managers at 7.

Consistent with the legislative history, an impairment may substantially limit the "condition" or "manner" under which a major life activity can be performed in a number of ways. For example, the condition or manner under which a major life activity can be performed may refer to the way an individual performs a major life activity. Thus, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limiting if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. For example, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment "causes the operation [of the bodily

function] to over-produce or under-produce in some harmful fashion." See 2008 House Judiciary Committee Report at 17.

"Duration" refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, since most people can stand for more than two hours without significant pain. However, a person who can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort. See 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 23).

The regulations provide that in assessing substantial limitation and considering facts such as condition, manner, or duration, the non-ameliorative effects of mitigating measures may be considered. Such "non-ameliorative effects" could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. Of course, in many instances, it will not be necessary to assess the negative impact of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and it thus is not necessary to consider the burdens that dialysis treatment imposes.

Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.

Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population. As Congress emphasized in passing the Amendments Act, "[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." 2008 Senate Statement of Managers at 8. Congress noted that: "In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to 'most people.' When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in Price v. National Board of Medical Examiners, Gonzales v. National Board of Medical Examiners, and Wong v. Regents of University of California. The Committee believes that the comparison of individuals with specific learning disabilities to 'most people' is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow--throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act." 2008 House Educ. & Labor Rep. at 10-11.

It bears emphasizing that while it may be useful in appropriate cases to consider facts such as condition, manner, or duration, it is always necessary to consider and apply the rules of construction in Sec. 1630.2(j)(1)(i)-(ix) that set forth the elements of broad coverage enacted by Congress. 2008 Senate statement of Managers at 6. Accordingly, while the Commission's regulations retain the concept of "condition, manner, or duration," they no longer include the additional list of "substantial limitation" factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment).

Finally, "condition, manner, or duration" are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. "Condition, manner, or duration" are not required "factors" that must be considered as a talismanic test. Rather, in referring to "condition, manner, or duration," the regulations make clear that these are merely the types of facts that may be considered in appropriate cases. To the extent such aspects of limitation may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage.

At the same time, individuals seeking coverage under the first or second prong of the definition of disability should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. See 2008 Senate Statement of Managers at 7. Of course, covered entities may defeat a showing of "substantial limitation" by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts related to "condition, manner, or duration" that are not pertinent to the substantial limitation the individual has proffered.

Sections 1630.2(j)(5) and (6) Examples of Mitigating Measures; Ordinary Eyeglasses or Contact Lenses

These provisions of the regulations provide numerous examples of mitigating measures and the definition of "ordinary eyeglasses or contact lenses." These definitions have been more fully discussed in the portions of this interpretive guidance concerning the rules of construction in Sec. 1630.2(j)(1).

Substantially Limited in Working

The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.

In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act. See, e.g., Corley v. Dep't of Veterans Affairs ex rel Principi, 218 F. App'x. 727, 738 (10th Cir. 2007) (employee with seizure disorder was not substantially limited in working because he was not foreclosed from jobs involving driving, operating machinery, childcare, military service, and other jobs; employee would now be substantially limited in neurological function); Olds v. United Parcel Serv., Inc., 127 F. App'x. 779, 782 (6th Cir. 2005) (employee with bone marrow cancer was not substantially limited in working due to lifting restrictions caused by his cancer; employee would now be substantially limited in normal cell growth); Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 763-64 (3d Cir. 2004) (issue of material fact concerning whether police officer's major depression substantially limited him in performing a class of jobs due to restrictions on his ability to carry a firearm; officer would now be substantially limited in brain function).\2\

\2\ In addition, many cases previously analyzed in terms of whether the plaintiff was "substantially limited in working" will now be analyzed under the "regarded as" prong of the definition of disability as revised by the Amendments Act. See, e.g., Cannon v. Levi Strauss & Co., 29 F. App'x. 331 (6th Cir. 2002) (factory worker laid off due to her carpal tunnel syndrome not regarded as substantially limited in working because her job of sewing machine operator was not a "broad class of jobs"; she would now be protected under the third prong because she was fired because of her impairment, carpal tunnel syndrome); Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996) (applicant not hired for firefighting job because of his mild hemophilia not regarded as substantially limited in working; applicant would now be protected under the third prong because he was not hired because of his impairment, hemophilia).

In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual 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. In keeping with the findings and purposes of the Amendments Act, the determination of coverage under the law should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including the major life activity of working, than they applied prior to the Amendments Act. The Commission believes that the courts, in applying an overly strict standard with regard to "substantially limits" generally, have reached conclusions with regard to what is necessary to demonstrate a substantial limitation in the major life activity of working that would be inconsistent with the changes now made by the Amendments Act. Accordingly, as used in this section the terms "class of jobs" and "broad range of jobs in various classes" will be applied in a more straightforward and simple manner than they were applied by the courts prior to the Amendments Act.\3\

\3\ In analyzing working as a major life activity in the past, some courts have imposed a complex and onerous standard that would be inappropriate under the Amendments Act. See, e.g., Duncan v. WMATA, 240 F.3d 1110, 1115 (DC Cir. 2001) (manual laborer whose back injury prevented him from lifting more than 20 pounds was not substantially limited in working because he did not present evidence of the number and types of jobs available to him in the Washington area; testimony concerning his inquiries and applications for truck driving jobs that all required heavy lifting was insufficient); Taylor v. Federal Express Corp., 429 F.3d 461, 463-64 (4th Cir. 2005) (employee's impairment did not substantially limit him in working because, even though evidence showed that employee's injury disqualified him from working in numerous jobs in his geographic region, it also showed that he remained qualified for many other jobs). Under the Amendments Act, the determination of whether a person is substantially limited in working is more straightforward and simple than it was prior to the Act.

Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.

A class of jobs may be determined by reference to the nature of the work that an individual is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs) or by reference to job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels).

For example, if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.

Section 1630.2(k) Record of a Substantially Limiting Impairment

The second prong of the definition of "disability" provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, the "record of" provision would protect an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as having learning disabilities or intellectual disabilities (formerly termed "mental retardation") are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52-53; House Judiciary Report at 29; 2008 House Judiciary Report at 7-8 & n.14. Similarly, an employee who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder.

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

Such evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a "record of" a substantially limiting impairment--and thus be protected under the "record of" prong of the statute--even if a covered entity does not specifically know about the relevant record. Of course, for the covered entity to be liable for discrimination under title I of the ADA, the individual with a "record of" a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

The terms "substantially limits" and "major life activity" under the second prong of the definition of "disability" are to be construed in accordance with the same principles applicable under the "actual disability" prong, as set forth in Sec. 1630.2(j).

Individuals who are covered under the "record of" prong will often be covered under the first prong of the definition of disability as well. This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. See 42 U.S.C. 12102(4)(D); Sec. 1630.2(j)(1)(vii). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the "actual disability" prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the "record of" prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, this section of the EEOC's regulations makes it clear that an individual with a record of a disability is entitled to a reasonable accommodation currently needed for limitations resulting from or relating to the past substantially limiting impairment. This conclusion, which has been the Commission's long-standing position, is confirmed by language in the ADA Amendments Act stating that individuals covered only under the "regarded as" prong of the definition of disability are not entitled to reasonable accommodation. See 42 U.S.C. 12201(h). By implication, this means that individuals covered under the first or second prongs are otherwise eligible for reasonable accommodations. See 2008 House Judiciary Committee Report at 22 ("This makes clear that the duty to accommodate . . . arises only when an individual establishes coverage under the first or second prong of the definition."). Thus, as the regulations explain, an employee with an impairment that previously substantially limited but no longer

substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments from a health care provider.

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

Coverage under the “regarded as” prong of the definition of disability should not be difficult to establish. See 2008 House Judiciary Committee Report at 17 (explaining that Congress never expected or intended it would be a difficult standard to meet). Under the third prong of the definition of disability, an individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not “transitory and minor.”

This third prong of the definition of disability was originally intended to express Congress's understanding that “unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions.” 2008 Senate Statement of Managers at 9; 2008 House Judiciary Committee Report at 17 (same). In passing the original ADA, Congress relied extensively on the reasoning of School Board of Nassau County v. Arline \4\ “that the negative reactions of others are just as disabling as the actual impact of an impairment.” 2008 Senate Statement of Managers at 9. The ADAAA reiterates Congress's reliance on the broad views enunciated in that decision, and Congress “believe[s] that courts should continue to rely on this standard.” Id.

\4\ 480 U.S. at 282-83.

Accordingly, the ADA Amendments Act broadened the application of the “regarded as” prong of the definition of disability. 2008 Senate Statement of Managers at 9-10. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress's intent to allow individuals to establish coverage under the “regarded as” prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment. Joint Hoyer-Sensenbrenner Statement at 3.

Thus it is not necessary, as it was prior to the ADA Amendments Act, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the “regarded as” prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be “regarded as having such an impairment.” In short, to qualify for coverage under the “regarded as” prong, an individual is not subject to any functional test. See 2008 Senate Statement of Managers at 13 (“The functional limitation imposed by an impairment is irrelevant to the third ‘regarded as' prong.”); 2008 House Judiciary Committee Report at 17 (that is, “the individual is not required to show that the perceived impairment limits performance of a major life activity”). The concepts of “major life activities” and “substantial limitation” simply are not relevant in evaluating whether an individual is “regarded as having such an impairment.”

To illustrate how straightforward application of the “regarded as” prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.

A “prohibited action” under the “regarded as” prong refers to an action of the type that would be unlawful under the ADA (but for any defenses to liability). Such prohibited actions include, but are not

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

Where an employer bases a prohibited employment action on an actual or perceived impairment that is not “transitory and minor,” the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision. Establishing that an individual is regarded as having such an impairment” does not, by itself, establish liability. Liability is established only if an individual meets the burden of proving that the covered entity discriminated unlawfully within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability. Thus, for example, an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry.

The fact that the “regarded as” prong requires proof of causation in order to show that a person is covered does not mean that proving a “regarded as” claim is complex. While a person must show, for both coverage under the “regarded as” prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.

As prescribed in the ADA Amendments Act, the regulations provide an exception to coverage under the “regarded as” prong where the impairment on which a prohibited action is based is both transitory (having an actual or expected duration of six months or less) and minor. The regulations make clear (at Sec. 1630.2(l)(2) and Sec. 1630.15(f)) that this exception is a defense to a claim of discrimination. “Providing this exception responds to concerns raised by employer organizations and is reasonable under the ‘regarded as' prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition.” 2008 Senate Statement of Managers at 10; see also 2008 House Judiciary Committee Report at 18 (explaining that “absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time”). However, as an exception to the general rule for broad coverage under the “regarded as” prong, this limitation on coverage should be construed narrowly. 2008 House Judiciary Committee Report at 18.

The 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. For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively “transitory and minor” hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have “regarded” the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not “transitory and minor.”

An individual covered only under the “regarded as” prong is not entitled to reasonable accommodation. 42 U.S.C. 12201(h). Thus, in cases where reasonable accommodation is not at issue, the third prong

provides a more straightforward framework for analyzing whether discrimination occurred. As Congress observed in enacting the ADAAA: "[W]e expect [the first] prong of the definition to be used only by people who are affirmatively seeking reasonable accommodations or modifications. Any individual who has been discriminated against because of an impairment--short of being granted a reasonable accommodation or modification--should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 6.

Section 1630.2(m) Qualified Individual

The ADA prohibits discrimination on the basis of disability against a qualified individual." * * * * * * * * *

Section 1630.2(o) Reasonable Accommodation

An individual with a disability is considered "qualified" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. A covered entity is required, absent undue hardship, to provide reasonable accommodation to an otherwise qualified individual with a substantially limiting impairment or a "record of" such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

The legislative history of the ADAAA makes clear that Congress included this provision in response to various court decisions that had held (pre-Amendments Act) that individuals who were covered solely under the "regarded as" prong were eligible for reasonable accommodations. In those cases, the plaintiffs had been found not to be covered under the first prong of the definition of disability "because of the overly stringent manner in which the courts had been interpreting that prong." 2008 Senate Statement of Managers at 11. The legislative history goes on to explain that "[b]ecause of [Congress's] strong belief that accommodating individuals with disabilities is a key goal of the ADA, some members [of Congress] continue to have reservations about this provision." Id. However, Congress ultimately concluded that clarifying that individuals covered solely under the "regarded as" prong are not entitled to reasonable accommodations "is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition [of disability], properly applied"). Further, individuals covered only under the third prong still may bring discrimination claims (other than failure-to-accommodate claims) under title I of the ADA. 2008 Senate Statement of Managers at 9-10.

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

Section 1630.4 Discrimination Prohibited

Paragraph (a) of this provision prohibits discrimination on the basis of disability against a qualified individual in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973.

Paragraph (b) makes it clear that the language "on the basis of disability" is not intended to create a cause of action for an individual without a disability who claims that someone with a disability was treated more favorably (disparate treatment), or was provided a reasonable accommodation that an individual without a disability was not provided. See 2008 House Judiciary Committee Report at 21 (this provision "prohibits reverse discrimination claims by disallowing claims based on the lack of disability"). Additionally, the ADA and this part do not affect laws that may require the affirmative recruitment or hiring of individuals with disabilities, or any voluntary affirmative action employers may undertake on behalf of individuals with disabilities. However, part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use criteria that are job related and consistent with business necessity to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

The Amendments Act modified title I's nondiscrimination provision to replace the prohibition on discrimination "against a qualified individual with a disability because of the disability of such individual" with a prohibition on discrimination "against a qualified individual on the basis of disability." As the legislative history of the ADAAA explains: "[T]he bill modifies the ADA to conform to the structure of Title VII and other civil rights laws by requiring an individual to demonstrate discrimination 'on the basis of disability' rather than discrimination 'against an individual with a disability' because of the individual's disability. We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual's impairment, and more time and energy on the merits of the case--including whether discrimination occurred because of the disability, whether an individual was qualified for a job or eligible for a service, and whether a reasonable accommodation or modification was called for under the law." Joint Hoyer-Sensenbrenner Statement at 4; see also 2008 House Judiciary Report at 21 ("This change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists.").

Section 1630.5 Limiting, Segregating and Classifying

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of Sec. 1630.4. The capabilities of qualified individuals must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees into separate work areas or into separate lines of advancement on the basis of their disabilities.

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Section 1630.9: Not Making Reasonable Accommodation

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Section 1630.9(e)

The purpose of this provision is to incorporate the clarification made in the ADA Amendments Act of 2008 that an individual is not entitled to reasonable accommodation under the ADA if the individual is only covered under the "regarded as" prong of the definition of "individual with a disability." However, if the individual is covered under both the "regarded as" prong and one or both of the other two prongs of the definition of disability, the ordinary rules concerning the provision of reasonable accommodation apply.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

Section 1630.10(a)--In General

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that those criteria, as used by the employer, are job related for the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, often resolved by reasonable accommodation.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See 1989 Senate Report at 37-39; House Labor Report at 70-72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. See Sec. 1630.2(n) (Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.10(b)--Qualification Standards and Tests Related to Uncorrected Vision

This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. An 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. In order to have standing to challenge such a standard, test, or criterion, however, a person must be adversely affected by such standard, test or criterion. The Commission also believes that such individuals will usually be covered under the "regarded as" prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See Sec. 1630.2(l); Appendix to Sec. 1630.2(l).)

In either case, a covered entity may still defend a qualification standard requiring a certain level of uncorrected vision by showing that it is job related and consistent with business necessity. For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department's qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other, and visual acuity of 20/20 in

both eyes with correction. The department would then have to establish that the standard is job related and consistent with business necessity.

Section 1630.15 Defenses

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Section 1630.15(f) Claims Based on Transitory and Minor Impairments Under the "Regarded As" Prong

It may be a defense to a charge of discrimination where coverage would be shown solely under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. Section 1630.15(f)(1) explains that an individual cannot be "regarded as having such an impairment" if the impairment is both transitory (defined by the ADAAA as lasting or expected to last less than six months) and minor. Section 1630.15(f)(2) explains that the determination of "transitory and minor" is made objectively. For example, an individual who is denied a promotion because he has a minor back injury would be "regarded as" an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory. Similarly, if an employer discriminates against an employee based on the employee's bipolar disorder (an impairment that is not transitory and minor), the employee is "regarded as" having a disability even if the employer subjectively believes that the employee's disorder is transitory and minor.

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Recent EEOC Guidance Updates

Performance and Conduct Standards

A core function for any supervisor is managing employee performance. Performance management, if done effectively, can help avoid discrimination, in addition to furthering an employer's business objectives. Employees work most effectively when they clearly understand what is expected of them and know that their performance will be measured against a standard that is fair and applied even-handedly. The same principles apply to workplace rules concerning employee conduct.

Although an employee's disability typically has no bearing on performance or conduct, sometimes an individual's disability may contribute to performance or conduct problems. When this is the case, a simple reasonable accommodation often may be all that is needed to eliminate the problem. However, employers still struggle with issues such as what steps are appropriate where a disability is causing – or seems to be causing – a performance or conduct problem, when a request for accommodation should be made, and when an employer can properly raise the issue of an employee's disability as part of a discussion about performance or conduct problems. Even when the disability is not causing the performance or conduct problem, some employers still have questions about what action they can take in light of concerns about potential ADA violations.

Employee Performance
Employers typically establish job-related requirements, the specific tasks or assignments that an employee must perform, and methods to evaluate performance. Evaluation criteria might take into account how well an employee is performing both essential and marginal functions and whether the employee is meeting basic job requirements (e.g., working well with others or serving customers in a professional manner). Employers might also enforce conduct standards (e.g., rules prohibiting destruction of company property or the use of company computers to access pornography).

It is advisable for employers to give clear guidance to an employee with a disability (as well as all other employees) regarding the quantity and quality of work that must be produced and the timetables for producing it. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation. However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard.

Likewise, an employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance. In many instances, an essential function can be performed in different ways (including with reasonable accommodation). An employee who must use an alternative method of performance because of a disability must be evaluated accordingly. However, an employer is not required to allow use of an alternate method that would impose an undue hardship.

An accurate assessment of the employee's performance may, in some cases, alert the employee that his disability is contributing to the problem. This may lead the employee to request

reasonable accommodation to address the problem and improve performance, which can benefit both the employee and the employer.

An employer may maintain a lower performance rating to an employee even when the employee responds by revealing they have a disability that is causing the performance problem. The rating reflects the employee's performance regardless of what role, if any, disability may have played. The employer could follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance. If the employee does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level.

The ADA does not compel employees to ask for accommodations at a certain time. Employees may ask for reasonable accommodation before or after being told of performance problems. Sometimes, an employee may not know or be willing to acknowledge that there is a problem requiring accommodation until the employer points out deficiencies in performance. However, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance.

When an employee requests a reasonable accommodation in response to the employer's discussion or evaluation of the person's performance, the employer may proceed with the discussion or evaluation but also should begin the "interactive reasonable accommodation process" by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it. Employers cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment for the performance problem. If a reasonable accommodation is needed to assist an employee in addressing a performance problem, and the employer refuses to provide one, absent undue hardship, the employer has violated the ADA.

The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem. The employer may also suggest possible accommodations.

When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

- tolerate or excuse the poor performance;
- withhold disciplinary action (including termination) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance.

However, an employer may not withdraw a reasonable accommodation as punishment for the unsatisfactory performance rating. For example, they couldn't withdraw a telework

arrangement or a modified schedule any more than they could discontinue an employee's use of a sign language interpreter or assistive technology as reasonable accommodations.

Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation is not working. The employer can proceed with the unsatisfactory rating but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation. If the reasonable accommodation is not assisting the employee in improving his performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted.

Employee Conduct

An employee's conduct in the workplace is held to the same standards as employee performance. If an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees. In most instances, an employee's disability will not be relevant to any conduct violations.

Even if an employee's disability causes violation of a conduct rule, the employer may discipline the individual as long as the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.

Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibiting inappropriate behavior between coworkers, prohibiting abuse of company equipment, requiring employees to observe safety rules and prohibiting illegal substances. Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers.

An employer may enforce conduct rules that are not found in workplace policies, employee handbooks, or similar documents so long as they are: (1) job-related and consistent with business necessity, and (2) applied consistently to all employees and not just to a person with a disability. Many times, the proscribed conduct is well understood by both the employer and employees as being unacceptable without being formally written, such as a prohibition on insubordination.

Performance Reviews

Generally, it is inappropriate for the employer to focus discussion about a performance or conduct problem on an employee's disability. The point of the employer's comments should be a clear explanation of the employee's performance deficiencies or misconduct and what he expects the employee to do to improve. Moreover, emphasizing the disability risks distracting from the focus on performance or conduct, and in some cases could result in a claim under the ADA that the employer "regarded" (or treated) the individual as having a disability.

An employer might have to provide a reasonable accommodation to enable an employee with a disability to understand the exact nature of any performance or conduct problem and to have a meaningful discussion with the employer about it or to participate in a performance review. Even if there are no performance problems, the employee is entitled to the same opportunity as a non-disabled employee to discuss his performance. The same holds true for an employee to be able to participate in an investigation into misconduct.

Some employers want to ask for medical information in response to an employee's performance or conduct problem because they believe it might help them to understand why the problem exists and what might be an appropriate response. The ADA permits an employer to request medical information or order a medical examination when it is job-related and consistent with business necessity. An employer must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination. In limited circumstances, the nature of an employee's performance problems or unacceptable conduct may provide objective evidence that leads an employer to a reasonable belief that a medical condition may be the cause.

Not all performance problems or misconduct will justify an employer's request for medical information or a medical examination. An employer cannot require a medical examination solely because an employee's behavior is annoying, inefficient, or otherwise unacceptable. It is advisable for employers to determine whether simply addressing the problem without such information will be effective.

Even if an employer believes they are trying to help an employee with a medical problem, they may not require an employee to receive or change treatment for a disability to comply with a conduct standard. Decisions about medication and treatment often involve many considerations beyond the employer's expertise. Employer comments about the disability and its treatment could lead to potential ADA claims.

Although employers should not intervene in medical decisions, they should be prepared to discuss providing a reasonable accommodation that will enable an employee to correct a conduct problem. The ADA requires an employer to provide reasonable accommodation regardless of what effect medication or other medical treatment may have on an employee's ability to perform the job. However, if an employee does not take medication or receive treatment and, as a result, cannot perform the essential functions of the position or poses a direct threat, even with a reasonable accommodation, she is unqualified. Similarly, if an employee does not take medication or receive treatment and, as a result, cannot meet a conduct standard, even with a reasonable accommodation, the employer may take disciplinary action.

Attendance

Employees with disabilities are entitled to whatever forms of leave the employer generally provides to its employees. This means that when an employee with a disability seeks leave under an employer's regular leave policies, she must meet any eligibility requirements for the leave that are imposed on all employees (e.g., only employees who have completed a probation program can be granted advance leave). Similarly, employers must provide employees with disabilities with equal access to programs granting flexible work schedules and modified schedules.

If an employee with a disability needs leave or a modified schedule beyond that provided for under an employer's benefits program, the employer may have to grant the request as a reasonable accommodation if there is no undue hardship.

Although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance. Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice.

Under these or similar circumstances, an employee who is chronically, frequently, and unpredictably absent may not be able to perform one or more essential functions of the job, or the employer may be able to demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.

Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations.

Deafness and Hearing Impairments

Between 2000 and 2004, estimates of the number of people in the United States with a self-described "hearing difficulty" ranged from 28.6 million to 31.5 million. The number of individuals with hearing difficulty is expected to rise rapidly by the year 2010 when the baby-boomer generation reaches age 65. As compared to other age groups, the percentage of individuals with hearing difficulty is greatest among those individuals age 65 and above. A "hearing difficulty" can refer to the effects of many different hearing impairments of varying degrees.

The Centers for Disease Control and Prevention (CDC) refer to hearing impairments as conditions that affect the frequency and/or intensity of one's hearing. Although the term "deaf" is often mistakenly used to refer to all individuals with hearing difficulties, it actually describes a more limited group. According to the CDC, "deaf" individuals do not hear well enough to rely on their hearing to process speech and language. Individuals with mild to moderate hearing impairments may be "hard of hearing," but are not "deaf." These individuals differ from deaf individuals in that they use their hearing to assist in communication with others. As discussed below, people who are deaf and those who are hard of hearing can be individuals with disabilities within the meaning of the ADA.

A hearing impairment can be caused by many physical conditions (e.g., childhood illnesses, pregnancy-related illnesses, injury, heredity, age, excessive or prolonged exposure to noise), and result in varying degrees of hearing loss. Generally, hearing impairments are categorized as mild, moderate, severe, or profound. An individual with a moderate hearing impairment may be able to hear sound, but have difficulty distinguishing specific speech patterns in a conversation. Individuals with a profound hearing impairment may not be able to hear sounds at all. Hearing impairments that occur in both ears are described as "bilateral," and those that occur in one ear are referred to as "unilateral."

The many different circumstances under which individuals develop hearing impairments can affect the way they experience sound, communicate with others, and view their hearing impairment. For example, some individuals who develop hearing losses later in life find it difficult both to adjust to a world with limited sound, and to adopt new behaviors that compensate for their hearing loss. As a result, they may not use American Sign Language (ASL) or other communication methods at all, or as proficiently as individuals who experienced hearing loss at birth or at a very young age.

Individuals with hearing impairments can perform successfully on the job and should not be denied opportunities because of stereotypical assumptions about hearing loss. Some employers assume incorrectly that workers with hearing impairments will cause safety hazards, increase employment costs, or have difficulty communicating in fast-paced environments. In reality, with or without reasonable accommodation, individuals with hearing impairments can be effective and safe workers.

A hearing impairment is a disability under the ADA if: (1) it substantially limits a major life activity; (2) it substantially limited a major life activity in the past; or (3) the employer regarded (or treated) the individual as if his or her hearing impairment was substantially limiting.

The determination of whether a hearing impairment is substantially limiting must be made on an individualized, case-by-case basis. If an individual uses mitigating measures, such as hearing aids, cochlear implants, or other devices that actually improve hearing, these measures must be considered in determining whether the individual has a disability under the ADA. Even someone who uses a mitigating measure may have a disability if the measure does not correct the condition completely and substantial limitations remain, or if the mitigating measure itself imposes substantial limitations.

Measures that merely compensate for the fact that someone has a substantially limiting hearing loss but that do not actually improve hearing, such as sign language interpreters or lip-reading, are not mitigating measures. Furthermore, if an individual does not use mitigating measures, then the hearing impairment must be considered as it exists, without speculation about how a mitigating measure might lessen the hearing loss.

Even if an individual's hearing impairment does not currently substantially limit a major life activity, the condition may still be a disability if it was substantially limiting in the past. For example, if an applicant discloses that he had an accident which left his hearing impaired but the use of hearing aids has now allowed him to hear sufficiently and respond verbally, that applicant would be considered an individual with a disability under the ADA because he has a "record of" a substantially limiting impairment.

Finally, an individual's hearing impairment may be a disability when it does not significantly restrict major life activities, but the employer treats the individual as if it does.

Interviewing a Hearing Impaired Applicant

The ADA limits the medical information an employer can obtain from an applicant. An employer may not ask questions about an applicant's medical condition or require the applicant to take a medical examination before it makes a conditional job offer. Accordingly, an employer cannot ask an applicant questions such as:

- whether he has ever taken a test that revealed a hearing loss;
- whether she uses any assistive devices for a hearing impairment (such as a hearing aid) or has done so in the past; or
- whether she has any hearing loss due to an on-the-job accident or injury.

However, an employer may ask all applicants whether they will need a reasonable accommodation for the application process. For example, an employer may have a statement on its job announcement or its website directing applicants who need reasonable accommodations (e.g., a sign language interpreter, additional test-taking time) for the application process to contact a designated person in the company's Human Resources Department.

The employer may not ask for an applicant's medical history, records, or other information about a hearing impairment that is obvious or that has been disclosed. However, if an employer reasonably believes that an applicant with a known hearing impairment will need a reasonable accommodation to do the job, it may ask if an accommodation is needed and, if so, what type. In addition, the employer may ask the applicant to describe or demonstrate how s/he could perform the job with or without an accommodation.

The ADA does not require an applicant to disclose his hearing impairment to a potential employer. Nevertheless, if an applicant knows he needs a reasonable accommodation to complete the hiring process, he must disclose his hearing impairment. Under the ADA, an employer must keep confidential any medical information the applicant discloses.

After an offer of employment is made, but before an applicant begins work, an employer may ask questions about an applicant's health (including whether the applicant has a hearing impairment) and may require an applicant to take a medical examination, as long as the employer asks the same questions and requires the same examinations of all potential hires for the same type of position.

If an employer becomes aware of an applicant's hearing impairment after offering the applicant a job and reasonably believes that the impairment may affect her ability to perform the job's essential functions (i.e., fundamental job duties) or to perform them safely, the employer may ask the applicant for information to determine whether she can perform the essential functions of the position with or without a reasonable accommodation and whether she would pose a "direct threat" (i.e. a significant risk of harm to herself or others that cannot be reduced through reasonable accommodation).

An employer may only withdraw a job offer made to an individual with a disability if it can demonstrate that the applicant is unable to perform the essential functions of the position with or without a reasonable accommodation or would pose a direct threat.

The Hearing Impaired Employee

The ADA severely restricts the circumstances under which an employer may obtain information about an employee's medical condition or require an employee to undergo a medical examination. If an employer has a reasonable belief, based on objective evidence, that an employee's hearing impairment is the cause of performance problems or may pose a direct threat to the employee or others, it may ask questions about the impairment or require a medical examination.

An employer that does not have a reasonable belief that an employee's performance problems are related to a hearing impairment may not ask questions about the impairment, but instead should handle the situation in accordance with its policies generally applicable to poor performance.

When an employee requests a reasonable accommodation for a hearing disability and the disability and/or need for accommodation is not obvious, an employer may ask for reasonable documentation showing that the condition is a disability and/or that accommodation is needed.

Disability-related questions and medical examinations are also permitted as part of an employer's voluntary wellness program.

Employers are required to provide adjustments or modifications that enable qualified people with disabilities to enjoy equal employment opportunities unless doing so would result in undue hardship (i.e., significant difficulty or expense). Employers should not assume that all persons with hearing impairments will require an accommodation or even the same accommodation.

Applicants or employees with hearing disabilities may need one or more of the following accommodations:

- a sign language interpreter
- a TTY, text telephone, voice carry-over telephone, or captioned telephone
- a telephone headset
- appropriate emergency notification systems (e.g., strobe lighting on fire alarms or vibrating pagers)
- written memos and notes (especially used for brief, simple, or routine communications)
- work area adjustments (e.g., a desk away from a noisy area or near an emergency alarm with strobe lighting)
- assistive computer software (e.g., net meetings, voice recognition software)
- assistive listening devices (ALDs)
- augmentative communication devices that allow users to communicate orally by typing words that are then translated to sign language or a simulated voice
- communication access real-time translation (CART), which translates voice into text at real-time speeds
- time off in the form of accrued paid leave or unpaid leave if paid leave has been exhausted or is unavailable.
- altering an employee's marginal (i.e., non-essential) job functions
- reassignment to a vacant position
- other modifications or adjustments that allow a qualified applicant or employee with a hearing disability to enjoy equal employment opportunities.

No "magic words" (such as "ADA" or "reasonable accommodation") are required. An applicant or employee simply has to inform his employer (verbally or in writing) that he needs an adjustment or change in the workplace or in the way things are usually done because of a hearing impairment.

A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of the individual with a hearing impairment. For example, an individual with a hearing disability may submit a note from her doctor requesting a change in the location of her work area due to excessive noise that interferes with her hearing aid.

An individual with a hearing disability is not required to request an accommodation needed for the job at a particular time (e.g., during the application process), and an employer may not refuse to consider a request for accommodation because it believes the request should have

been made earlier. However, it is a good idea for an individual with a hearing disability to request reasonable accommodation before performance or conduct problems occur.

When a person's hearing impairment is not obvious, the employer may ask the person to provide reasonable documentation showing the existence of a disability and why a reasonable accommodation is needed. The request for documentation must be reasonable. An employer may not ask for information about conditions unrelated to the one for which the accommodation is requested or require more information than is necessary for the employer to determine whether an accommodation is needed.

An employer is not required to provide accommodations that would result in an undue hardship (i.e., significant difficulty or expense). If an employer determines that the cost of a reasonable accommodation would cause an undue hardship, it should consider whether some or all of the accommodation's cost can be offset. For example, in some instances, state vocational rehabilitation agencies or disability organizations may be able to provide accommodations at little or no cost to the employer. There are also federal tax credits and deductions to help offset the cost of accommodations, and some states may offer similar incentives. However, an employer may not claim undue hardship solely because it is unable to obtain an accommodation at little or no cost or because it is ineligible for a tax credit or deduction.

Even if a particular accommodation would result in undue hardship, however, an employer should not assume that no accommodation is available. It must consider whether there is another accommodation that could be provided without undue hardship.

An employer does not have to remove an essential job function (i.e., a fundamental job duty), lower production standards, or excuse violations of conduct rules that are job-related and consistent with business necessity, even where an employee claims that the disability caused the misconduct. Additionally, employers are not required to provide employees with personal use items, such as hearing aids or similar devices that are needed both on and off the job.

Furthermore, the ADA does not require employers to monitor an employee to ensure that he uses an assistive hearing device. Nor may an employer deny an individual with a hearing disability a reasonable accommodation because the employer believes that the individual has failed to take some measure that would improve his hearing.

Reasonable accommodations related to the "benefits and privileges" of employment include those accommodations that are necessary to provide an employee with a hearing disability equal access to information communicated in the workplace, the opportunity to participate in employer-sponsored events (e.g., training, meetings, social events, award ceremonies), and the opportunity for professional advancement.

An employer will not be excused from providing an employee with a hearing disability with a necessary accommodation because the employer has contracted with another entity to conduct the event or training. Even if the company conducting the event or training has an obligation, under Title III of the ADA, to provide "auxiliary aids and services," which would include CART services and sign language interpreters, this fact does not alter the employer's obligation to provide the employee with a reasonable accommodation for the event or training.

Safety Concerns
If an employee would pose a "direct threat" (i.e. a significant risk of substantial harm to herself or others) when working in a particular position, even with a reasonable accommodation, then an employer can prohibit her from performing that job. Any potential harm must be substantial and likely to occur.

An employer must consider the following to assess if an employee or applicant poses a direct threat:

- the duration of the risk involved;
- the nature and severity of the potential harm;
- the likelihood the potential harm will occur;
- the imminence of the potential harm; and
- the availability of any reasonable accommodation that might reduce or eliminate the risk.

An employer has a defense to a failure-to-hire claim under the ADA if another federal law actually prohibits it from hiring someone with a hearing impairment for a particular position. However, the employer should ensure that the federal law requires, rather than permits, exclusion of the individual with a disability and that there are no applicable exceptions. An example is an applicant with a severe hearing impairment that applies for a position driving large trucks. These positions are subject to hearing requirements and other standards enforced by the Department of Transportation (DOT). The employer may rely on DOT's hearing requirement in denying employment. However, the employer may not rely on the DOT hearing requirement to exclude the applicant from a position driving smaller trucks which are not subject to DOT's standards. Instead, the employer would have to establish that the applicant would pose a direct threat, within the meaning of the ADA, if it denied them a position driving smaller trucks because of their hearing disability.

Blindness and Vision Impairments

Estimates vary as to the number of Americans who are blind and visually impaired. According to one estimate, approximately 10 million people in the United States are blind or visually impaired. Other estimates indicate that one million adults older than the age of 40 are blind, and 2.4 million are visually impaired. Over the next 30 years, as the baby-boomer generation ages, the number of adults with vision impairments is expected to double. Recent figures also indicate that only 46% of working-age adults with vision impairments and 32% of legally blind working-age adults are employed.

The Centers for Disease Control and Prevention (CDC) define "vision impairment" to mean that a person's eyesight cannot be corrected to a "normal level." Vision impairment may result in a loss of visual acuity, where an individual does not see objects as clearly as the average person, and/or in a loss of visual field, meaning that an individual cannot see as wide an area as the average person without moving the eyes or turning the head. There are varying degrees of vision impairments, and the terms used to describe them are not always consistent. The CDC and the World Health Organization define low vision as a visual acuity between 20/70 and 20/400 with the best possible correction, or a visual field of 20 degrees or less. Blindness is described as a visual acuity worse than 20/400 with the best possible correction, or a visual field of 10 degrees or less. In the United States, the term "legally blind," means a visual acuity of 20/200 or worse with the best possible correction, or a visual field of 20 degrees or less. Although there are varying degrees of vision impairments, the visual problems an individual faces cannot be described simply by the numbers; some people can see better than others with the same visual acuity.

There are many possible causes for vision impairment, including damage to the eye and the failure of the brain to interpret messages from the eyes correctly. The most common causes of vision impairment in American adults are: diabetic retinopathy, age-related macular degeneration, cataracts, and glaucoma. Additionally, many individuals have monocular vision - perfect or nearly perfect vision in one eye, but little or no vision in the other. Vision impairment can occur at any time in life, but as a person's age increases, so does the likelihood that he or she will have some form of vision impairment.

Persons with vision impairments successfully perform a wide range of jobs and can be dependable workers. Yet, many employers still automatically exclude them from certain positions based on generalizations about vision impairments and false assumptions that it would be too expensive, or perhaps even too dangerous, to employ them. Thus, employers may erroneously assume that any accommodation that would allow a person with a vision impairment to do her job would be too costly. Employers also may have liability concerns related to the fear of accidents and/or injuries.

Whether a vision impairment actually substantially limits a major life activity depends on how significant the visual loss is. While a person who has no sight at all is obviously substantially limited in seeing, the assessment of most vision impairments requires a more individualized approach. Although mitigating measures that the individual uses, such as corrective lenses and

compensatory strategies that the body has developed, must be taken into account, they do not automatically exclude someone from coverage under the first part of the ADA's definition of "disability."

Mitigating measures do not include devices, reasonable accommodations, or compensatory strategies that simply compensate for the fact that an individual is substantially limited in seeing. For example, a totally blind person still meets the ADA's first definition of "disability" even if she can move about freely with the use of a white cane or service animal, can work with assistive technology or a reader, and can use her hearing to do what others can do using sight (e.g., cross a street).

Individuals with monocular vision also may meet the ADA's first definition of disability. Some individuals with monocular vision have learned to compensate visually (e.g., by turning their head or using "monocular cues," such as shadows and highlights, to judge distances) effectively enough that they no longer are substantially limited. These individuals (as well as many others), however, still may meet one of the ADA's other definitions of disability.

A person who has a record of an impairment that substantially limited a major life activity in the past or who is regarded by his employer as having such an impairment also has a disability and, therefore, is covered by the ADA. Although the second part of the definition -- having a record of a substantially limiting impairment -- does not apply frequently to individuals with vision impairments, examples of when it might apply would include situations in which someone's vision has been corrected surgically, or when an individual with monocular vision that was once substantially limiting has developed compensatory strategies over time.

Being "regarded as" substantially limited in seeing is a more common basis for coverage. An applicant may have done poorly on a vision test and found to be unsuitable for positions that require acute attention to detail.

Job Applicants

The ADA limits the medical information that an employer may seek from a job applicant. An employer may not require a job applicant to submit to a medical examination or ask about an applicant's disability before making a job offer. This means, for example, that an employer may not:

- ask about any medical procedures an applicant has had related to her vision (e.g., whether the applicant ever has had eye surgery);
- inquire as to whether the applicant uses any prescription medications, including medications for conditions related to the eye; and
- ask whether an applicant has any condition that may have caused a vision impairment (e.g., whether the applicant has diabetes if the employer suspects that the applicant has retinopathy).

An employer, however, may ask all applicants if they will need a reasonable accommodation for the application process. For example, an employer may include on an application contact information for the person who will handle accommodation requests. Additionally, an employer

may ask all applicants whether they can meet job-related requirements and may conduct non-medical tests that require the use of vision and that measure the applicant's ability to perform job-related functions.

If a disability is obvious (or if an applicant discloses that she has a visual disability) and an employer reasonably believes the applicant will require a reasonable accommodation to perform the job, the employer may ask whether the applicant will need a reasonable accommodation and, if so, what type.

An employer also may ask a person with a non-obvious vision impairment who requests a reasonable accommodation for the application process to provide documentation demonstrating that the condition is a disability and that the accommodation is necessary.

Once the employer has made a job offer, it may ask questions about the applicant's health (including questions about whether the applicant has a visual disability) and may ask for, or require, a medical examination, as long as all applicants for the same type of position are treated the same (i.e., all applicants are asked the same questions and are subject to the same examination). The job offer must be "real," meaning that the employer has obtained and evaluated all non-medical information that was reasonably available before making the offer.

If an employer learns from a post-offer inquiry or medical examination that an applicant has a vision impairment, it may ask medically related follow-up questions or may conduct medically-related examinations. An employer may not withdraw an offer from a person whose vision impairment is a disability, however, unless it can demonstrate that the applicant is unable to perform the essential functions of the position, with or without a reasonable accommodation, or that the applicant will pose a direct threat to safety.

Employees

An employer may ask an employee with a non-obvious vision impairment who has requested a reasonable accommodation for documentation demonstrating that he has a disability and needs the accommodation. In addition, an employer may ask an employee with a vision impairment to justify the use of sick leave by providing a doctor's note or other explanation, as long as it requires all employees to do so.

Finally, medical information about a vision impairment may be collected and an eye examination may be conducted as part of an employer's voluntary wellness program. For example, an employer may offer a voluntary annual screening for glaucoma so that employees can promptly obtain treatment where necessary. A wellness program is voluntary if an employee is neither required to participate, nor penalized for non-participation.

An employer must keep all medical information separate from general personnel files and treat it as a separate, confidential medical record. Issues regarding confidentiality more frequently arise in regard to non-obvious conditions; however, even if the impairment is obvious, information about it must be kept confidential. For example, if an employee with a vision impairment needs a monitor with a special program that allows them to see the screen better, the employer may not divulge to other curious employees, any information about their impairment, including the fact that the monitor is a reasonable accommodation.

Information that is otherwise confidential under the ADA may only be disclosed:

- to supervisors and managers who need the information in order to provide a reasonable accommodation or to meet the employee's work restrictions;
- to first aid and safety personnel if the employee would need emergency treatment or other assistance in the event of an emergency (e.g., in case of a fire), because of his vision impairment;
- to officials who are investigating compliance with the ADA and similar state or local laws;
- to state workers' compensation offices or workers' compensation insurance carriers in accordance with state workers' compensation laws; or
- for insurance purposes.

Accommodating Individuals with Visual Disabilities

People with visual disabilities may need one or more of the following accommodations:

- Assistive technology, including:
- A closed circuit television system (CCTV) for reading printed materials
- An external computer screen magnifier
- Cassette or digital recorders
- Software that will read information on the computer screen
- An optical scanner that can create documents in electronic form from printed ones
- Written materials in an accessible format, such as in large print, Braille, audio cassette, or computer disk
- Modification of employer policies to allow use of a guide dog in the workplace
- Modification of an employment test
- A reader
- A driver or payment for the cost of transportation to enable performance of essential functions
- An accessible website
- Modified training or training in the use of assistive technology
- A modified work schedule
- Time off, in the form of accrued paid leave or unpaid leave if paid leave has been exhausted or is unavailable
- Reassignment to a vacant position

Although these represent some examples of the types of accommodations commonly requested by applicants or employees with visual disabilities, other employees may need different changes or adjustments. Further, although a particular accommodation may work for one person, an employer should not assume that the same accommodation will work for another person with the same apparent visual disability.

Reasonable accommodations related to the "benefits and privileges" of employment include accommodations that are necessary to provide individuals with disabilities access to facilities or

portions of facilities to which all employees are granted access (e.g., employee break rooms and cafeterias), access to information communicated in the workplace, and the opportunity to participate in employer-sponsored training and social events.

In determining whether the provision of a particular accommodation would result in undue hardship, an employer should consider not only the cost of the accommodation in relationship to its own resources, but also other resources that may be available in the form of tax incentives or funding from third parties. For example, there are federal tax credits and deductions to help offset the cost of accommodations, and some states may offer similar incentives. Additionally, applicants or employees who are clients of a state's vocational rehabilitation system may be eligible for funding to pay for workplace accommodations. If a requested accommodation is too difficult or expensive, an employer must determine whether there is another easier or less costly accommodation that would meet the employee's needs.

An employer does not have to remove an essential job function (i.e., a fundamental job duty), lower production standards, excuse violations of conduct rules that are job-related and consistent with business necessity, or provide employees with personal use items, such as eyeglasses or other devices that are used both on and off the job.

When a person's vision impairment is not obvious, the employer may ask the person to provide reasonable documentation about how the condition limits major life activities (i.e., whether the person has a disability) and why a reasonable accommodation is needed. The request for documentation must be reasonable. An employer may not ask for information about conditions unrelated to the one for which accommodation has been requested or more information than is necessary for the employer to determine whether an accommodation is needed.

Certain individuals with visual disabilities may require only one reasonable accommodation, while others may need more than one. Additionally, because the obligation to provide reasonable accommodation is ongoing, an employer may have to provide a different reasonable accommodation when an employee's needs related to a visual disability or the nature of a job change.

An employer must also accommodate a vision impairment that results from another disability even if the vision impairment is not itself substantially limiting. An example is an employee who has diabetes and has developed a vision impairment. Even if his vision problems alone do not rise to the level of a substantial limitation, the employer is required to make accommodations for this employee because his vision impairment results from his diabetes, which is a disability.

Safety Issues

When it comes to safety concerns, an employer should be careful not to act on the basis of myths, fears, or stereotypes about vision impairments. Instead, the employer must evaluate each individual's knowledge, skills, and experience, as well as how the impairment affects his or her ability to perform a particular job safely. In other words, in order to exclude someone whose vision impairment is a disability under the ADA from a job for safety reasons, an employer must determine that a "direct threat" exists. A "direct threat" is a significant risk of substantial harm to an individual with a disability or to others that cannot be reduced or eliminated through reasonable accommodation. This assessment must be based on objective, factual evidence that takes into account the nature of the risk, the severity of the potential harm, the likelihood that

the harm will occur, and the imminence of the harm, as well as the availability of any reasonable accommodation that might reduce or eliminate the risk.

There are federal safety laws that may require an employer to exclude individuals with certain kinds of visual disabilities from certain types of jobs. For example, the U.S. Department of Transportation (DOT) has regulations that require a certain level of visual acuity for interstate drivers of commercial motor vehicles weighing more than 10,000 pounds. An employer may defend a claim of discrimination under the ADA on the grounds that it was complying with the DOT regulation.

However, an employer may not rely on this defense where the other federal law does not in fact *require* exclusion of the individual with a disability (e.g., where the employer applies federal standards to jobs other than those to which they are specifically intended to apply).

Cancer in the Workplace

Approximately 40 percent of the more than one million Americans diagnosed with some form of cancer each year are working-age adults, and nearly 10 million Americans have a history of cancer.

Despite significant gains in cancer survival rates and the passage of the ADA, people with cancer still experience barriers to equal job opportunities. One reason individuals with cancer face discrimination at work is their supervisors' and co-workers' misperceptions about their ability to work during and after cancer treatment. Even when the prognosis is excellent, some employers expect that a person diagnosed with cancer will have long absences from work or not be able to focus on duties. Today, however, unlike one hundred years ago when cancer was a literal "death sentence," most working-age cancer survivors return to work and have relatively the same productivity rates as other workers.

Cancer is a group of related diseases characterized by the out-of-control growth of abnormal cells caused both by external and internal factors such as chemicals, radiation, immune conditions, and inherited mutations. Different cancers have different risk factors. Many people with one or more risk factors never develop cancer, while others with this disease have no known risk factors. Different types of cancer vary in their rate of growth, pattern of spreading throughout the body, and response to treatment. Many types of cancer may be cured by surgery, radiation, chemotherapy, hormone therapy, and/or bone marrow transplant.

Cancer's effect on an individual depends on many factors, including the primary site of the cancer, stage of the disease, age and health of the individual, and type of treatment(s). The most common symptoms and side effects of cancer and/or its treatment are pain, fatigue, problems related to nutrition and weight management, nausea, vomiting, hair loss, low blood counts, memory and concentration loss, depression, and respiratory problems.

Cancer is a disability under the ADA when it or its side effects substantially limit(s) one or more of a person's major life activities.

Even when the cancer itself does not substantially limit any major life activity (such as when it is diagnosed and treated early), it can lead to the occurrence of other impairments that may be disabilities. For example, sometimes depression may develop as a result of the cancer, the treatment for it, or both. Where the condition lasts long enough (i.e., for more than several months) and substantially limits a major life activity, such as interacting with others, sleeping, or eating, it is a disability within the meaning of the ADA.

Cancer also may be a disability because it was substantially limiting some time in the past.

Finally, cancer is a disability when it does not significantly affect a person's major life activities, but the employer treats the individual as if it does.

Under the ADA, the determination of whether an individual currently has, has a record of, or is regarded as having a disability is made on a case-by-case basis.

Job Applicants

An employer may not ask questions about an applicant's medical condition or require an applicant to have a medical examination before it makes a conditional job offer. This means that an employer *cannot* ask an applicant questions such as:

- whether she has or ever had cancer;
- whether she is undergoing chemotherapy or radiation or taking medication used to treat or control cancer (e.g., Tamoxifen) or ever has done so in the past; or,
- whether she ever has taken leave for surgery or medical treatment, or how much sick leave she has taken in the past year.

Of course, an employer may ask an applicant who appears to be sick or tired how he is feeling. An employer also may ask any applicant questions pertaining to the performance of the job, such as:

- whether he can lift up to 50 pounds;
- whether he can travel out of town; or
- whether he can work rotating shifts.

The ADA also does not require applicants to voluntarily disclose that they have or had cancer or another disability *unless* they will need a reasonable accommodation for the application process (e.g., additional time to take a pre-employment test due to fatigue caused by radiation treatments). Some individuals with cancer, however, choose to disclose their condition to dispel any rumors or speculation about their appearance, such as emaciation or hair loss. Others choose to disclose their cancer when applying for a job because they will need a reasonable accommodation to do the job (e.g., flexible working hours to receive or recover from treatment). A person with cancer also is permitted to request an accommodation after becoming an employee, even if she did not ask for one when applying for the job or after receiving the job offer.

An employer may not ask an applicant who has voluntarily disclosed that he has cancer any questions about the cancer, its treatment, or its prognosis. However, if an applicant voluntarily discloses that he has cancer and the employer reasonably believes that an accommodation will be required to perform the job, an employer may ask whether the applicant will need an accommodation and, if so, what type.

Once an employer has made a job offer, it may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants for the same type of position in the same manner. A job offer is not considered "real," however, until the employer has obtained and evaluated all readily available non-medical information.

The fact that an applicant has or had cancer may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, and without posing a direct threat to safety. A "direct threat" is a significant risk of substantial harm to the individual or others in the workplace that cannot be reduced or eliminated through reasonable accommodation. The employer, therefore, should evaluate the applicant's *present* ability to perform the job rather than make unfounded assumptions. To do this, an employer also may ask the applicant medically related follow-up

questions about his cancer, such as whether he is undergoing treatment or experiencing any side effects that could interfere with the ability to do the job or that might require a reasonable accommodation.

Employees
An employer may ask questions or require an employee to have a medical examination only when it has a legitimate reason to believe that cancer, or some other medical condition, may be affecting the employee's ability to do her job, or to do so safely. Sometimes an employer will be able to ask for medical information because it knows that the person has cancer and reasonably believes that the cancer itself, its treatment, and/or side effects are causing the employee's performance problems. At other times, an employer may ask for medical information when it has observed symptoms, such as fatigue or difficulties with memory or concentration, or has received reliable information from someone else (e.g., a family member or co-worker), indicating that the employee may have a medical condition that is causing performance problems.

Poor job performance, however, often is unrelated to a medical condition and should be handled in accordance with an employer's existing employment policies.

If the employer has a reasonable belief that the employee may be unable to perform her job or may pose a direct threat to herself or others, the employer may ask for medical information. However, the employer may obtain only the information needed to make an assessment of the employee's *present* ability to perform her job and to do so safely.

An employer may ask an employee with cancer:

- for information, including reasonable documentation, explaining the need for a reasonable accommodation requested because of cancer;
- for medical information that is part of a voluntary wellness program;
- to justify the use of sick leave by providing a doctor's note or other explanation, as long as all employees who use sick leave are required to do the same and the information requested does not exceed what is necessary to verify that sick leave is being used appropriately; and,
- for periodic updates on his condition if the employee has not provided an exact or fairly specific date of return, or where the employee requests leave in excess of that which the employer already has granted.

Of course, an employer may call employees on extended leave to check on their progress or to express concern for their health.

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. Under the following circumstances, however, an employer may disclose that an employee has cancer:

- to supervisors and managers, if necessary to provide a reasonable accommodation or meet an employee's work restrictions;

- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance at work;
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- as needed for workers' compensation or insurance purposes (for example, to process a claim).

Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure of the employee's disability. Although the employee's co-workers and others in the workplace may be concerned about the employee's health, an employer may not reveal that the employee has cancer.

An employer also may not explain to other employees why an employee with cancer has been absent from work.

Accommodating Employees with Cancer
The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (i.e., a significant difficulty or expense). Accommodations vary depending on the needs of an individual with a disability. Not all employees with cancer will need an accommodation or require the same accommodations, and most of the accommodations a person with cancer might need will involve little or no cost. An employer must provide a reasonable accommodation that is needed because of the limitations caused by the cancer itself, the side effects of medication or treatment for the cancer, or both. For example, an employer may have to accommodate an employee who is unable to work while she is undergoing chemotherapy or who has depression as a result of cancer, the treatment for it, or both. An employer, however, has no obligation to monitor an employee's medical treatment or ensure that he is receiving appropriate treatment.

Some employees with cancer may need one or more of the following accommodations:

- leave for doctors' appointments and/or to seek or recuperate from treatment
- periodic breaks or a private area to rest or to take medication
- adjustments to a work schedule
- permission to work at home
- modification of office temperature
- permission to use work telephone to call doctors
- reallocation or redistribution of marginal tasks to another employee
- reassignment to another job

Some employees with cancer may need accommodations other than the ones listed above. The employer, therefore, should discuss with the employee her particular limitations and whether there is anything the employer can do to enable her to work. For example, an employer might explore the possibility of providing certain equipment (e.g., a chair or stool to help with fatigue), a temporary transfer, or changes in how work is performed (e.g., altering when or how a function is done to help with concentration problems).

A request for reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with cancer.

An employer may request reasonable documentation where a disability or the need for reasonable accommodation is not obvious. An employer, however, is entitled only to documentation sufficient to establish that the employee's cancer is a disability and that explains why an accommodation is needed. A request for an employee's entire medical record, for example, would be inappropriate, as it likely would include information about conditions other than the employee's cancer.

The duty to provide a reasonable accommodation is an ongoing one. Although some employees with cancer may require only one reasonable accommodation, others may need more than one. For example, an employee with cancer may require leave for surgery and subsequent recovery but may be able to return to work on a part-time or modified schedule while receiving chemotherapy. An employer must consider each request for a reasonable accommodation and determine whether it would be effective and whether providing it would pose an undue hardship.

An employer never has to reallocate essential functions as a reasonable accommodation but can do so if it wishes. In fact, it may be mutually beneficial to the employer and employee to remove an essential function that the employee is unable to do, at least on a temporary basis, because of limitations caused by the cancer, its treatment, and/or side effects.

Granting leave to an employee who is unable to provide a fixed date of return may be a reasonable accommodation. Although many types of cancer can be successfully treated -- and often cured -- the treatment and severity of side effects often are unpredictable and do not permit exact timetables. An employee requesting leave because of cancer, therefore, may be able to provide only an *approximate* date of return (e.g., "in six to eight weeks," "in about three months"). In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss the need for continued leave beyond what originally was granted. The employer also has the right to require that the employee provide periodic updates on his condition and possible date of return. After receiving these updates, the employer may reevaluate whether continued leave constitutes an undue hardship.

Safety

When it comes to safety, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes about cancer. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and the extent to which cancer affects his ability to work in a particular job.

Intellectual Disabilities

An estimated 2.5 million people in the United States have an intellectual disability-approximately 1% of the United States population. Estimates also indicate that only 31% of individuals with intellectual disabilities are employed, although many more want to work.

An individual is considered to have an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18. "Adaptive skill areas" refers to basic skills needed for everyday life. They include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work.

Intellectual disabilities will vary in degree and effect from person to person, just as individual capabilities vary considerably among people who do not have an intellectual disability. People should not make generalizations about the needs of persons with intellectual disabilities. In some instances an intellectual disability will not be obvious from a person's appearance, nor will it be accompanied by a physical disability.

Persons who have intellectual disabilities may have other impairments as well. Examples of coexisting conditions may include: cerebral palsy, seizure disorders, vision impairment, hearing loss, and attention-deficit/hyperactivity disorder (ADHD). Persons with severe intellectual disabilities are more likely to have additional limitations than persons with milder intellectual disabilities.

Persons with intellectual disabilities successfully perform a wide range of jobs, and can be dependable workers. The types of jobs people with intellectual disabilities are able to perform will depend on individual strengths and interests. Examples include: animal caretakers, laundry workers, building maintenance workers, library assistants, data entry clerks, mail clerks, store clerks, messengers, cooks, printers, assemblers, factory workers, photocopy operators, grocery clerks, sales personnel, hospital attendants, housekeepers, statement clerks, automobile detail workers, and clerical aides.

Yet, many employers still exclude persons with intellectual disabilities from the workplace because of persistent, but unfounded myths, fears, and stereotypes. For instance, some employers believe that workers with intellectual disabilities will have a higher absentee rate than employees without disabilities. Studies show that this is not true and that workers with intellectual disabilities are absent no more than other workers. Another popular misperception is that employing people with intellectual disabilities will cause insurance costs to skyrocket. Studies show, however, that employing workers with intellectual disabilities will not lead to higher insurance rates or more workers' compensation claims.

Not everyone with an intellectual impairment is covered by the ADA. A person may meet the ADA's definition of "disability" in any one of three ways:

1. An individual's impairment must substantially limit one or more major life activities. Major life activities are activities that an average person can perform with little or no difficulty. Examples include walking, seeing, hearing, thinking, speaking, learning, concentrating, performing manual tasks, caring for oneself, and working.

2. A person may have two or more impairments that are not substantially limiting by themselves, but that taken together substantially limit one or more major life activities. In that situation, the person has a disability. An example would be a person with a mild intellectual disability and a mild form of ADHD.

3. Even if an impairment does not *currently* substantially limit a major life activity, if the person has a past record or history of a substantially limiting intellectual disability, the person is covered under the ADA.

The ADA also protects persons who do not have a substantially limiting intellectual disability, but are treated by an employer as if they do.

The ADA's protections extend to people who do not have disabilities themselves but are discriminated against on the basis of their association with a person with a disability. The association may be with family members, friends, or any other person. A person who experiences discrimination based on such an association has a right to protection under the ADA, but is not entitled to reasonable accommodation.

Job Applicants
The ADA limits the kinds of medical information that an employer can seek from a job applicant. An employer may not require a job applicant to take a medical examination or ask about a person's disability before making a job offer. However, the employer can ask an applicant questions about his/her ability to perform job-related functions, as long as the questions are not phrased in terms of a disability.

Example: An employer may not ask the following questions:

- whether or to what extent a person has an intellectual disability;
- whether the applicant has ever filed for workers' compensation;
- whether the applicant takes medication;
- whether the applicant has been hospitalized in an institution; or
- whether the applicant is receiving psychiatric treatment.

Example: An employer may ask the following questions if they relate to performance of the job:

- whether the applicant can lift a 45 pound load;
- whether the applicant can put files in alphabetical order; and
- whether the applicant can place items in numerical order.

If an applicant voluntarily tells an employer that s/he has an intellectual disability or if the disability is otherwise obvious, an employer may only ask questions regarding the need for a reasonable accommodation and/or what kind of accommodation may be needed.

At the pre-offer stage, an employer is also prohibited from asking a third party (such as a job coach, family member, or social worker attending an interview with an applicant who has an intellectual disability) any questions that it would not be permitted to ask the applicant directly.

Once the employer has made a job offer, the employer may ask questions about the applicant's health (including questions about the applicant's disability) and may ask for or require a medical examination, as long as all applicants are treated the same, i.e. all applicants are asked the same questions and are required to take the same examination.

After an employer has obtained basic medical information from all individuals who have received job offers, it may ask specific individuals for more medical information if it is medically related to the previously obtained medical information. An employer must keep all obtained medical information confidential.

Employees

The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to undergo a medical examination. Generally, to ask an employee for medical information, an employer must have a reason to believe that there is a medical explanation for changes in the employee's job performance, or must believe that the employee's medical condition may pose a direct threat to safety.

Poor job performance may be unrelated to an intellectual disability and should generally be dealt with according to an employer's existing quality performance policy. Medical information can be sought only when an employer has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee's performance problems.

The ADA's confidentiality requirements also include limited exceptions. An employer may disclose the fact that someone has an intellectual disability:

- to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in the event of an emergency;
- to individuals investigating compliance with the ADA and similar state and local laws; and
- where required for workers' compensation or insurance purposes, for example, to process a claim.

Accommodating Persons with Intellectual Disabilities

A third party may often request an accommodation on behalf of the person with an intellectual disability. If this happens, the employer must respond to the request as if the employee or applicant requested the accommodation.

Accommodations vary depending on the needs of the person with a disability. In some instances, the appropriate accommodation will be readily apparent. In others, the proper accommodation is not obvious. In those situations, the employer should have an informal and

interactive discussion with the person and/or his representative to determine a suitable accommodation.

Some persons with intellectual disabilities will need reasonable accommodations to apply and/or interview for a job. Such accommodations might include:

- providing someone to read or interpret application materials for a person who has limited ability to read or to understand complex information;
- demonstrating, rather than describing, to the applicant what the job requires;
- modifying tests, training materials, and/or policy manuals; and
- replacing a written test with an "expanded" interview. An expanded interview allows applicants who have difficulty describing their abilities to demonstrate their skills at the employment office or work site.

The following are accommodations that employees with intellectual disabilities may need:

- Job restructuring (e.g., exchanging non-essential functions between employees)
- Training for the Job

  The employer may:

  - have the supervisor give instructions at a slower pace;
  - give the employee additional time to finish the training;
  - break job tasks into sequential steps required to perform the task;
  - use charts, pictures, or colors;
  - provide a tape recorder to record directions as a reminder of steps in a task;
  - use detailed schedules for completing tasks; and
  - provide additional training if there are any on-the-job changes.

- Job Coach

  A Job Coach can:

  - assist the employee to reach job stabilization by helping her learn how to do the job. Once the employee learns her job duties, the Job Coach can gradually reduce the amount of time spent working with her;
  - provide intensive monitoring, training, assessment and support to workers with intellectual disabilities;
  - help develop a healthy working relationship between management and the employee by encouraging appropriate social interaction and maintaining open communications; and
  - assist the parties in determining what reasonable accommodation is needed.

- Modified Work Schedule
- Help in Understanding Job Evaluations or Disciplinary Proceedings

  - An employer may allow the employee to bring someone to a job evaluation or disciplinary meeting to help him ask questions and to explain the job evaluation results or the purpose of the meeting.

- Acquisition or Modification of Equipment or Devices
- Work Station Placement

A person can ask for a reasonable accommodation at any time during the application process and any time the need develops during employment. An employee may also request a reasonable accommodation if there are new tasks on the job that make accommodations necessary. An employee with an intellectual disability may ask for a reasonable accommodation even if s/he did not ask for one when applying for a job or after receiving a job offer.

An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

In most cases, accommodating persons with intellectual disabilities is not expensive. Studies show that most workers with intellectual disabilities require no special accommodations and that the cost of accommodations is minimal. If an employer believes that a particular accommodation would result in undue hardship, however, it must consider an alternative accommodation.

An employer does not have to remove an essential job function (i.e., a fundamental job duty), lower production standards, excuse violations of conduct rules that are job-related and consistent with business necessity or provide employees with personal use items, such as wheelchairs, eyeglasses, hearing aids, and other devices needed both on and off the job.

When a person's disability is not obvious, the employer may ask the person to provide reasonable documentation about his/her disability. The employer is entitled to know that the person has a covered disability for which a reasonable accommodation is needed. The employer may not request documentation unrelated to the disability at issue, or the accommodation requested. If a person has more than one disability, an employer may *only* ask for information related to the disability that requires accommodation. The employer may request that information or documentation of a person's impairment be provided by a physician or an appropriate professional. Information about a person's functional limitations can also be obtained from non-professionals, such as the applicant, his/her family members, and friends.

The type and amount of supervision required for employees with intellectual disabilities will depend on the type of work and the person's individual strengths. It may take persons with intellectual disabilities longer to master the tasks associated with a job. However, studies have established that when workers with intellectual disabilities are properly trained, they can perform as effectively as workers without intellectual disabilities in the same job. In other situations, modifying supervisory methods may be an appropriate form of reasonable accommodation. Some employees with intellectual disabilities may benefit from additional day-

to-day guidance or feedback, or from having a large task broken down into smaller parts that are easier to understand.

Safety
It is a common misperception that persons with intellectual disabilities are more susceptible to accidents in the workplace and present an increased safety risk. A number of surveys indicate that employees with intellectual disabilities do not create an increased safety risk in the workplace and that their safety records are equivalent to those of employees without disabilities. An employer may refuse to hire a person because of her disability only if she in fact poses a "direct threat" to her own health or safety, or to the health and safety of others in the workplace. The term "direct threat" means "significant risk to the health or safety of the individual with a disability or others that cannot be eliminated by reasonable accommodation."

The employer must evaluate the person's ability to safely perform the essential functions of the job. Factors the employer must consider are the duration of the risk, nature and severity of the potential harm, the likelihood that it will occur, and the imminence of the potential harm. The effect of any reasonable accommodation that would reduce or eliminate the risk of harm must also be considered. The employer's assessment of direct threat must not be based on fears, myths or stereotypes, but on credible and objective evidence.

Conduct
As with any employees, circumstances may arise when employers must determine whether to discipline employees with intellectual disabilities for misconduct.

An employer does not have to excuse violations of a uniformly applied conduct rule that is job-related and consistent with business necessity. An employer may discipline an employee with a disability for engaging in misconduct, as long as the employer imposes the same discipline on an employee without a disability. This means, for instance, that an employer does not have to tolerate or excuse violence, threats of violence, stealing, or destruction of property.

Harassment
The ADA prohibits harassment based on disability just as other federal laws prohibit harassment based on race, sex, color, gender, national origin, religion or age. Approximately 20% of the employment discrimination claims brought by persons with intellectual disabilities under the ADA allege harassment based on disability.

The ADA prohibits offensive conduct that is sufficiently severe or pervasive to create a hostile or abusive work environment. Acts of harassment may include verbal abuse, such as name-calling, behavior such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. The law does not protect workers with disabilities (or any workers) from merely rude or uncivil conduct. To be actionable, conduct related to an employee's intellectual disability must be sufficiently severe or pervasive as to be both subjectively hostile and abusive (to the person) and to a reasonable person.

An employer is responsible for maintaining a workplace that is free of harassment based on disability. Failure by an employer to take appropriate steps to prevent or correct harassment may contribute to employer liability for unlawful harassment.

Epilepsy

About 2.3 million people in the United States or one percent of the population have some form of epilepsy, with more than 180,000 new cases diagnosed each year in Americans of all races and ages. Epilepsy is a general term that includes various types of seizures. A seizure happens when abnormal electrical activity in the brain causes an involuntary change in body movement or function, sensation, awareness, or behavior. People diagnosed with epilepsy have had more than one seizure, and they may have had more than one kind of seizure. A seizure can last from a few seconds to a few minutes. Some individuals recover immediately from a seizure, while others may be dazed and sleepy for a period of time following a seizure. The severity of epilepsy and the type of seizure vary from person to person. For most people with epilepsy, no single cause has been determined. Seizures may result from illness (including high fever), head trauma, stroke, brain tumor, poisoning, infection, inherited conditions, brain disorders, or problems during fetal development.

Individuals with epilepsy successfully perform all types of jobs, including heading corporations, teaching and caring for children, and working in retail and customer service positions. Individuals with epilepsy also can perform jobs that might be considered "high-risk," such as police officer, firefighter, welder, butcher, and construction worker. Yet, many employers wrongly assume that people with epilepsy automatically should be excluded from certain jobs. For example, many employers believe that anyone with epilepsy cannot safely operate certain types of machinery, drive, or use computers. The reality is that because antiseizure medications and other treatment methods totally control seizures for more than half of the people with epilepsy, many employers do not know when someone in the workplace has this condition. Some people whose epilepsy is not completely controlled experience a sensation or warning called an "aura" that lets them know that they are about to have a seizure. Many other people with epilepsy only have seizures while asleep (nocturnal seizures) or seizures that do not cause loss of consciousness or motor control.

Some employers also fear hiring individuals with epilepsy because they are concerned about higher workplace insurance rates or believe that employees with epilepsy will use a lot of sick leave. Workplace insurance rates, however, are determined by how hazardous the type of work is and by an employer's overall claims record in the past, not by the physical condition of individual employees. There is no evidence that people with epilepsy are more prone to accidents on the job than anyone else. Finally, because medications usually can control seizures for most people, they do not need to take time off from work because of their epilepsy.

Epilepsy is a disability when it substantially limits one or more of a person's major life activities. Major life activities are basic activities that an average person can perform with little or no difficulty, such as walking, seeing, hearing, speaking, breathing, performing manual tasks, caring for oneself, learning, and working. Major life activities also include thinking, concentrating, interacting with others, reproduction, and sleeping.

Epilepsy may be a disability because of limitations that occur as the result of seizures or because of side effects or complications that can result from medications used to "control" the condition.

Epilepsy also may be a disability because it was substantially limiting some time in the past (i.e., before seizures were controlled). Even if the individual's epilepsy is not now substantially limiting, it substantially limited major life activities such as caring for herself and interacting with others in the past. This individual has a record of a disability.

Finally, epilepsy is a disability when it does not significantly affect a person's everyday activities, but the employer treats the individual as if it does.

Job Applicants
The ADA limits the medical information that an employer can seek from a job applicant. An employer may not ask questions about an applicant's medical condition or require an applicant to take a medical examination before it makes a conditional job offer. This means that an employer *cannot* ask an applicant questions such as:

- whether she has epilepsy or seizures;
- whether she uses any prescription drugs; or
- whether she ever has filed for workers' compensation or was injured on a job.

After making a job offer, an employer may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants the same.

The ADA does not require applicants to disclose that they have epilepsy or another disability unless they will need a reasonable accommodation for the application process. Some individuals with epilepsy, however, choose to disclose their condition to eliminate any surprise should a seizure occur in the workplace. Often the decision to disclose depends on the type of seizure a person has, the need for assistance during or after a seizure, the frequency of seizures, and the type of work for which the person is applying.

Sometimes the decision to disclose depends on whether an individual will need a reasonable accommodation to perform the job. A person with epilepsy, however, may request an accommodation after becoming an employee even if she did not ask for one when applying for the job or after receiving the job offer.

If an applicant voluntarily discloses that she has epilepsy, an employer only may ask two questions: whether she needs a reasonable accommodation, and if so, what type. The employer also must keep any information an applicant discloses about her medical condition confidential.

The fact that an applicant has epilepsy may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety. The employer, therefore, should evaluate the applicant's present ability to perform the job effectively and safely. After an offer has been made, an employer also may ask the applicant additional questions about his epilepsy, such as whether he takes any medication; whether he still has seizures and, if so, what type; how long it takes him to recover after a seizure; and/or, whether he will need assistance if he has a seizure at work.

The employer also could send the applicant for a follow-up medical examination or ask him to submit documentation from his doctor answering questions specifically designed to assess the applicant's ability to perform the job's functions and to do so safely.

Employees
An employer may ask questions or require an employee to have a medical examination only when it has a legitimate reason to believe that epilepsy, or some other medical condition, may be affecting the employee's ability to do her job, or to do it safely.

On the other hand, when an employer does not have a reason to believe that a medical condition is causing an employee's poor job performance, it may not ask for medical information but should handle the matter as a performance problem.

An employer also may ask an employee about epilepsy when it has a reason to believe that the employee may pose a "direct threat" (i.e., a significant risk of substantial harm) to himself or others. An employer should make sure that its safety concerns are based on objective evidence and not general assumptions.

An employer may require an employee on leave because of epilepsy to have a medical exam or provide documentation before allowing her to return to work if the employer has a reasonable belief that the employee may be unable to perform her job or may pose a direct threat to herself or others. However, the employer may obtain only the information needed to make an assessment of the employee's present ability to perform her job and to do so safely.

An employer also may ask an employee about epilepsy when the employee has requested a reasonable accommodation because of his epilepsy or as part of a voluntary wellness program. In addition, an employer may ask an employee with epilepsy to justify the use of sick leave by providing a doctor's note or other explanation, as long as it requires all employees to do so.

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. An employer, however, under certain circumstances may disclose to particular individuals that an employee has epilepsy:

- to supervisors and managers, if necessary to provide a reasonable accommodation or meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance if she had a seizure at work;
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- as needed for workers' compensation or insurance purposes (for example, to process a claim).

An employer may not disclose that an employee has epilepsy or is receiving a reasonable accommodation. However, an employer certainly may respond to a question about why a co-worker is receiving what is perceived as "different" or "special" treatment by emphasizing that it tries to assist any employee who experiences difficulties in the workplace.

Although the employee's co-workers and others in the workplace who witness the seizure naturally may be concerned, an employer may not reveal that the employee has epilepsy. Rather, the employer should assure everyone present that the situation is under control. The employer also should follow the employee's plan of action if one has been created.

An employer also may allow an employee voluntarily to tell her co-workers that she has epilepsy and provide them with helpful information, such as how to recognize when she is having a seizure, how long her seizures generally last, what, if anything, should be done if she has a seizure, and how long it generally takes her to recover. However, even if an employee voluntarily discloses that she has epilepsy, an employer is limited in sharing this information with others.

Accommodating Employees with Epilepsy
Not all employees with epilepsy will need an accommodation or require the same accommodation, and most of the accommodations a person with epilepsy might need will involve little or no cost.

Some employees may need one or more of the following accommodations:

- breaks to take medication
- leave to seek treatment or adjust to medication
- a private area to rest after having a seizure
- a rubber mat or carpet to cushion a fall
- adjustments to work schedules
- a consistent start time or a schedule change (e.g., from the night shift to the day shift)
- a checklist to assist in remembering tasks
- to bring a service animal to work
- someone to drive to meetings and other work-related events
- to work at home

Although these are some examples of the types of accommodations employees with epilepsy commonly need, other employees may need different changes or adjustments. An employer should ask the employee requesting an accommodation because of his epilepsy what is needed to do the job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the web site for the Job Accommodation Network (JAN) (www.jan.wvu.edu/media/epilepsy.html) provides information about many types of accommodations for employees with epilepsy.

Job reassignment may be necessary where an employee with epilepsy no longer can perform his job, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship. The new position should be equal in pay and status to the employee's original position, or as close as possible if no equivalent position is available. The new position does not have to be a promotion, although the employee should have the right to compete for promotions just like other employees.

A request for reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with epilepsy. If the employer does not already know that an employee has epilepsy, the employer can ask the employee for verification from a health care professional.

Employers have no obligation to monitor an employee to make sure that she does not have a seizure. However, an employer may have to provide a flexible work schedule or allow the employee breaks to rest or to take medication to keep her epilepsy under control.

If an employee does not have a license because of epilepsy, an employer does not have to eliminate driving from his job duties if driving is an essential function of the job. However, an employer should carefully consider whether driving actually is a job function or simply a way of accomplishing an essential function. If an accommodation is available that would enable an employee with epilepsy to perform a function that most employees would perform by driving, then the employer must provide the accommodation, absent undue hardship.

Similarly, if driving is a marginal (or non-essential) function, the fact that an individual with epilepsy does not have a driver's license cannot be used to deny the individual an employment opportunity.

Safety

When it comes to safety, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes about epilepsy. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and how having epilepsy affects him. In other words, an employer should determine whether a *specific* applicant or employee would pose a "direct threat" or significant risk of substantial harm to himself or others that cannot be eliminated or reduced through reasonable accommodation. This assessment must be based on objective, factual evidence, including the best recent medical evidence and advances to treat and control epilepsy.

An employer may prohibit a person who has epilepsy from performing a job when it can show that the individual may pose a direct threat. In making a "direct threat" assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also should consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and, (4) the imminence of the potential harm. The harm also must be serious and likely to occur, not remote and speculative. Finally, the employer must determine whether any reasonable accommodation would reduce or eliminate the risk.

Diabetes

Diabetes is becoming more common in the United States, with approximately one million new cases diagnosed each year. Today, nearly 17 million Americans age 20 years or older have diabetes, including individuals of nearly every race and ethnicity. Diabetes occurs when the pancreas does not produce any insulin or produces very little insulin, or when the body does not respond appropriately to insulin. Insulin is a hormone that is needed to convert sugar, starches, and other food into energy. The process of turning food into energy is crucial because the body depends on this energy for every action, from pumping blood and thinking to running and jumping. Although diabetes cannot be cured, it can be managed. Some people control their diabetes by eating a balanced diet, maintaining a healthy body weight, and exercising regularly. Many individuals, however, must take oral medication and/or insulin to manage their diabetes.

Individuals with diabetes successfully perform all types of jobs from heading major corporations to protecting public safety. Yet, many employers still automatically exclude them from certain positions based on myths, fears, or stereotypes. For example, some employers wrongly assume that anyone with diabetes will be unable to perform a particular job (e.g., one that requires driving) or will need to use a lot of sick leave. The reality is that, because many individuals with diabetes work with few or no restrictions, their employers do not know that they have diabetes. Some employees, however, tell their employers that they have diabetes because they need a "reasonable accommodation" a change or adjustment in the workplace to better manage and control their condition. Most of the accommodations requested by employees with diabetes such as regular work schedules, meal breaks, a place to test their blood sugar levels, or a rest area do not cost employers anything to provide.

Diabetes is a disability when it substantially limits one or more of a person's major life activities. Major life activities are basic activities that an average person can perform with little or no difficulty, such as eating or caring for oneself. Diabetes also is a disability when it causes side effects or complications that substantially limit a major life activity. Even if diabetes is not currently substantially limiting because it is controlled by diet, exercise, oral medication, and/or insulin, and there are no serious side effects, the condition may be a disability because it was substantially limiting in the past (i.e., before it was diagnosed and adequately treated). Finally, diabetes is a disability when it does not significantly affect a person's everyday activities, but the employer treats the individual as if it does. For example, an employer may assume that a person is totally unable to work because he has diabetes. Under the ADA, the determination of whether an individual has a disability is made on a case-by-case basis.

Applicants

The ADA limits the medical information that an employer can seek from a job applicant. During the application stage, an employer may not ask questions about an applicant's medical condition or require an applicant to take a medical examination before it makes a conditional job offer. This means that an employer cannot ask:

- questions about whether an applicant has diabetes, or
- questions about an applicant's use of insulin or other prescription drugs.

After making a job offer, an employer may ask questions about an applicant's health (including asking whether the applicant has diabetes) and may require a medical examination as long as it treats all applicants the same.

If an applicant voluntarily tells an employer that she has diabetes, an employer only may ask two questions: whether she needs a reasonable accommodation and what type of accommodation.

The fact that an applicant has diabetes may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety. The employer, therefore, should evaluate the applicant's present ability to perform the job effectively and safely. After an offer has been made, an employer also may ask the applicant additional questions about his condition. For example, following an offer, an employer could ask the applicant how long he has had diabetes, whether he takes any medication, and whether the condition is under control. The employer also could send the applicant for a follow-up medical examination. An employer may withdraw an offer from an applicant with diabetes only if it becomes clear that he cannot do the essential functions of the job or would pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of himself or others.

Employees
The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to have a medical examination. Generally, to obtain medical information from an employee, an employer must have a reason to believe that there is a medical explanation for changes in the employee's job performance or must believe that the employee may pose a direct threat to safety because of a medical condition.

If an employer has a legitimate reason to believe that diabetes, or some other medical condition, may be affecting an employee's ability to do her job, the employer may ask questions or require the employee to have a medical examination.

Poor job performance often is unrelated to a medical condition and should be handled in accordance with an employer's existing policies concerning performance. Medical information can be sought only where an employer has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee's performance problems.

An employer also may ask an employee about diabetes when an employee:

- has asked for a **reasonable accommodation** because of his diabetes;
- is participating in a **voluntary** wellness program that focuses on early detection, screening, and management of diseases such as diabetes.

In addition, an employer may require an employee with diabetes to provide a doctor's note or other explanation to justify his use of sick leave, as long as it has a policy or practice of requiring all employees who use sick leave to do so.

Disclosure
With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. An employer, however, may disclose that an employee has diabetes under the following circumstances:

- to supervisors and managers in order to provide a reasonable accommodation or to meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance because, for example, her blood sugar levels are too low;
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- where needed for workers' compensation or insurance purposes (for example, to process a claim).

An employer may not disclose that an employee has diabetes. However, an employer certainly may respond to a question about why a co-worker is receiving what is perceived as "different" or "special" treatment by emphasizing that it tries to assist any employee who experiences difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal and, that in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that her privacy similarly would be respected if she ever had to ask the employer for some kind of workplace change for personal reasons.

An employer will benefit from providing information about reasonable accommodations to all of its employees. This can be done in a number of ways, such as through written reasonable accommodation procedures, employee handbooks, staff meetings, and periodic training. This kind of proactive approach may lead to fewer questions from employees who misperceive co-worker accommodations as "special treatment."

Accommodating Employees with Diabetes
The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (i.e., a significant difficulty or expense). Accommodations vary depending on the needs of the individual with a disability. Not all employees with diabetes will need an accommodation or require the same accommodation.

Some employees may need one or more of the following accommodations:

- a private area to test blood sugar levels or to take insulin
- a place to rest until blood sugar levels become normal
- breaks to eat or drink, take medication, or test blood sugar levels
- leave for treatment, recuperation, or training on managing diabetes
- modified work schedule or shift change
- allowing a person with diabetic neuropathy (a nerve disorder caused by diabetes) to use a stool

Although these are some examples of the types of accommodations commonly requested by employees with diabetes, other employees may need different changes or adjustments. Employers should ask the particular employee requesting an accommodation because of his diabetes what he needs that will help him do his job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the website for the Job Accommodation Network (http://janweb.icdi.wvu.edu/media/diabetes.html) provides information about many types of accommodations for employees with diabetes.

A request for a reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with diabetes. If the employer does not already know that an employee has diabetes, the employer can ask the employee for verification from a health care professional.

Employers have no obligation to monitor an employee to make sure that she is keeping her diabetes under control. It may be a form of reasonable accommodation, however, to allow an employee sufficient breaks to check her blood sugar levels, eat a snack, or take medication.

Safety
When it comes to safety concerns, an employer should be careful not to act on the basis of myths, fears, or stereotypes about diabetes. Instead, the employer should evaluate each individual on her skills, knowledge, experience and how having diabetes affects her.

In other words, an employer should determine whether a specific applicant or employee would pose a "direct threat" or significant risk of substantial harm to himself or others that cannot be reduced or eliminated through reasonable accommodation. This assessment must be based on objective, factual evidence, including the best recent medical evidence and advances to treat and control diabetes.

An employer may ask an employee about his diabetes when it has a reason to believe that the employee may pose a "direct threat" to himself or others. An employer should make sure that its safety concerns are based on objective evidence and not general assumptions.

An employer may require an employee who has been on leave because of diabetes to submit to a medical exam or provide medical documentation before allowing him to return to work but only if the employer has a reasonable belief that the employee may be unable to perform his job or may pose a direct threat to himself or others. Any inquiries or examination must be limited to obtaining only the information needed to make an assessment of the employee's present ability to safely perform his job.

If a federal law prohibits an employer from hiring a person who takes insulin, the employer would not be liable under the ADA. The employer should be certain, however, that compliance with the law actually is **required**, not voluntary. The employer also should be sure that the law does not contain any exceptions or waivers. For example, the Department of Transportation has issued exemptions to certain insulin- treated diabetic drivers of commercial motor vehicles.

Although not everyone who has diabetes has a disability as defined by the ADA, it is in the employer's best interest to try to work with employees who have diabetes, or are at risk for the

disease, to help improve productivity, decrease absenteeism, and generally promote healthier lifestyles. Employers also should avoid policies or practices that categorically exclude people with diabetes from certain jobs and, instead, should assess each applicant's and employee's ability to perform a particular job with or without reasonable accommodation.

Titles I and V of the Americans with Disabilities Act, As Amended

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TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101-336, Sec. 2, July 26, 1990, 104 Stat. 328.)

References in Text

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

Short Title

Section 1(a) of Pub. L. 101-336 provided that: "This Act [enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, 12161, and 12181 of this title] may be cited as the 'Americans with Disabilities Act of 1990'."

Study by General Accounting Office of Existing Disability-Related Employment Incentives

Pub. L. 106-170, title III, Sec. 303(a), Dec. 17, 1999, 113 Stat. 1903, provided that, as soon as practicable after Dec. 17, 1999, the Comptroller General was to undertake a study to assess existing tax credits and other disability-related employment incentives under the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) and other Federal laws, specifically addressing the extent to which such credits and other incentives would encourage employers to hire and retain individuals with disabilities; and that, not later than 3 years after Dec. 17, 1999, the Comptroller General was to transmit to the appropriate congressional committees a written report presenting the results of the study and any appropriate recommendations for legislative or administrative changes.

Sec. 3. Definition of disability.

As used in this Act:

(1) DISABILITY- The term 'disability' means, with respect to an individual--

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

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) MAJOR LIFE ACTIVITIES-

(A) IN GENERAL- For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) MAJOR BODILY FUNCTIONS- For purposes of paragraph

(1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) REGARDED AS HAVING SUCH AN IMPAIRMENT- For purposes of paragraph (1)(C):

(A) 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.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.

Sec. 4. Additional definitions.

As used in this Act:

(1) AUXILIARY AIDS AND SERVICES- The term 'auxiliary aids and services' includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) STATE- The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I--EMPLOYMENT

Sec. 12111. Definitions

As used in this subchapter:

(1) Commission- The term “Commission” means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity- The term “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat- The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee- The term “employee” means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general- The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions- The term “employer” does not include--

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

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general- The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs- The term “drug” means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc.- The terms “person”, “labor organization”, “employment agency”, “commerce”, and “industry affecting commerce”, shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual- The term “qualified individual” 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. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written

description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation- The term "reasonable accommodation" may include—

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

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general- The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered in determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

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

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

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

(Pub. L. 101-336, title I, Sec. 101, July 26, 1990, 104 Stat. 330; Pub. L. 102-166, title I, Sec. 109(a), Nov. 21, 1991, 105 Stat. 1077.)

References in Text

The effective date of this subchapter, referred to in par. (5)(A), is 24 months after July 26, 1990, see section 108 of Pub. L. 101-336, set out as an Effective Date note below.

The Controlled Substances Act, referred to in par. (6)(A), is title II of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (Sec. 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

This chapter, referred to in par. (10)(B)(i), was in the original "this Act", meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

Amendments

1991--Par. (4). Pub. L. 102-166 inserted at end "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."

Effective Date of 1991 Amendment

Amendment by Pub. L. 102-166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102-166, set out as a note under section 2000e of this title.

Effective Date

Section 108 of title I of Pub. L. 101-336 provided that: "This title [enacting this subchapter] shall become effective 24 months after the date of enactment [July 26, 1990]."

Sec. 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes--
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations 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; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub. L. 101-336, title I, Sec. 102, July 26, 1990, 104 Stat. 331; Pub. L. 102-166, title I, Sec. 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

Amendments

1991--Subsecs. (c), (d). Pub. L. 102-166 added subsec. (c) and redesignated former subsec. (c) as (d).

Effective Date of 1991 Amendment

Amendment by Pub. L. 102-166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102-166, set out as a note under section 2000e of this title.

Sec. 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny

a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Qualification Standards and Tests Related to Uncorrected Vision

Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

(d) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(e) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall--

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public. Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability \1\ published by the Secretary of Health and Human Services.

(Pub. L. 101-336, title I, Sec. 103, July 26, 1990, 104 Stat. 333.)

Sec. 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who--

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity--

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that--

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to--

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub. L. 101-336, title I, Sec. 104, July 26, 1990, 104 Stat. 334.)

References in Text

The Drug-Free Workplace Act of 1988, referred to in subsec. (c)(3), is subtitle D (Secs. 5151-5160) of title V of Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4304, which is classified generally to chapter 10 (Sec.701 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 41 and Tables.

Sec. 12115**.** Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

(Pub. L. 101-336, title I, Sec. 105, July 26, 1990, 104 Stat. 336.)

Sec. 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

(Pub. L. 101-336, title I, Sec. 106, July 26, 1990, 104 Stat. 336.)

Sec. 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the
Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the
Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by

the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub. L. 101-336, title I, Sec. 107, July 26, 1990, 104 Stat. 336.)

References in Text

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub.
L. 93-112, Sept. 26, 1973, 87 Stat. 355, as amended, which is classified generally to chapter 16 (Sec. 701 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

Additional Resources

Federal Tax Incentives Relating to the ADA

The Internal Revenue Code includes several provisions aimed at making businesses more accessible to people with disabilities. The following is designed to give you general information about three of the most significant tax incentives. **It is not legal advice.** You should check with your accountant or tax advisor to find out whether you are eligible to take advantage of these incentives or visit the Internal Revenue Service's website, www.irs.gov, for more information. Additionally, consult your accountant or tax advisor about whether there are similar state and local tax incentives.

Small Business Tax Credit (Internal Revenue Code Section 44: Disabled Access Credit): Small businesses with either **$1,000,000 or less in revenue or 30 or fewer full-time employees** may take a tax credit of up to $5,000 annually for the cost of providing reasonable accommodations such as sign language interpreters, readers, materials in alternative format (such as Braille or large print), the purchase of adaptive equipment, the modification of existing equipment, or the removal of architectural barriers.

Work Opportunity Tax Credit (Internal Revenue Code Section 51): Employers who hire certain targeted low-income groups, including individuals referred from vocational rehabilitation agencies and individuals receiving Supplemental Security Income (SSI) may be eligible for an annual tax credit of up to **$2,400** for each qualifying employee who works at least **400 hours** during the tax year. Additionally, a maximum credit of **$1,200** may be available for each qualifying summer youth employee.

Architectural/Transportation Tax Deduction (Internal Revenue Code Section 190: Barrier Removal): This annual deduction of up to **$15,000** is available to businesses of any size for the costs of removing barriers for people with disabilities, including the following: providing accessible parking spaces, ramps, and curb cuts; providing wheelchair-accessible telephones, water fountains, and restrooms; making walkways at least 48 inches wide; and making entrances accessible.

Where to Find Answers to Questions Regarding Disabilities

The following resource provides an overview of Federal civil rights laws that ensure equal opportunity for people with disabilities. To find out more about how these laws may apply to you, contact the agencies and organizations listed below.

Americans with Disabilities Act (ADA)

The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

ADA Title I: Employment

Title I requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship.

For more information regarding employment discrimination on the basis of disability contact any U.S. Equal Employment Opportunity Commission field office. Field offices are located in 50 cities throughout the U.S. and are listed in most telephone directories under "U.S. Government." For the appropriate EEOC field office in your geographic area, contact:

(800) 669-4000 (voice)
(800) 669-6820 (TTY)

www.eeoc.gov

Publications and information on EEOC-enforced laws may be obtained by calling:

(800) 669-3362 (voice)
(800) 800-3302 (TTY)

For information on how to accommodate a specific individual with a disability, contact the Job Accommodation Network at:

(800) 526-7234 (voice/TTY)

www.jan.wvu.edu

ADA Title II: State and Local Government Activities

Title II covers all activities of State and local governments regardless of the government entity's size or receipt of Federal funding. Title II requires that State and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings).

State and local governments are required to follow specific architectural standards in the new construction and alteration of their buildings. They also must relocate programs or otherwise provide access in inaccessible older buildings, and communicate effectively with people who have hearing, vision, or speech disabilities. Public entities are not required to take actions that would result in undue financial and administrative burdens. They are required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

For more information, contact:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Disability Rights Section - NYAV
Washington, D.C. 20530

www.ada.gov

(800) 514-0301 (voice)
(800) 514-0383 (TTY)

ADA Title II: Public Transportation

The transportation provisions of title II cover public transportation services, such as city buses and public rail transit (e.g. subways, commuter rails, Amtrak). Public transportation authorities may not discriminate against people with disabilities in the provision of their services. They must comply with requirements for accessibility in newly purchased vehicles, make good faith efforts to purchase or lease accessible used buses, remanufacture buses in an accessible manner, and, unless it would result in an undue burden, provide paratransit where they operate fixed-route bus or rail systems. Paratransit is a service where individuals who are unable to use the regular transit system independently (because of a physical or mental impairment) are picked up and dropped off at their destinations. Questions about public transportation should be directed to:

Office of Civil Rights
Federal Transit Administration
U.S. Department of Transportation
400 Seventh Street, S.W.
Room 9102
Washington, D.C. 20590

www.fta.dot.gov/ada

(888) 446-4511 (voice/relay)

ADA Title III: Public Accommodations

Title III covers businesses and nonprofit service providers that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs. Transportation services provided by private entities are also covered by title III.

Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.

Courses and examinations related to professional, educational, or trade-related applications, licensing, certifications, or credentialing must be provided in a place and manner accessible to people with disabilities, or alternative accessible arrangements must be offered.

Commercial facilities, such as factories and warehouses, must comply with the ADA's architectural standards for new construction and alterations.

For more information, contact:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Disability Rights Section - NYAV
Washington, D.C. 20530

www.ada.gov

(800) 514-0301 (voice)
(800) 514-0383 (TTY)

ADA Title IV: Telecommunications Relay Services

Title IV addresses telephone and television access for people with hearing and speech disabilities. It requires common carriers (telephone companies) to establish interstate and intrastate telecommunications relay services (TRS) 24 hours a day, 7 days a week. TRS enables callers with hearing and speech disabilities who use telecommunications devices for the deaf (TDDs), which are also known as teletypewriters (TTYs), and callers who use voice telephones to communicate with each other through a third party communications assistant. The Federal Communications Commission (FCC) has set minimum standards for TRS services. Title IV also requires closed captioning of Federally funded public service announcements. For more information about TRS, contact the FCC at:

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

www.fcc.gov/cgb/dro

(888) 225-5322 (Voice)
(888) 835-5322 (TTY)

Telecommunications Act

Section 255 and Section 251(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, require manufacturers of telecommunications equipment and providers of telecommunications services to ensure that such equipment and services are accessible to and usable by persons with disabilities, if readily achievable. These amendments ensure that people with disabilities will have access to a broad range of products and services such as telephones, cell phones, pagers, call-waiting, and operator services, that were often inaccessible to many users with disabilities. For more information, contact:

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

www.fcc.gov/cgb/dro

(888) 225-5322 (Voice)
(888) 835-5322 (TTY)

Fair Housing Act

The Fair Housing Act, as amended in 1988, prohibits housing discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin. Its coverage includes private

housing, housing that receives Federal financial assistance, and State and local government housing. It is unlawful to discriminate in any aspect of selling or renting housing or to deny a dwelling to a buyer or renter because of the disability of that individual, an individual associated with the buyer or renter, or an individual who intends to live in the residence. Other covered activities include, for example, financing, zoning practices, new construction design, and advertising.

The Fair Housing Act requires owners of housing facilities to make reasonable exceptions in their policies and operations to afford people with disabilities equal housing opportunities. For example, a landlord with a "no pets" policy may be required to grant an exception to this rule and allow an individual who is blind to keep a guide dog in the residence. The Fair Housing Act also requires landlords to allow tenants with disabilities to make reasonable access-related modifications to their private living space, as well as to common use spaces. (The landlord is not required to pay for the changes.) The Act further requires that new multifamily housing with four or more units be designed and built to allow access for persons with disabilities. This includes accessible common use areas, doors that are wide enough for wheelchairs, kitchens and bathrooms that allow a person using a wheelchair to maneuver, and other adaptable features within the units.

For more information, contact:

Office of Program Compliance and Disability Rights
Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W. , Room 5242
Washington, D.C. 20410

www.hud.gov/offices/fheo

(800) 669-9777 (voice)
(800) 927-9275 (TTY)

For questions about the accessibility provisions of the Fair Housing Act, contact Fair Housing FIRST at:

www.fairhousingfirst.org

(888) 341-7781 (voice/TTY)

For publications, you may call the Housing and Urban Development Customer Service Center at:

(800) 767-7468 (voice/relay)

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA) (formerly called P.L. 94-142 or the Education for all Handicapped Children Act of 1975) requires public schools to make available to

all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs.

IDEA requires public school systems to develop appropriate Individualized Education Programs (IEP's) for each child. The specific special education and related services outlined in each IEP reflect the individualized needs of each student.

IDEA also mandates that particular procedures be followed in the development of the IEP. Each student's IEP must be developed by a team of knowledgeable persons and must be at least reviewed annually. The team includes the child's teacher; the parents, subject to certain limited exceptions; the child, if determined appropriate; an agency representative who is qualified to provide or supervise the provision of special education; and other individuals at the parents' or agency's discretion.

For more information, contact:

Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-7100

www.ed.gov/about/offices/list/osers/osep

(202) 245-7468 (voice/TTY)

Rehabilitation Act

The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the Americans with Disabilities Act.

Section 501

Section 501 requires affirmative action and nondiscrimination in employment by Federal agencies of the executive branch. To obtain more information, employees should contact their agency's Equal Employment Opportunity Office.

Section 503

Section 503 requires affirmative action and prohibits employment discrimination by Federal government contractors and subcontractors with contracts of more than $10,000. For more information on section 503, contact:

Office of Federal Contract Compliance Programs
U.S. Department of Labor

200 Constitution Avenue, N.W.
Room C-3325
Washington, D.C. 20210

http://www.dol.gov/compliance/laws/comp-rehab.htm

(202) 693-0106 (voice/relay)

Section 504

Section 504 states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that either receives Federal financial assistance or is conducted by any Executive agency or the United States Postal Service.

Each Federal agency has its own set of section 504 regulations that apply to its own programs. Agencies that provide Federal financial assistance also have section 504 regulations covering entities that receive Federal aid. Requirements common to these regulations include reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and accessible new construction and alterations. Each agency is responsible for enforcing its own regulations.

For information, contact:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Disability Rights Section - NYAV
Washington, D.C. 20530

www.ada.gov

(800) 514-0301 (voice)
(800) 514-0383 (TTY)

Section 508

Section 508 establishes requirements for electronic and information technology developed, maintained, procured, or used by the Federal government. Section 508 requires Federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public.

An accessible information technology system is one that can be operated in a variety of ways and does not rely on a single sense or ability of the user. For example, a system that provides output only in visual format may not be accessible to people with visual impairments and a system that provides output only in audio format may not be accessible to people who are deaf or hard of hearing. Some individuals with disabilities may need accessibility-related software or

peripheral devices in order to use systems that comply with Section 508. For more information on section 508, contact:

U.S. General Services Administration
Center for IT Accommodation (CITA)
1800 F Street, N.W.
Room 1234, MC:MKC
Washington, DC 20405-0001

www.gsa.gov/section508

(202) 501-4906 (voice)
(202) 501-2010 (TTY)

U.S. Architectural and Transportation Barriers Compliance Board
1331 F Street, N.W., Suite 1000
Washington, DC 20004-1111

www.access-board.gov

800-872-2253 (voice)
800-993-2822 (TTY)

Architectural Barriers Act

The Architectural Barriers Act (ABA) requires that buildings and facilities that are designed, constructed, or altered with Federal funds, or leased by a Federal agency, comply with Federal standards for physical accessibility. ABA requirements are limited to architectural standards in new and altered buildings and in newly leased facilities. They do not address the activities conducted in those buildings and facilities. Facilities of the U.S. Postal Service are covered by the ABA. For more information, contact:

U.S. Architectural and Transportation Barriers Compliance Board
1331 F Street, N.W., Suite 1000
Washington, D.C. 20004-1111

www.access-board.gov

(800) 872-2253 (voice)
(800) 993-2822 (TTY)

Information on Reasonable Accommodations

Below are a few of the most frequently consulted resources for accommodating qualified individuals with disabilities. Many other resources exist both nationally and locally, such as organizations of and for individuals with particular types of disabilities. Finding one of these organizations in your area may be as simple as consulting your local phone book. Additionally, the federal government has a web site, www.disabilitydirect.gov, which provides links to many federal resources.

Job Accommodation Network (JAN)- provides lists based on specific disabilities as well as links to various other accommodation providers.

P.O. Box 6080
Morgantown, WV 26506-6080
(800) 526-7234 or (304) 293-7184
www.jan.wvu.edu

U.S. Department of Labor
For written materials: (800) 959-3652 (voice); (800) 326-2577 (TTY)
To ask questions: (202) 219-8412
www.dol.gov

ADA Disability and Business Technical Assistance Centers (DBTACs) - 10 federally funded regional centers to provide assistance on all aspects of the ADA.
(800) 949-4232

RESNA Technical Assistance Project - can refer individuals to projects offering technical assistance on technology-related services for individuals with disabilities.
(703) 524-6686 (voice); (703) 524-6639 (TTY)
www.resna.org

Access for All Program on Employment and Disability
School of Industrial and Labor Relations
106 ILR Extension
Ithaca, NY 14853-3901
(607) 255-7727 (voice); (607) 255-2891 (TTY)
ilr_ped@cornell.edu

Business Leadership Network 1331 F Street, N.W.
Washington, D.C. 20004-1107
(202) 376-6200, ext. 35 (voice); (202) 376-6205 (TTY)
dunlap-carol@dol.gov
www.usbln.com

Source: EEOC.gov

Finding Qualified Workers with Disabilities

Many businesses say that they would like to hire qualified individuals with disabilities, but do not know where to find them. The following resources may be able to help. In addition, you may contact organizations of and for individuals with specific disabilities in your area and consult www.disabilitydirect.gov.

RISKON - executive recruitment firm committed to helping people with disabilities find jobs:

15 Central Avenue
Tenafly, NJ 07670
(201) 568-7750
(201) 568-5830 (fax)
www.riskon.com

National Business & Disability Council - provides full range of services to assist businesses successfully integrate people with disabilities into the workplace:

201 I.U. Willets Road
Albertson, NY 11507
(516) 873-9607 or (516) 465-1501
https://www.disability.gov/
www.abletowork.org
www.ncds.org

Job Accommodation Network (JAN) - provides a variety of resources for employers with employees with disabilities and those seeking to hire employees with disabilities:

P.O. Box 6080
Morgantown, WV 26506-6080
(800) 526-7234 or (304) 293-7184
www.jan.wvu.edu

Employer Assistance Referral Network (EARN) - a national toll-free telephone and electronic information referral service to assist employers in locating and recruiting qualified workers with disabilities. EARN is a service of the U.S. Department of Labor, Office of Disability Employment Policy with additional support provided by the Social Security Administration's Office of Employment Support Programs:

1-866- EARN NOW (327-6669)
www.earnworks.com