RECORD NO. 14-2079

In The

United States Court Of Appeals

For The Fourth Circuit

WHITNEY C. STEPHENSON,

Plaintiff – Appellant,

v.

PFIZER, INCORPORATED,

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT GREENSBORO**

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Stephanie E. Lewis Date: 10/22/2014

Counsel for: Pfizer Inc.

CERTIFICATE OF SERVICE

****

I certify that on October 22, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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UNITED STATES COURT OF APPEALS
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I. ISSUE FOR REVIEW

The only issue on appeal is whether Pfizer is required by the Americans with Disabilities Act ("ADA") to hire a full-time, permanent driver as an accommodation for Stephenson to perform her sales representative job.[1] The district court correctly applied the undisputed facts to black letter law to conclude that driving is an essential job duty of Stephenson's sales representative job and that Pfizer is not required to hire another person to perform an essential job function. Stephenson has acknowledged throughout this litigation that traveling in a motor vehicle is an essential job duty, but she maintains that Pfizer is required to hire a second person on a full-time, permanent

[1] In the Complaint, Stephenson appeared to base her claim on both the failure to provide her a driver and the failure to create a comparable position for her that did not require regular driving. (J.A. at 1295.) The district court addressed both claims. (J.A. at 1306-09.) On appeal, Stephenson has abandoned any claim regarding reassignment/failure to create a comparable position and has made clear that the only issue on appeal is whether Pfizer was required to provide her a driver. (Appellant's Brief ("App. Br.") at 29 n.10, 32, 34 n.13.)

basis for the sole purpose of driving for her and traveling with her. Stephenson's notion that she, as an employee, can redefine, and in doing so, fundamentally alter the nature of the sales representative job is directly contrary to well-settled law. Reversal of the district court would have a sweeping precedential impact on all jobs involving driving, including all outside sales representative positions.[2] Because the ADA does not "demand action beyond the realm of the reasonable,"[3] and, as a matter of law, hiring a permanent, full-time employee to drive Stephenson falls squarely into that realm, the district court's decision should be affirmed.

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND[4]

1. Stephenson's Expansive Sales Territory.

As a pharmaceutical sales representative, all parties agree that Stephenson was responsible for meeting with physicians in person throughout her assigned

[2] The EEOC dismisses this precedential concern by asserting that the accommodation analysis is conducted on a "case by case" basis. Given the record evidence on the amount of driving at issue with this position, however, any ruling to the effect that driving is not an essential function of this position would necessarily require the same outcome in every case involving driving.

[3] *US Airways v. Barnett*, 535 U.S. 391, 401 (2002).

[4] There is no factual dispute in this matter, a point which is discussed further *infra* at 40. The facts here have been presented directly from Stephenson's testimony and uncontroverted evidence. There are several instances where the EEOC's amicus briefing presents facts incorrectly. This is not a factual dispute but simply reflects a misrepresentation of facts without any evidentiary support, which is not a proper role for amicus participation. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) ("[A]n amicus who argues facts should rarely be welcomed."). Those instances are identified where relevant.

territory to market Pfizer's products. (J.A. at 76:3-16.) Stephenson's territory was approximately 80-90 miles in radius and covered Mount Airy and Madison on the north side of the territory, Kernersville on the east side of the territory, and the outer bounds of Forsyth County on the south side of the territory. (J.A. at 68:8-69:2.) From where Stephenson lived, the furthest point in her territory was 45 miles away by driving distance. (J.A. at 69:3-7.) Stephenson called on the physicians in her territory in person by herself. (J.A. at 75:18-76:16.) She testified that she would not have been able to effectively do her job without calling on the physicians in person. (J.A. at 76:17-20.) She also testified that it would not have made business sense for more than one representative to call on a physician at the same time. (J.A. at 75:18-25.) She visited on average eight to ten physicians a day, five days a week. (J.A. at 76:21-23.)

2. Pfizer Provided Stephenson With A Car, Rather Than An Office, With The Mutual Understanding That She Would Drive To Meet With Physicians Throughout Her Assigned Territory.

Pfizer did not provide Stephenson with a physical office. (J.A. at 77:18-22.) The entire time she worked for Pfizer, Stephenson was provided a Company car. (J.A. at 81:19-21.) Stephenson testified that when she took the job with Pfizer, she understood that the job required her to "drive" to meet with the physicians located throughout her territory. (J.A. at 78:23-79:8.)

3. Stephenson Spent The Majority Of Her Time Every Work Day Driving To Meet With Physicians.

Stephenson spent 80%-90% of every work day on the road meeting with physicians.[5] (J.A. at 78:4-18). Stephenson testified that she was "on the road from around 8:30 to 5:30 most days." (J.A. at 77:14-17.) Stephenson testified that the "majority" or "the bulk of [her] day was spent traveling to meet with physicians." (J.A. at 77:11-13; 77:23-25.) Stephenson agreed that the way she always performed her job for Pfizer was by driving. (J.A. at 79:15-17.) Stephenson also agreed that there was no way for her to utilize public transportation to do the job of sales representative for Pfizer in Winston-Salem. (J.A. at 80:23-81:1; 115:2-12.) Stephenson transported samples of Pfizer's pharmaceutical products in her Company-provided car with her every day so that she could deliver these samples to physicians as part of her presentations.[6] (J.A. at 81:7-18.)

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[5] Stephenson and the EEOC attempt to discount Stephenson's testimony about the amount of time she spent driving by offering explanations that are not borne out by the record. For example, the EEOC offers speculation, without any evidentiary support, that perhaps the bulk of Stephenson's day was actually in meetings with physicians and not driving. (EEOC Amicus Brief ("EEOC Br.") at 17.) Stephenson was asked whether she spent 95% of her time on the road to meet with physicians, and she responded with an estimate of "90%." (J.A. at 77:23-78:18.) She also testified that she spent the "majority" or "bulk" of her day every day on the road "traveling" to meet physicians. (J.A. at 77:11-13.)

[6] The EEOC states that Stephenson was not required to make deliveries in her role as a sales representative. (EEOC Br. at 20.) The record does not support this assertion.

4. Pfizer Has Always Required Its Sales Representatives To Drive, And All Sales Representatives Drive To Perform The Job.

All of Pfizer's sales representatives drive. (J.A. at 79:18-20.) Sales representatives at Pfizer cannot be hired and are not eligible to continue in their jobs if they are unable to drive. (J.A. at 316:16-19; 320:16-21:12.) Sales representatives who lose their driver's licenses for reasons unrelated to a medical condition are not allowed to continue in the sales representative role. (J.A. at 843:17-844:1, 958:5-16.) Sales representatives are punished for poor driving records. (J.A. at 220:11-25:7.) Sales representatives are required to undergo a motor vehicle administration background check before being eligible for hire and are required to yearly certify that they can operate a motor vehicle safely. (J.A. at 220:16-21:21.)

5. Stephenson's Eye Disorder And Pfizer's Accommodation Process.

In 2008, Stephenson lost a portion of her peripheral vision in her left eye as a result of insufficient blood supply to the optic nerve. (J.A. at 40:4-46:15; 95:18-96:13.) At the time, she was able to perform her job without the need for an accommodation. (J.A. at 95:25-96:13.) In October 2011, the same condition began to affect the peripheral vision in Stephenson's right eye. (J.A. at 96:14-97:5.) As a

result of her restricted peripheral vision in both eyes,[7] she no longer qualifies for a North Carolina driver's license. (J.A. at 16; 51:4-52:25; 88:14-25; 95:2-24; 97:21-99:4; 175:22-25.) Stephenson has no other restrictions other than a need for software or tools to magnify images on her computer. (J.A. at 53:12-55:19.) Her condition is stable and permanent and not expected to deteriorate. (J.A. at 55:22-56:3; 92:8-18.)

When Stephenson's vision deteriorated in late October 2011 and she felt she could not drive herself to a sales meeting at a physician's office, her immediate supervisor, Tom Rulon, came and picked her up and drove her to the customer. (J.A. at 97:21-98:11.) Rulon then contacted Pfizer's Human Resources representative, John Harp, who "told [Stephenson] how to apply for an accommodation." (J.A. at 98:12-21.) Jenny Mark in Pfizer's Occupational Health and Wellness ("OHW") Group provided Stephenson a "Reasonable Accommodation Request Form" to complete and return. (J.A. at 101:7-02:2; 194-95.) Stephenson's treating physician completed the paperwork and specifically requested an accommodation for the job function of "driving." (J.A. at 104:3-05:21.) Stephenson testified that her treating physician understood her job functions both because she explained them and because "as a physician he was aware of what drug reps do." (J.A. at 104:25-05:6.) Stephenson requested that Pfizer modify the job duties of "driving," "computer use,"

[7] The EEOC characterizes Stephenson as "legally blind," citing to the Complaint. (Dkt. No. 25-1 at 17.) Neither Stephenson nor her treating physician characterized her condition in this manner. (Dist. Ct. Dkt. No. 1; J.A. at 53:12-54:11.)

and "reading clinical documents/reprints." (J.A. at 197.) Stephenson's accommodation request for a driver was on a permanent, full-time basis. (J.A. at 111:20-12:1.) Stephenson acknowledged that she was looking for a "driver" as an accommodation, and not simply "transportation" because public transportation was not an option in that area. (J.A. at 114:19-15:12.) Stephenson's proposal was for Pfizer to pay for the driver. (J.A. at 113:20-22.) She never offered to pay for a driver.[8] (J.A. at 113:23-14:3.)

A group that consisted of Mark, Pfizer's in house employment counsel (Danielle Rosen), Pfizer's Human Resources Manager (Harp initially), and Pfizer's business team (Thomas Salamone, Regional Manager, and Rulon, District Manager) discussed Stephenson's proposed accommodations. (J.A. at 227:3-29:16; 298:6-99:9; 301:21-04:11; 309:9-10:3; 312:19-13:4; 340:21-42:7; 353:10-16.) Rulon, Salamone, and Human Resources also spoke to Stephenson directly about her proposed accommodations.[9] On November 28, 2011, Harp informed Stephenson that

[8] Stephenson suggests that the district court erred when it "assumed that Stephenson did not propose to contribute to the accommodation." (Dkt. No. 14 at 30 n.11.) This was not an assumption. Stephenson testified that she did not propose to contribute to the accommodation, (J.A. at 113:23-14:3), and there is no record evidence to the contrary.

[9] The EEOC states that between November and January, Pfizer and Stephenson had two conference calls, in December and January, to discuss her accommodation request. (Dist. Ct. Dkt. No. 25-1 at 13.) Again, this statement is belied by the record. Pfizer and Stephenson had more than four conference calls during this time period and several discussions in person (in addition to written correspondence). (J.A. at 231:10-22, 250:2-12, 290:6-14, 411, 413, 425, 432.)

Pfizer would accommodate Stephenson by providing magnifying glasses and special computer software, but explained that Pfizer would not grant her request for a driver because, among other reasons, driving is an essential function of the sales representative position. (J.A. at 381-82; 232:14-33:22; 248:4-54:9; 123:8-25:16; 127:4-17.) Harp explained that Pfizer continued to be willing to explore reasonable accommodations and other positions within the Company that did not include driving as an essential function of the job. (J.A. at 381-82; 127:11-29:14.) He offered to further discuss Stephenson's request with her and to continue the interactive dialogue. (J.A. at 127:18-28:2.)

On December 9, 2011, Stephenson reiterated her request for a driver. (J.A. at 128:16-30:7; 384.) Harp responded and again explained that driving is an essential job function. (J.A. at 411; 132:15-34:3; 266:4-15.) Harp noted that Pfizer was committed to continuing its effort to accommodate Stephenson's impairment in a position that did not include driving as an essential function and set forth several options for Stephenson to consider, including virtual positions (referred to as tele-detailing or web-based detailing,[10]) a position on site at Wake Forest, and other such alternatives. (J.A. at 411; 133:3-36:19; 254:10-55:11; 290:12-92:5.) Stephenson would not relocate for a position. (J.A. at 153:19-21.)

[10] This refers to selling pharmaceutical products remotely, primarily on the internet, as opposed to through face to face interactions. (J.A. at 135:16-36:10, 140:1-41:11.)

Harp left Pfizer at the end of December, and Stephenson's matter was assigned to Charisse Smith in HR to continue the interactive dialogue. (J.A. at 137:4-9; 214:8-13; 343:10-21.) On January 9, 2012, Smith and Stephenson discussed the matter, and Stephenson again repeated her desire for Pfizer to provide her a driver. (J.A. at 137:20-39:25; 369:10-71:5.) Smith explained that the question of providing a driver had been dealt with and was not an option for the reasons previously discussed and that Pfizer would explore other potential accommodations with Stephenson, including a tele-detailing position. (J.A. at 139:21-40:8; 361:8-63:9; 369:22-71:21.)

On February 8, 2012, Smith provided Stephenson a job posting and description for a tele-detailing position for vaccine sales which would not require driving. (J.A. at 425-26; 149:22-52:5.) Smith specifically told Stephenson in writing that if she were interested in the role, Pfizer could explore allowing her to work from home. (J.A. at 425; 291:8-15; 363:5-66:7.) Smith testified that she had already started taking steps to consider arrangements that would allow Stephenson to perform the tele-detailing job from home. (J.A. at 363:15-66:7.) Stephenson testified that she was not interested in the tele-detailing job and did not apply for the job. (J.A. at 152:3-53:25.) Stephenson testified that she did not want to consider the web-based/tele-detailing role because it would "pigeonhole [her] into sitting behind a computer desk all day with – talking to people that [she] didn't know." (J.A. at 140:20-21.)

Smith also repeatedly directed Stephenson to open internal job postings and advised her to let her know if there were any she would like to explore. (J.A. at 425, 143:10-14; 374:6-10.) Salamone testified that "at any given time there are hundreds of positions." (J.A. at 294:8-9.) Stephenson testified that she did not apply for or express interest in a single job posting with Pfizer. (J.A. at 144:3-8.)

On February 22, 2012, Stephenson sent an e-mail to Ian Read, Pfizer's Chief Executive Officer, in which she complained that the Company would not hire a driver for her. (J.A. at 655-56; 160:24-65:12.) Stephenson did not complain that Pfizer had violated the law. (J.A. at 655-56.) Instead, she said that Pfizer should go beyond what they "have to do" versus what they "can do" and hire a driver for her. (J.A. at 655-56.) Anna DiDio in Employee Relations spoke to Stephenson and investigated the issue and concluded that driving is an essential job duty of a sales representative position. (J.A. at 664-65; 168:6-12; 771:16-72:21; 798:5-19.) DiDio reminded Stephenson to reach out to Smith if she learned of any positions within Pfizer that she was interested in, and Stephenson did not do so at any time. (J.A. at 169:2-7.)

Pfizer provided Stephenson with Short Term Disability and FMLA leave beginning in November 2011, and Long Term Disability leave beginning in May 2012. (J.A. at 176:11-79:15.) She received 100% pay for 13 weeks during her Short Term Disability and FMLA leave and then received 70% pay per her benefits

elections for another 13 weeks until she became eligible for Long Term Disability, through which she receives 60% of her pay per her benefits elections. (J.A. at 178:12-82:2.) She remains on Long Term Disability leave with 60% pay and has not been terminated. (J.A. at 179:13-81:10.)

B. PROCEDURAL HISTORY

On May 3, 2012, Stephenson filed a Charge of Discrimination with the EEOC alleging failure to accommodate by not providing her a full-time, permanent driver. (Supplemental Appendix ("Supp. App.") at 1.)[11] The EEOC investigated the identical issues that are presented by this appeal and found no cause to believe that Pfizer had violated the ADA by denying this accommodation.[12] (Supp. App. at 3.) Stephenson then brought this suit against Pfizer alleging one cause of action for disability discrimination in violation of the Americans with Disability Act, as amended ("ADA"). (J.A. at 21-23.) Following discovery, the district court granted Pfizer's motion for summary judgment in a nineteen-page decision. (J.A. at 1291-1309.) This appeal followed. NC Disability Rights and the EEOC have submitted amicus briefing (collectively, "amici").

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[11] Pfizer has filed a separate motion to supplement the joint appendix, which includes the supplemental documents as an attachment.

[12] The EEOC's opinions as set forth in its amicus brief are not entitled to deference because, *inter alia*, they are inconsistent with the EEOC's own findings in this case. *Young v. United Parcel Serv.*, ____ U.S. ____, 135 S. Ct. 1338, 1352 (2015) (holding that the EEOC's guidance was not entitled to deference because of inconsistency with earlier positions).

III. SUMMARY OF ARGUMENT

There is no factual dispute in this case. The district court thoroughly considered the undisputed facts and properly concluded based on applicable law that Stephenson cannot meet her burden to show that she could perform the essential functions of the sales representative position, with or without a reasonable accommodation. More specifically, the district court properly determined that driving is essential to the sales representative position, and that removing this function would fundamentally alter the position as it is performed at Pfizer. There is no genuine dispute about the importance of this function to the sales representative position. Stephenson and amici agree that Stephenson cannot perform the sales representative job without getting to the physicians' offices by motor vehicle, with someone driving. They, however, maintain that the job function itself should be redefined to be "traveling" rather than "driving." With the job redefined in this manner, they argue that the job can be reasonably reconfigured so that Pfizer can hire another person to drive Stephenson throughout her sales territory to perform the job, essentially turning a one-person job into a two-person job. However, well-established law precludes employees and courts from overruling an employer's business judgment and fundamentally altering an employer's job in this extraordinary manner. All parties agree, and well-settled precedent from this Court holds, that Pfizer is not required to hire a third-party to

perform an essential function, which is precisely the accommodation requested by Stephenson in this case.

All of the record evidence corroborates Pfizer's business judgment that driving, and not traveling, is the actual job function of Stephenson's position, including (1) before hiring someone as a sales representative, Pfizer confirms that the candidate has a valid driver's license and reviews each candidate's driving record to determine whether the candidate can safely and effectively perform job; (2) at the time of hire, Pfizer provides each sales representative with a Company car, rather than an office, to perform the job; (3) once hired, a sales representative's driving record is reviewed annually, and sales representatives are disciplined for poor driving records; (4) all Pfizer sales representatives perform the job by driving; (5) Stephenson understood when she was hired that she was required to drive, and she always performed the job by driving; (6) Stephenson spent the majority of her time each day driving to meet with physicians throughout her territory; and (7) Stephenson acknowledges that she cannot continue to perform the job unless a full-time, permanent driver is hired to drive for her.

The district court's conclusion that driving is an essential function of the sales representative position is consistent with numerous other federal court decisions. Indeed, every court to address the job functions of outside sales representatives has recognized that driving is an essential function of the position.

Stephenson and amici point to no evidence that travel is the actual job function, and to accept their argument requires the Court to dismiss Pfizer's business judgment that driving is the actual function. Significantly, even if the Court were to credit Stephenson's and amici's argument that travelling, and not driving, is the essential function of the sales representative position, Stephenson would still be unable to establish that she could perform the job's essential functions with a reasonable accommodation. This is because it is well-settled that employers are not required to hire an individual on a full-time, permanent basis to assist an employee with performing the essential functions of a job.

In sum, the undisputed evidence demonstrates that Stephenson was not "qualified" for the sales representative position because her inability to drive renders her unable to perform the job's essential functions, with or without a reasonable accommodation. Accordingly, the district court's decision to grant summary judgment to Pfizer should be affirmed.

IV. ARGUMENT

A. Stephenson Has The Burden Of Showing That She Could Perform The Essential Functions Of The Sales Representative Position.

To establish a prima facie case of disability discrimination under the ADA, "a plaintiff must prove that she is 'qualified,' by showing that either (1) 'she could perform the essential functions of the job, i.e. functions that bear more than a

marginal relationship to the job at issue,' or (2) some 'reasonable accommodation by the employer would enable [her] to perform those functions.'" *Bell v. Shinseki*, 584 F. App'x 42, 43 (4th Cir. 2014) (quoting *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994)). Thus, Stephenson bears the burden of showing that she is "qualified" for the sales representative position, which includes the burden of showing that she could perform the essential functions of the position with or without reasonable accommodation. *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012) ("A plaintiff asserting a violation of the ADA or Rehabilitation Act bears the burden to establish that [she] is qualified."); *Harris v. Reston Hosp. Ctr., LLC*, No. 12-1544, 2013 U.S. App. LEXIS 8323, at *23 (4th Cir. Apr. 24, 2013) ("Appellant bears the burden of establishing that she could perform the essential functions of her job."). Stephenson also bears the burden of proof with regard to whether a challenged function is essential. *See Hawkins v. Schwan's Home Servs. Inc.*, 778 F.3d 877, 888-89 (10th Cir. 2015).

B. The District Court Correctly Concluded That Driving Is An Essential Function Of Stephenson's Position.

The district court thoroughly considered the evidence in the record in conjunction with applicable law from this Court and properly concluded that driving is an essential function of the sales representative position. This Court has consistently defined "essential functions" to mean all "'functions that bear more than a marginal relationship to the job at issue.'" *Bell*, 584 F. App'x at 43 (quoting

Tyndall, 31 F.2d at 213); *see also Harris*, 2013 U.S. App. LEXIS 8323, at *23 ("'A job function is essential if it bears more than a marginal relationship to the job at issue.'") (quoting *Rohen v. Networks Presentations LLC*, 375 F.3d 266, 279 (4th Cir. 2004)) (internal quotations and alterations omitted). The EEOC regulations likewise define essential functions as those that are "fundamental," as opposed to "marginal." 29 C.F.R. § 1630.2(n)(1).

1. Pfizer's Judgment That Driving Is Essential Should Not Be Second-Guessed.

In determining which functions of the job are essential, the ADA expressly mandates that "consideration shall be given to the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111(8). The EEOC likewise mandates consideration of the employer's judgment as to whether a job function is essential. 29 C.F.R. § 1630.2(n)(2). In its Regulations, the EEOC lists seven non-exhaustive factors as evidence of whether a particular function (as identified by the employer) is essential – the first factor being the employer's judgment as to which functions are essential. *Id.* Based on these statutory and regulatory provisions, courts and the EEOC have explained that an employer's judgment should not be second-guessed if there is evidence corroborating the employer's judgment. *See EEOC v. Ford Motor Co.*, No. 12-2484, 2015 U.S. App. LEXIS 5813, at *15 (6th Cir. Apr. 10, 2015) (en banc) (noting that, according to EEOC guidance, an inquiry into a job's essential functions is not intended to second-guess an employer's

judgment); *Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 601 (7th Cir. 2009) ("The employer, not a court, determines what functions are essential, and we will not second-guess that decision."); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 152 (1st Cir. 2006) (explaining that "we generally give substantial weight to the employer's view of job requirements" and that the "inquiry into essential functions is not intended to second guess the employer") (citations and quotations omitted).

The record is clear that in Pfizer's judgment, driving is an essential function of the sales representative position. Thomas Salamone, John Harp, Charisse Smith, and Anna DiDio all testified that driving is an essential job function of the sales representative position and that the position cannot be performed without driving. (J.A. at 234:1-236:7; 237:14-238:11; 320:7-322:14; 349:3-21; 437:17-438:24; 442:3-24; 446:18-22.)

Importantly, Pfizer's judgment that driving is an essential function is corroborated by the overwhelming evidence in this case. For example, before hiring someone as a sales representative, Pfizer confirms that that the candidate has a valid driver's license and reviews the candidate's driving record for history of incidents to determine whether the candidate is qualified for the job. (J.A. at 220:16-221:21; 438:18-24.) Pfizer will not hire an individual to be a sales representative if, after reviewing the candidate's driving record, there are concerns about the individual's ability to safely drive. (J.A. at 321:4-8; 438:18-24; 264:2-9.)

Indeed, Stephenson testified that when she accepted the sales representative position with Pfizer, she understood that the job required her to drive to meet with the physicians located throughout her territory. (J.A. at 78:23-79:8.)

Once hired, a sales representative's driving record is reviewed annually to ensure that the individual is still driving safely and remains qualified for the job. (J.A. at 220:19-20; 438:18-24) Additionally, sales representatives are required to annually certify that they can safely drive a motor vehicle. (J.A. at 221:15-17.) Sales representatives are subject to discipline for poor driving records. (J.A. at 225:4-7.) For example, if a sales representative has his or her license suspended by law enforcement for violating traffic laws, the sales representative is terminated. (J.A. at 843:17-844:1, 958:5-16.)

In light of this overwhelming evidence demonstrating that in Pfizer's judgment, driving is an essential function of the sales representative position, it would be improper for the Court to second-guess Pfizer's judgment.

2. The Additional Non-Exhaustive Factors In The EEOC's Regulations Also Demonstrate That Driving Is Essential.

In addition to factor (i)—the employer's judgment as to whether a function is essential—the EEOC's Regulations list six additional non-exhaustive factors as evidence of whether a particular function (as identified by the employer) is essential: "… (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job

performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs." 29 C.F.R. § 1630.2(n)(2).

As the district court recognized, these factors demonstrate conclusively that driving is fundamental and not marginal. With respect to factor (iii), Stephenson's own testimony was that she spent the majority of her time every day driving. (J.A. at 75:11-13, 23-25; *supra* at 4.) She spent so much of her time in the car that throughout her employment as a sales representative, Pfizer provided Stephenson with a company car instead of an office to perform her job. (J.A. at 77:20-22; 79:2-4.)

With respect to factor (iv), the undisputed consequence of not requiring Stephenson to perform the function of driving would be Pfizer would have to hire a full-time driver for Stephenson. (J.A. at 113:15-19; App. Br. at 29.) This clearly demonstrates the essential nature of the driving function. *See Moore v. Jackson Cnty. Bd. of Educ.*, 979 F. Supp. 2d 1251, 1263 (N.D. Ala. 2013) (concluding that cooking and cleaning were essential functions because if the plaintiff had been permitted to return to work without performing these duties, the defendant would have been required to hire a third-party to perform them).

With respect to factors (vi) and (vii), a driver's license and a safe driving record have always been prerequisites for the sales representative position. (*See supra* at 5, 17-18.) The undisputed evidence shows that there are no sales representatives for Pfizer who do not drive as part of their job. (J.A. at 79:15-20; 290:16-18; 314:15-17; 321:16-322:1; 322:7-14.) Furthermore, Stephenson always performed the job by driving. (J.A. at 79:15-17.)

With respect to factor (ii), the parties agree that the job description did not specifically include driving. However, this Court has held on materially analogous facts that the absence of the function from the job description does not create an issue of fact as to whether the function is essential. *Rohen v. Networks Presentations LLC*, 375 F.3d 266, 279 n.22 (4th Cir. 2004); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686-87 (4th Cir. 1997), *affirming* 917 F. Supp. 419, 423 (W.D. Va. 1996). In *Martinson*, the plaintiff, who suffered epileptic seizures, worked as a shoe salesperson. *Id.* at 685. Despite these seizures, Martinson was an excellent salesperson, he exceeded sales expectations, and he was twice named "Employee of the Month." *Id.* The company terminated Martinson because he could not adequately maintain store security in light of his seizures, which the company argued was an essential function of the shoe salesperson position. *Id.* at 687. The EEOC filed a disability discrimination lawsuit on behalf of Martinson. *Id.* at 685. The requirement of maintaining store security was not listed in the job

description for the salesperson position. *Martinson*, 917 F. Supp. at 426. This Court affirmed summary judgment for the company, ruling as a matter of law that maintaining store security was an essential function of the position. *Martinson*, 104 F.3d at 686-87.

Recently, the Eighth Circuit held that driving was an essential function of an operations supervisor position as a matter of law even though driving was not specifically included as a function in the job description. *Minnihan v Media. Commc'ns Corp*., 779 F.3d 803 (8th Cir. 2015). There, the supervisor's "primary responsibilities" were to "supervise, train, and support the technicians installing cable and internet services in customers' homes, as well as to respond to customers' service needs." *Id.* at 807. He was required to perform a certain number of Quality Control checks on each of the 13-14 technicians under his supervision each quarter. *Id.* The way he always did this was by driving himself to the locations where the technicians worked. *Id*. The company provided him a vehicle to perform the job. *Id*. There was a dispute about how much time exactly he spent driving, but the parties agreed he spent more than 50% of his time in the field. *Id.* The supervisor had a series of seizures and was therefore restricted from driving. *Id.* at 807-08. The company initially accommodated him on a temporary basis on and off for ten months by having him ride with other employees, but concluded that it could not accommodate him permanently because driving was an essential

function of the position. *Id.* at 811-12. The Eighth Circuit affirmed the entry of summary judgment in favor of the company, holding as a matter of law that driving was an essential job function and that the company need not reallocate essential job functions under the ADA. *Id.* at 812-13. The Eighth Circuit noted that while driving was not specifically included in the job description, it was inherent that the plaintiff could not perform those job functions without driving. *Id.* at 812.

The Tenth Circuit also recently held as a matter of law that driving was an essential function of a supervisor position even though "driving" was not specifically listed as a function in the job description: "[T]he job description need not be Byzantine or prolix in order to be deemed sufficient—and, in fact, . . . certain essential functions could be 'a given' when considering the job in context." *Hawkins*, 778 F.3d at 891.

As in *Hawkins*, here, considering the context (including the fact that Stephenson was given a car rather than an office when hired, a review of her driving record was conducted at the time of hire and annually, and Stephenson knew when hired that she was expected to travel in her company car to visit doctors and deliver product samples), the absence of driving in the job description is entirely unremarkable and of no consequence.

Additionally, Stephenson herself expressly argued to the district court that "job descriptions [are] not dispositive." (Dist. Ct. Dkt. No. 40 at 11.) In this same

regard, Stephenson and amici argue that travel is an essential job function despite the fact that it is not listed in the job description.

In sum, the district court correctly applied the EEOC's regulations in concluding as a matter of law that driving is an essential function of Stephenson's sales representative job.

3. The District Court's Holding That Driving Is An Essential Function Of A Sales Representative's Job Is Consistent With Every Decision Addressing The Issue.

Every court to address the job functions of outside sales representatives has recognized as a matter of law that driving is an essential function of the position.[13] *See, e.g., Mathews v. Trilogy Comm., Inc.*, 143 F.3d 1160, 1164 (8th Cir. 1998) ("[Plaintiff] was not qualified to perform one of the essential functions of a traveling salesperson—driving to the locations of clients."); *Walsh v. AT&T Corp.*, No. 1:05 CV 00769, 2007 U.S. Dist. LEXIS 50051, at *18 (N.D. Ohio July 11, 2007) (holding that driving to Columbus was an essential function of the plaintiff's job as sales representative); *Dicino v. Aetna U.S. Healthcare*, No. 01-3206, 2003 U.S. Dist. LEXIS 26487, at *54 (D.N.J. June 23, 2003) (holding that plaintiff could not perform the essential functions of the sales account manager position because she could not drive to customer locations throughout South New Jersey); *Oliva v. Pride*

[13] Even the website relied upon by the EEOC referencing functions generically of chemical and pharmaceutical sales representatives includes driving or "operating a motor vehicle" as a core function of the position, not simply traveling. (EEOC Br. at 13 (citing http://www.occupationalinfo.org/onet/49005b.html).)

Container Corp., 81 F. Supp. 2d 907, 911 (N.D. Ill. 2000) (noting that driving was an essential function of plaintiff's job as sales representative); *Durning v. Duffens Optical, Inc.*, No. 95-1093, 1996 U.S. Dist. LEXIS 1685, at *19 (E.D. La. Feb. 15, 1996) (finding that sales representative's "inability to drive long distances and, as a consequence, to make in-person sales calls to remote customers is uncontroverted. Accordingly, the Court finds that he could not perform the essential function of his position."); *see also Hurd v. Am. Income Life Ins.*, No. 2:13-cv-5205-RSWL-MRW, 2014 U.S. Dist. LEXIS 163742, at *2, *14 (C.D. Cal. Nov. 20, 2014) (finding that the plaintiff's testimony that she traveled throughout her territory to attend meetings and make sales calls "establishe[d] that driving was an essential duty of Plaintiff's position" as a marketing specialist).

Significantly, Stephenson and amici do not cite to a single case or authority that has held that driving is not an essential function of a sales representative position. The only case that involved driving that is discussed by Stephenson and amici is *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001). *Lovejoy-Wilson* bears no resemblance to the facts and legal issues in the present case. In *Lovejoy-Wilson*, the plaintiff alleged that her former employer, NOCO, discriminated against her by failing to promote her to an assistant manager position at one of NOCO's gasoline service stations. 263 F.3d at 212. NOCO denied Lovejoy-Wilson's request for a promotion because she could not drive. *Id.* at 213.

According to NOCO, depositing store receipts at the bank was an essential function of an assistant manager's job, which NOCO alleged Lovejoy-Wilson could not perform because of her inability to drive. *Id.* at 217. NOCO did not contend that driving was an essential function of the assistant manager position, and thus that issue was never addressed by the court. *Id.* The sole issue in dispute was whether Lovejoy-Wilson could perform the function of depositing store receipts at the bank, and NOCO never asserted that the only way to perform this function was for an assistant manager to drive herself to the bank. *Id.* In fact, the evidence showed that there were numerous alternative ways for the receipts to be deposited, which did not require Lovejoy to be able to drive, including that several other stores had an armored car service that picked up and deposited the store receipts. *Id.* Additionally, there was evidence that managers for stores near Lovejoy-Wilson's store were going to the same bank to make deposits and could have picked up Lovejoy-Wilson and driven her. *Id.* Furthermore, there was evidence that it was actually preferable to have someone drive Lovejoy-Wilson, as one of Lovejoy-Wilson's supervisors testified that having assistant managers travel to the bank alone to make the deposit was a safety concern. *Id.* at 222. Given this evidence, the court concluded that there were issues of fact regarding whether Lovejoy-Wilson could perform the assistant manager job duties without an accommodation. *Id.*

The facts here are not analogous. First and foremost, unlike NOCO, Pfizer does contend, and has always insisted, that driving is an essential function of the sales representative job, and there is undisputed evidence in support of Pfizer's position. (*See supra* at 4-5, 16-19.) Additionally, unlike the assistant store managers in *Lovejoy-Wilson*, sales representatives for Pfizer spend the "majority" of their work time on the road driving, and Stephenson testified that she was "on the road from around 8:30 to 5:30 most days." (J.A. at 77:11-17.) Furthermore, unlike in *Lovejoy-Wilson*, there is no car service that other sales representatives rely on; nor are there any employees who are already traveling to meet with Stephenson's doctors with whom Stephenson could ride. (J.A. at 75:18-76:1.) Also, unlike in *Lovejoy-Wilson*, there is no evidence that having someone drive Stephenson is preferable to having Stephenson drive herself because of safety concerns. In fact, all of the evidence is to the contrary. Pfizer had significant concerns with someone else driving Stephenson on a full-time, permanent basis. (J.A. at 220:12-22; 238:22-239:6; 245:5-14; 256:3-257:4; 261:15-262:8; 262:17-263:9; 264:2-13; 264:15-265:5; 273:4-274:3; 274:13-275:1; 281:8-14; 344:1-16.) The undisputed evidence shows that Pfizer requires all of its sales representatives to drive to meet with doctors, and there are no sales representatives who do not drive. (J.A. at 79:15-20; 290:16-19; 314:15-17; 321:16-322:1; 322:7-14.) Thus, Stephenson's reliance on *Lovejoy-Wilson* is misplaced.

4. Stephenson's And Amici's Arguments Are Inconsistent With Settled Law.

Stephenson and amici argue that the district court erred in concluding that driving is an essential function as a matter of law for the following reasons: (1) only certain "primary" functions related to selling drugs can be essential job functions; (2) the Court should substitute "travel," instead of "driving," as the job function at issue; (3) the "manner" of performing the job can never be an essential job function; and (4) there are questions of fact that preclude the entry of summary judgment on whether driving is an essential job function. Each argument is addressed in turn.

a. There Is No Legal Support For Stephenson's Contention That Driving Is Non-Essential Because It Is Not A "Primary Duty."

Stephenson argues that driving is not an essential function of the sales representative position because it was not one of her "primary" duties. (App. Br. at 7-8.) Stephenson opines that her "primary duty as a pharmaceutical sales representative was to sell drugs; travel was incidental to those duties." (*Id.* at 7.) As an initial matter, this argument is wholly contradicted by Stephenson's repeated assertions that travel *is* an essential function of the sales representative position. (*Id.* at 21 (asserting that the evidence "supports the undisputed fact that travel was essential").)[14]

[14] Stephenson has stated repeatedly throughout this litigation that she does not dispute that traveling in a motor vehicle throughout her territory to meet with the

Furthermore, as noted above, this Court has previously defined essential job functions as all "functions that bear more than a marginal relationship to the job at issue." (*Supra* at 15.) As the district court explained, based on this definition of essential functions, "even if the court were to accept Stephenson's argument that traveling and selling Pfizer products are essential functions of her position, it would not preclude a finding that driving is an additional, essential function." (J.A. at 1303.) Indeed, numerous circuit courts of appeals have expressly held that the essential functions of a position are not limited to the "primary" or "core" functions. *See Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 78 (1st Cir. 2010) ("The essential functions of a position are not limited to the 'primary' function of the position."); *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) ("[T]he term essential function encompasses more than core job requirements"). Accordingly, it is incorrect as a matter of law for Stephenson to argue that evidence about the importance of understanding, explaining, and selling Pfizer's drugs somehow undermines the conclusion that driving is also an essential job function. (App. Br. at 15.)

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physicians in person is one of the essential job functions of the position. (Dist. Ct. Dkt. No. 40 at 4, 9, 12, 13.)

b. Stephenson Is Not Permitted To Substitute The Function Of Traveling, Instead Of Driving.

Stephenson and amici argue that the Court should conclude that driving was not a function at all of her sales representative position and that the function instead is the ability to "travel." This is critical to Stephenson's position because all parties agree that Pfizer is not required to hire another person to perform an essential function. (Disability Rights of N.C. Amicus Brief ("D.R.N.C. Br.") at 13; Dist. Ct. Dkt. No. 40 at 12.) Thus, if driving is an essential function of the position, as the district court held, Stephenson admittedly cannot prevail. Stephenson therefore attempts to shift the function to travel, arguing that Pfizer may be required to hire another person to "assist" with that function.[15]

The law does not permit the Court to substitute its view of the function identified by the employer in the manner advocated by Stephenson and amici. Instead, the law requires that the Court defer to the employer in identifying the functions of the job at issue unless the job function identified by the employer is not "actually required" of employees in the position. The EEOC's Interpretive Guidance makes this analytical framework clear:

> If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry

[15] As explained in Section IV(D) below, even if the Court accepts this argument, well-settled law holds that Pfizer is not required to hire an individual on a full-time basis for the sole purpose of assisting Stephenson with performing her essential functions.

> will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the following factors listed in part 1630.
>
> . . .
>
> If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper.

See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. ("Interpretive Guidance") at § 1630.2(n) (emphasis added).

The EEOC's Technical Assistance Manual also expressly states, "[t]he first consideration is whether employees in the position actually are required to perform the function." EEOC Technical Assistance Manual On The Employment Provisions of (Title I) of the Americans with Disabilities Act at Section II. 2.3(a), EEOC-M-1A (Jan. 1992) ("Technical Assistance Manual"). The Sixth Circuit recently rejected the notion that an employee can define the functions of her position:

> Neither the statute nor regulations nor EEOC guidance instructs courts to credit the employee's opinion about what functions are essential. . . . And for good reason: If we did, every failure-to-accommodate claim involving essential functions would go to trial because all employees who request their employer to exempt an essential function think they can work without that essential function.

Ford Motor, 2015 U.S. App. LEXIS 5813, at *18-*19. The court went on to explain:

> None of this is to say that whatever the employer says is essential necessarily becomes essential. Suppose, for instance, that a fire department regularly allows certain firefighters to refrain from driving fire trucks. But then the department denies the same accommodation to a firefighter with a known disability that prevents her from driving the trucks. A genuine fact issue might exist as to whether driving a fire truck is actually essential--it is contradicted by materially similar job practices. Our ruling does not, in other words, require blind deference to the employer's stated judgment. ***But it does require granting summary judgment where an employer's judgment as to essential job functions--evidenced by the employer's words, policies, and practices and taking into account all relevant factors--is "job-related, uniformly-enforced, and consistent with business necessity."***

Id. at *23-*24 (emphasis added). The Tenth and Seventh Circuits have also directly rejected the argument that the plaintiff can change the function identified by the employer when that function is actually required of employees: "The employer describes the job and functions required to perform that job. We will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity." *Mason v. Avaya Comm'cns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004); *see also Lloyd*, 552 F.3d at 601 ("The employer, not a court, determines what functions are essential, and we will not second-guess that decision."); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995) ("[I]t is the employer's province to establish what a job is and what functions are required to perform it."). This deference is consistent with this

Court's admonition that "this Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination . . . ." *Dejarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (internal quotations omitted); *see also* Interpretative Guidance at § 1630.2(n) ("It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment . . . .").

Here, there is no dispute that Pfizer actually required all sales representatives to drive. (J.A. at 79:18-20; 234:11-21; 235:3-4; 235:9-236:2; 237:14-238:11; 316:3-4; 349:3-16; 438:18-24; 440:7-10; 442:3-16; 445:7-16; 446:4-7; 446:18-22.) Stephenson testified that the way "[she] always performed the job for Pfizer was through driving." (J.A. at 79:15-17.) There are no sales representatives for Pfizer who do not drive. (J.A. at 79:15-20; 290:16-18; 314:15-17; 321:16-322:1; 322:7-14.) There was also specific undisputed testimony that driving, and not travel, is the job function of the sales representative position. (J.A. at 882:22-884:7.)

As noted above, according to the EEOC, given that it is undisputed that Stephenson was actually required to perform the driving function, "the inquiry will then center around whether removing the function would fundamentally alter that position." Interpretive Guidance at § 1630.2(n). It is clear in this case that eliminating the driving function fundamentally alters the sales representative position. By eliminating the driving function, what has always been a one-person

job becomes a two-person job. Stephenson and other sales representatives would no longer have to perform a function that they previously spent the majority of their workday performing. It is difficult to imagine an alteration of the sales representative job that would be more significant than removing the driving function. Thus, based on the EEOC's own Interpretative Guidance, there is no basis for supplanting Pfizer's judgment that driving, not just traveling, is essential.

This same "travel versus driving" argument was expressly rejected by the district court in this case and by the court in *Kielbasa v. Ill. E.P.A.* in a case involving substantially less driving than here:

> Kielbasa does not dispute that 20% of the position involves traveling by automobile. But he argues that "operating a motor vehicle" and "traveling between the vehicle emissions testing stations" are in fact separate and distinct functions of a VECS and though the latter may be essential, the former is not. . . . Kielbasa's argument is ultimately unpersuasive. In short, ***although driving is not the purpose of the VCES position, the record leaves no doubt that the job cannot be done without driving. As such, driving is essential***. . . . To hold otherwise would expand greatly the scope of the ADA and the Rehabilitation Act. ***If the court were to find that driving is a marginal function of a VCES, then it would, for instance, necessarily have to find that driving is a marginal function of the vast array of sales positions in which employees are chiefly responsible for selling a given product but must spend considerable time in a car to do so. The court does not believe, and Kielbasa has cited no authority to suggest, that Congress ever intended such a result.***

2005 U.S. Dist. LEXIS 26758, at *19, *25-26 (N.D. Ill. 2005) (emphasis added).

In support of the argument that the Court should substitute travel for driving, Stephenson relies on *Keith v. Cnty. of Oakland*, 703 F.3d 918 (6th Cir. 2012). This reliance is untenable. In *Keith*, the employer initially believed that it could accommodate a deaf applicant in the lifeguard position and extended an offer of employment to him. *Id.* at 920. During the post-offer, pre-employment medical examination, a physician and an aquatics consultant opined that the deaf applicant could not perform the lifeguard job. *Id.* at 920-21. The court did not, as Stephenson argues, substitute the employer's identified function of hearing for "communication." Rather, the court noted that the employer's own designated representative testified that the job function at issue was the ability to communicate. *Id.* at 925-28. The applicant in *Keith* also was not requesting that the employer hire another person on a full-time, permanent basis. *Id.* The court simply held that there was disputed expert testimony and other facts that supported that a deaf applicant could perform the essential job functions of the lifeguard position. *Id.* Thus, *Keith* provides no support for Stephenson's argument.

In sum, Stephenson's attempt to have the Court substitute its judgment for the judgment of Pfizer does not comport with the EEOC's regulations, Interpretive Guidance, or case law and should be rejected.

c. The Argument That The Manner In Which An Employee Performs A Duty Should Not Be Considered An Essential Function Is Contrary To The ADA's Text And Established Case Law.

Next, amici argue that driving cannot be an essential job function because it relates to the "manner" in which the job is customarily performed, and not the "purpose" of the position. The only authority cited for this proposition is the EEOC's Technical Assistance Manual. (EEOC Br. at 15-16.) The Technical Assistance Manual taken as a whole does not support the EEOC's argument here, in that it expressly states that if an employee "whose job requires driving loses her sight, reassignment to a vacant position that does not require driving may be a reasonable accommodation"; it does not state or suggest that the employer is required to hire a driver on a full-time, permanent basis. Technical Assistance Manual at Section III, 3.4. Moreover, to the extent that any portion of the Technical Assistance Manual can be read to suggest that the manner in which a job is performed can never be an essential function of the job, such a position is not supported by the ADA's regulations, the EEOC's Interpretive Guidance, or controlling case law.[16] Critically, the EEOC's regulations do not draw this

[16] The amount of deference to be given to the EEOC's "rulings, interpretations and opinions" in a particular case depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). The Supreme Court recently held that the EEOC's position which it adopted through guidelines issued post-litigation was not entitled

distinction between "manner" and "purpose"; rather, they define essential functions as all fundamental functions (not marginal), the elimination of which would "fundamentally alter" the position. 29 C.F.R. § 1630.2(n); Interpretive Guidance at § 1630.2(n). The EEOC's Interpretive Guidance similarly makes clear that essential functions can encompass the manner in which the job is performed and not simply the "purpose" of the position. For example, the Guidance states that the ability to "carry" a person out of a building is an essential function of a firefighter, even though this is a manner of performing the job and not the purpose of the job itself. *See* Interpretive Guidance at § 1630.2(n). The Guidance also states "if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function," although operating the cash register is not the purpose of the position. *Id.*

The EEOC's reliance on *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) is also misplaced. Skerski worked as a cable installer for Time Warner, doing both "overhead" and "underground" work on cables. *Id.* at 275. The overhead work could be performed either by climbing or through the use of a

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to deference because of the "timing," "consistency," and "thoroughness" of consideration. *Young*, 135 S. Ct. at 1352. Here, the portion of the Technical Assistance Manual cited by the EEOC similarly lacks the power to persuade because it is inconsistent with other EEOC guidance, the legislative history of the ADA, and with the well-reasoned consensus of authorities.

bucket truck. *Id.* at 276-77, 285-86. In June 1993, Skerski was diagnosed with an anxiety disorder that prevented him from climbing. *Id.* at 275. For three and a half years following his diagnosis, Skerski never had to climb to perform his job, and, by all accounts, he performed his job in an exemplary manner without the ability or need to climb. *Id.* at 276. However, he was assigned to a new supervisor in the fall of 1996, and in January 1997, his new supervisor insisted that he had to be able to climb to remain in the position. *Id.* at 276-77. On these facts, the Third Circuit concluded that a reasonable jury could find that Skerski was qualified for the cable installer position because there were facts that showed that Skerski could have been assigned to underground work only or he could have been given one of Time Warner's bucket trucks and still performed the cable installer job effectively. *Id.* at 279-87. Thus, as the EEOC points out in its brief, the facts in *Skerski* showed that climbing was just one of several "means" by which cable installers for Time Warner accomplished the job. Here, by contrast, it is undisputed that all sales representatives must drive to perform Pfizer's sales representative job, and Stephenson concedes that, given her inability to drive, she cannot perform the job unless Pfizer hires a full-time driver to drive for her.

Perhaps most importantly, amici's position simply cannot be reconciled with the numerous cases throughout the country holding that driving is an essential function of various positions where driving is the manner of performing the

position and not the "purpose" of the position, including sales representative, supervisor, and technician positions. (*See supra* at 21-24.) In this same regard, the EEOC's position is irreconcilable with multiple cases throughout the country holding that lifting is an essential function of various positions where lifting is the manner of performing the position and not the "purpose" of the position. *See, e.g.*, *Autry v. Bowen*, No. 87-1535, 1987 U.S. App. LEXIS 19593, at *4 (4th Cir. Sept. 9, 1987) (holding that heavy lifting is an essential function of system operator position); *Majors v. Gen. Elec. Co.*, 714 F.3d 527, 534 (7th Cir. 2013) (ruling that lifting more than twenty pounds is an essential function of auditor position); *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001) (holding that lifting more than fifty pounds is an essential function of nurse position). A review of these cases and others holding that various "manners" or "methods" of performing a job are essential functions of those jobs demonstrates the fallacy of amici's argument here.

In fact, the EEOC recently made this precise argument in *EEOC v. Picture People, Inc.*, 684 F.3d 981 (10th Cir. 2012), and the Tenth Circuit rejected it.[17] At issue in *Picture People* was whether "verbal communication" was the essential function of the job. *Id.* at 985-86. The EEOC argued that this was simply the

[17] The EEOC notes that it made this argument in amicus briefing in the *Lovejoy-Wilson* case. (EEOC Br. at 16.) The court, however, did not adopt this rationale in its holding.

"manner" of performing the job and therefore could not be the essential function, and thus argued that the court should substitute a different function. *Id.* at 986-87. As part of this argument, the EEOC contended that the district court "confused the essential functions of the 'performer' position with the manner in which Picture People's employees accomplish these essential functions." *See* Brief of the EEOC as Appellant in *EEOC v. Picture People, Inc.*, 684 F.3d 981 (10th Cir. 2012) (Dkt. No. 01018724967 at p. 65, filed Oct. 6, 2011). In Picture People's judgment, however, the ability to communicate *verbally* in an effective manner was an essential function of a performer's duties and under its business model communication through other methods was insufficient. 684 F.3d at 986. The Tenth Circuit rejected the EEOC's argument, affirmed the district court's grant of summary judgment, and explained that the EEOC could not supplant Picture Perfect's judgment that strong verbal communications was the essential function. *Id.* at 985-87. The Tenth Circuit explained: "'*[T]he employer has a right to establish what a job is and what is required to perform it.*'" *Id.* at 986 (quoting *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1262 (10th Cir. 2009)) (emphasis added).

Accordingly, the Court should reject the argument that the manner of performing the job cannot be an essential function as unsupported by uniform legal precedent under the ADA.

d. The Question Of Whether A Function Is Essential And The Reasonableness Of The Proposed Accommodation Are Questions of Law Where, As Here, There Are No Disputed Facts.

Finally, Stephenson and amici incorrectly assert that the issue of whether driving is essential and her proposed driver accommodation is reasonable is one for the jury to decide. None of the briefing points to any factual conflicts in the record.[18] Rather, the EEOC suggests that the question is one for the jury if "reasonable minds could differ" as to whether driving is an essential function and whether hiring a full-time, permanent driver is a reasonable accommodation. (EEOC Br. at 11-12.)

The Fourth Circuit, however, has held that whether a plaintiff is a qualified individual with a disability, which encompasses the requirement that a plaintiff be able to perform the essential functions of the job with or without a reasonable accommodation, "is a question of law for a court, not a question of fact for a jury." *Hooven-Lewis v. Caldera*, 249 F.3d 259, 268 (4th Cir. 2001); *see also Jameson v. U.S. Post Office, Office of the Inspector General*, 2009 U.S. Dist. LEXIS 115362, at *17 (E.D. Va. Dec. 8, 2009) ("Whether or not Plaintiff meets the statutory requirement of a qualified individual with a disability under the statute is a

[18] The only "factual dispute" that has even been suggested is whether the job description included driving. (EEOC Br. at 16.) Pfizer never disputed that the job description in place at the time for Stephenson's position did not contain the word "driving."

question of law.") (internal quotations omitted), *aff'd*, 399 F. App'x 856 (4th Cir. 2010). The Fourth Circuit also has repeatedly held that the specific, underlying question of whether an individual can perform the essential job functions is one that may properly be decided as a matter of law on summary judgment. *See Martinson v. EEOC*, 104 F.3d at 686-87 (affirming summary judgment after determining job function was essential as a matter of law); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995) (same); *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 212-13 (4th Cir. 1994) (same); *Lusby v. Metro. Wash. Air. Auth.*, No. 98-2162, 1999 U.S. App. LEXIS 18428, at *8-*17 (4th Cir. 1999) (same); *Hollestelle v. Metro. Wash. Airports Auth.*, No. 97-1465, 1998 U.S. App. LEXIS 9420, at *6-*9 (4th Cir. May 8, 1998) (same); *Carrozza v. Howard Cnty.*, No. 94-1593, 1995 U.S. App. LEXIS 387, at *7-*10 (4th Cir. 1995) (same).

Additionally, in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), the Supreme Court addressed whether the reasonableness of a proposed accommodation should be decided on a "case by case" basis by the jury, rather than as a matter of law, and held that the question of reasonableness is one of law unless the plaintiff can meet her burden of showing that the proposed accommodation is "reasonable on its face, i.e., ordinarily or in the run of cases." *Id.* at 401. The Supreme Court held that the proposed accommodation was **not** reasonable on its face as a matter of law and

noted the practical implications of allowing millions of cases to reach a jury on the question of reasonableness of the proposed accommodation. *Id.*

Moreover, it is evident that the dispute in this case is a legal dispute for the Court, not a factual one for a jury. There are no facts in dispute. Based on the undisputed facts, Stephenson and amici all agree that traveling in a motor vehicle throughout one's territory is an important and essential function of the sales representative position Stephenson held. The only issue is whether the ADA permits Stephenson to redefine the function of the job as "traveling" instead of "driving" and, if so, whether the ADA imposes a requirement on Pfizer to hire two people to perform the "traveling" function instead of one. These are clearly legal issues outside the province of a jury.

C. All Parties Agree That If The Court Does Not Substitute Its View Of The Job Function At Issue For Pfizer's, the District Court's Judgment Must Be Affirmed Because Pfizer Does Not Have To Hire Another Person To Perform An Essential Job Function.

All parties agree that Pfizer does not have to eliminate, reassign, or require someone else to perform an essential job function. (*See* D.R.N.C. Br. at 13 ("If driving is determined to be essential, Pfizer would not be required to reallocate that job duty."); EEOC Br. at 12 ("A finding that a function is essential is important because an employer need not eliminate, reassign, or hire someone else to do an essential function."); Dist. Ct. Dkt. No. 40 at 12 ("Pfizer argues the point that an employer cannot be required under the ADA to hire an additional person to

perform the essential duties of the plaintiff's position. Plaintiff is not contending otherwise.").)

Indeed, this Court has repeatedly held that the ADA does not require employers to eliminate, reallocate, or hire an additional person to perform an essential function. For example, in *Martinson*, this Court made clear that the employer was not required to hire someone to perform an essential function:

> To accommodate Martinson adequately, Kinney would need to hire an additional person to perform the essential security function of Martinson's job. The ADA simply does not require an employer to hire an additional person to perform an essential function of a disabled employee's position.

Martinson, 104 F.3d at 687. Likewise, in *Lusby*, this Court explained that the plaintiff's former employer was not required to hire someone else to perform the essential functions of the plaintiff's job. 1999 U.S. App. LEXIS 18428, at *15; *see also Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 F. App'x 314, 323 (4th Cir. 2011) ("[T]he ADA does not require an employer to reallocate essential job functions . . . .").

Thus, if this Court agrees that driving is an essential function of the sales representative position, all parties concede that Stephenson's claim fails as a matter of law because Pfizer is not required to eliminate this function or hire someone else to perform it.

D. Even If The Court Accepts The Argument That "Travel" Is The Essential Function, Stephenson Has Not Met Her Burden Of Showing That Hiring A Driver On A Full-time, Permanent Basis Is A Reasonable Accommodation To Assist Her In Performing This Essential Function.

Even if the Court were to accept the argument that travel instead of driving is the proper job function, it is not reasonable as a matter of law to require Pfizer to hire a permanent, full-time driver for Stephenson as an accommodation. As noted above, Stephenson has the initial burden of demonstrating that the proposed accommodation is reasonable on its face, or in the ordinary run of cases. *Barnett*, 535 U.S. at 391.

Courts have consistently held as a matter of law that the ADA does not require an employer to hire and/or retain an individual on a full-time basis for the sole purpose of assisting an employee with performing the essential functions of a job. For example, in *Moritz v. Frontier Airlines, Inc.*, the Eighth Circuit affirmed the district court's grant of summary judgment to Frontier and rejected the plaintiff's argument that Frontier was required to retain an assistant to help her perform her job. 147 F.3d 784, 788 (8th Cir. 1998). In *Moritz*, the plaintiff was employed as a station agent for Frontier, and one of her job duties included "gate duty." *Id.* at 785-86. After she was diagnosed with multiple sclerosis, she requested that an assistant be assigned to her to assist her with gate duty. *Id.* at 786. While an assistant was made available to plaintiff initially, no assistant was

assigned to her after a schedule change. *Id.* The plaintiff then filed an ADA discrimination claim and argued that Frontier should have accommodated her by "provid[ing] her with an assistant while performing her gate duties." *Id.* at 788. The Eighth Circuit disagreed, affirmed the grant of summary judgment, and held that under the ADA "Frontier is not obligated to hire additional employees or reassign existing workers to assist her in her gate duties." *Id.*

The Eighth Circuit's decision is consistent with decisions from numerous other courts. For example, in *Jewell v. Blue Valley Unified Sch. Dist.*, the plaintiff, an elementary school teacher, requested a full-time paraprofessional be hired to assist her with moving, lifting, and other tasks. 210 F. Supp. 2d 1241, 1242-1245 (D. Kan. 2002). When the school district refused to hire an individual to assist her on a daily basis, the plaintiff brought a failure to accommodate claim under the ADA. *Id.* at 1247. The school district argued that the plaintiff's request for a full-time individual to be available to assist her was not a reasonable accommodation as a matter of law, and the court agreed. *Id.* at 1248, 1251. The court explained that the "courts of appeals have consistently held that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his or her disability." *Id.* at 1251.

The holdings in *Moritz* and *Jewell* are consistent with holdings from federal courts throughout the country. *See, e.g., Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 866-67 (7th Cir. 2005) (affirming summary judgment for employer on the plaintiff's ADA discrimination claim and finding that the plaintiff's proposed accommodation of having an individual assist the plaintiff in his work was unreasonable as a matter of law because the ADA does not require an employer to accommodate a disabled employee by "shepherd[ing] that employee through what is an essential and legitimate requirement of the job"); *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 n.5 (8th Cir. 2003) (explaining that "[a]n employer is not required to hire additional people or assign tasks to other employees" as a reasonable accommodation); *Miller v. Santa Clara Library*, 24 F. App'x 762, 765 (9th Cir. 2001) ("'Reasonable accommodation' does not encompass within its meaning the use of an additional person to help the clearly unqualified who cannot perform on their own."); *Hansen v. Henderson*, 233 F.3d 521, 523-24 (7th Cir. 2000) (holding that the employer was not required to hire a helper as an accommodation to assist the plaintiff in performing his job duties and explaining that the plaintiff "must be able to do the job as configured by the employer, not his own conception of the job"); *Merrell v. ICEE-USA Corp.*, No. 99-4173, 2000 U.S. App. LEXIS 33327, at *13 (10th Cir. Dec. 19, 2000) (affirming summary judgment for employer on the plaintiff's ADA failure-to-accommodate claim and

finding that retaining an additional person to accompany the plaintiff on his service calls was not a reasonable accommodation as a matter of law); *Floyd v. Lee*, No. 11-01228 (RC), 2015 U.S. Dist. LEXIS 41368, at *67 (D.D.C. Mar. 31, 2015) (holding that hiring an assistant for the plaintiff was not a reasonable accommodation as a matter of law); *Lewis v. Gibson*, No. 1:12CV1189, 2014 U.S. Dist. LEXIS 172853, at *36 (M.D.N.C. Dec. 15, 2014) ("[C]ase law establishes that employers are not required to hire another employee in order to accommodate a disabled employee."); *Lankford v. Radioshack Corp*., No. 3:04CV-294-H, 2006 U.S. Dist. LEXIS 30396, at *13 (W.D. Ky. May 15, 2006) ("[T]he ADA does not require an employer to hire additional people or to assign tasks to other employees in order to enable a disabled employee to perform the essential functions of his position."); *Ricks v. Xerox Corp.*, 877 F. Supp. 1468, 1477 (D. Kan. 1995) ("[T]he court does not believe that requiring Xerox to hire a 'helper' to assist [plaintiff] in performing the essential functions of any position would, as a matter of law, be a reasonable accommodation.").

In this same regard, this Court has repeatedly held that the ADA does not require employers to place an employee on "permanent light duty" as a reasonable accommodation because that typically entails requiring additional individuals to engage in additional work. *See Crabill*, 423 F. App'x at 323 (finding that "the district court correctly concluded that the ADA does not require an employer to . . .

assign an employee 'permanent light duty'" and explaining further that "an accommodation that would require other employees to work harder is unreasonable") (internal quotations omitted);[19] *Shin v. Univ. of Md. Med. Sys. Corp.*, 369 F. App'x 472, 482 (4th Cir. 2010) (explaining that the ADA "does not require an employer to assign an employee to permanent light duty" and that "[a]n accommodation that would result in other employees having to worker [sic] harder or longer hours is not required") (internal citations and quotations omitted). Thus, in *Shin*, this Court concluded that "staff[ing] a nurse practitioner while [plaintiff] was on call" was not a reasonable accommodation. 369 F. App'x at 481-82.

Accordingly, in the present case, even if the Court accepts Stephenson's contention that traveling as opposed to driving is the essential function of the sales representative position, Pfizer still was not required to hire a permanent, full-time driver devoted solely to Stephenson to assist her with this function. *See Moritz*, 147 F.3d at 788; *Hammel*, 407 F.3d at 866-67; *Epps*, 353 F.3d at 593 n.5; *Miller*, 24 F. App'x at 765; *Hansen*, 233 F.3d at 523-24; *Merrell*, 2000 U.S. App. LEXIS 33327, at *13; *Floyd*, 2015 U.S. Dist. LEXIS 41368, at *67; *Lewis*, 2014 U.S. Dist. LEXIS 172853, at *36; *Lankford*, 2006 U.S. Dist. LEXIS 30396, at *13; *Jewell*, 210 F. Supp. 2d at 1251; *Ricks*, 877 F. Supp. at 1477. Furthermore, Stephenson's

[19] In *Crabill*, this Court went on to hold that reassigning the plaintiff to an open position was a reasonable accommodation, which is the same accommodation that Pfizer suggested to Stephenson. 423 F. App'x at 324.

requested accommodation is equivalent to being assigned a "permanent light duty" position where, unlike every other sales representative in the country, she is constantly assisted by another individual in performing her essential functions. Such a "permanent light duty" assignment is not required because it results in multiple individuals performing the plaintiff's essential functions. *See Crabill*, 423 F. App'x at 323; *Shin*, 369 F. App'x at 482. Because this Court has held than an accommodation is unreasonable as a matter of law if it results in existing employees having to work harder or longer, logic dictates that an accommodation that results in an employer having to take the additional step of hiring another person on a full-time basis is likewise unreasonable. [20] *See Crabill*, 423 F. App'x at 323; *Shin*, 369 F. App'x at 482.

The cases relied upon by Stephenson and amici are inapposite because they involved temporary or periodic provision of a third party to assist with benefits unrelated to job duties or only to marginal duties. For example, in *Keith*, the request was for an interpreter for periodic staff meetings and additional training. *Keith*, 703 F.3d. at 925-28. The Interpretive Guidance indicates that it may be reasonable for a travel attendant to act as a sighted guide to assist a blind employee

[20] If this was not the case, plaintiffs could always argue that instead of having existing employees work longer and harder, the employer could instead simply hire more people. Of course, it is common sense that hiring additional people is a less reasonable and more extraordinary form of an accommodation than shifting responsibilities to existing employees.

on "***occasional*** business trips." Interpretive Guidance at § 1630.2(o) (emphasis added). The EEOC's guidance on accommodations also specifically uses the word "temporary" in suggesting that an employer may be required to provide a "temporary" life coach as an accommodation. EEOC Enforcement Guidance: Psychiatric Disabilities & the ADA, FEP (BNA) 405:7461 (Mar. 25, 1997). The Technical Assistance Manual states that the obligation to provide readers and interpreters would generally be for part-time, "as needed," or occasional use. Technical Assistance Manual at § 3.10(8)-(9).

Amici also cite *Supinski v. UPS*, 413 F. App'x 536 (3d Cir. 2011). In *Supinski*, UPS argued that the accommodation proposed by the plaintiff would require that it hire a second person to assist with his lifting duties "the majority of the time." *Id.* at 543. The court found that there was "no evidence to support this contention." *Id.* The court also questioned the extent to which the plaintiff's lifting restriction would impact his regular activities. *Id* at 542-43. The court thus did not reach or rule on the question of whether hiring a second person to assist with duties "the majority of time" could be required as a reasonable accommodation. *Id.* at 543.

Stephenson and amici also cite to *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), in support of their position that Pfizer was required to hire a permanent, full-time driver for Stephenson as a reasonable accommodation. The

facts and issues presented to the court in *Nelson*, however, bear little resemblance to those presented here. In *Nelson*, for many years, several blind case workers, with the approval of their employer, DPW, each used a reader to assist them for a specific task during one part of the day. 567 F. Supp. at 371-74. These case workers later brought suit under the Rehabilitation Act to force DPW to pay for the part-time reader that they had used with DPW's approval. *Id.* The court made clear that "a full-time reader is not required" in this case. *Id.* at 376. Significantly, unlike the present case, DPW's sole argument was that paying for a reader would cost too much. *Id.* at 379. The court rejected DPW's sole defense that paying for a part-time reader would be too expensive and relied on regulations interpreting the Rehabilitation Act, which expressly identify the "provision of readers" as an example of a reasonable accommodation. *Id.* at 379-80. Thus, unlike the present case, *Nelson* did not involve the hiring of a new worker on a full-time basis to assist one employee for the entire work day. Additionally, DPW did not raise, and thus the court did not address, the arguments raised by Pfizer in this case.

N.C. Disability Rights also relies on *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979), in support of its contention that Pfizer was required to provide a full-time driver to Stephenson as a reasonable accommodation. (D.R.N.C. at 11, 14.) However, *Coleman* provides no support for this contention. In *Coleman*, the Tenth Circuit affirmed summary judgment in favor of the employer, which was the

EEOC, on all of the plaintiff-employee's claims. 595 F.2d at 540. The Tenth Circuit found "reasonable" the EEOC's conclusion that it was *not* required to provide a reader as an accommodation for a research analyst because the reader would essentially be doing part of the research analyst's job. *Id.* Notably, in reaching this conclusion, the Tenth Circuit rejected the plaintiff's argument that the ability to read should not be considered a requirement of the job because it was not listed as a requirement in the job description, just like the district court rejected Stephenson's argument that driving is not an essential function because it was not specifically identified in the job description. *Id.* Furthermore, contrary to NC Disability Rights' assertion, the Tenth Circuit did *not* find that "it would be reasonable to provide a reading assistant to an employee working as a law clerk or staff attorney." (D.R.N.C. at 11.) On the contrary, the Tenth Circuit merely noted that the EEOC had provided at least part-time readers to staff attorneys and law clerks, but the Tenth Circuit had not occasion to, and did not consider, whether the EEOC was required to do so. 595 F.2d at 540.

E. The Argument That Pfizer Failed To Engage In Good Faith In The Interactive Dialogue Finds No Support In The Record.

Stephenson also contends that Pfizer "flat[ly] refus[ed] to engage in a good-faith [interactive] process" to accommodate Stephenson. (App. Br. at 8.) She argues further that Pfizer's "refusal to consider Stephenson's requested accommodation and to engage in the interactive process when the facts necessitate

it violates the ADA." (*Id.* at 33.) Stephenson's contentions are belied by the record and contrary to well-established law.

A review of the record shows indisputably that Pfizer did engage in an interactive process with Stephenson to identify reasonable accommodations, which included consideration of her request for a driver. (*See supra* at 5-10.) The accommodation dialogue lasted over several months and included multiple conversations, in person meetings, and correspondence. (*See id.*) The written correspondence between the parties leaves no room for dispute about Pfizer's accommodation efforts. (*See id.*) The record shows that Pfizer provided two of the three accommodations requested by Stephenson and offered to explore other accommodations in terms of available jobs that did not require driving. (*See id.*)

Stephenson's argument that Pfizer did not engage in the interactive process is premised entirely on Pfizer's refusal to provide her preferred accommodation-- a full-time, permanent driver. This Court has held repeatedly that "'an employer is not obligated to provide an employee the accommodation he or she requests or prefers.'" *Crabill*, 423 F. App'x at 323 (quoting *Crawford v. Union Carbide Corp.*, 202 F.3d 257 (4th Cir 1999)); *see also O'Grady v. Zurich Holding Co. of Am.*, 12 Fed. App'x 96, 98 (4th Cir. 2001) (explaining that an employer "is not obligated to provide the requested or preferred accommodation") (citing *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998)).

In sum, contrary to Stephenson's assertions, the record reveals that: (1) Pfizer considered and discussed with Stephenson each of her proposed accommodations; (2) Pfizer provided two of the three accommodations requested by Stephenson; (3) Pfizer proposed other accommodations to Stephenson after it considered and determined that it could not provide a driver for her because driving is an essential function of the sales representative job; and (4) Stephenson rejected Pfizer's proposed accommodations and repeatedly insisted that Pfizer reconsider hiring a driver for her. (*See supra* at 5-10.) Based on these facts, it cannot reasonably be argued that Pfizer failed to engage in the interactive process. Accepting Stephenson's argument would mean that an employer fails to engage in the interactive process any time it considers and rejects an employee's preferred accommodation, which is not a position that finds any support in the law.

V. CONCLUSION

For the foregoing reasons, Pfizer respectfully requests that the Court affirm the district court's judgment in favor of Pfizer.

Respectfully submitted this the 4th day of May, 2015.

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

Contents

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

SOURCE: 56 FR 35734, July 26, 1991, unless otherwise noted.

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§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 §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.

[76 FR 16999, Mar. 25, 2011]

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§1630.2 Definitions.

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

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

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

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

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

(2) *Exceptions.* The term employer does not include—

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

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

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

(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 §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 §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 §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 §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 §1630.3 for exceptions to this definition.

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

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

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

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

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

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

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

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

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

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

(v) The terms of a collective bargaining agreement;

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

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

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

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

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

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

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

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

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

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

(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).

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

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

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

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

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

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

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

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

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

(1) The duration of the risk;

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

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

[56 FR 35734, July 26, 1991, as amended at 76 FR 16999, Mar. 25, 2011]

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

(a) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) *Drug* means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C 812)

(2) *Illegal use of drugs* means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms *disability* and *qualified* individual with a disability may not exclude an individual who:

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

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

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b) (1) or (2) of this section is no longer engaging in the illegal use of drugs. (See §1630.16(c) Drug testing).

(d) *Disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) *Homosexuality and bisexuality* are not impairments and so are not disabilities as defined in this part.

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§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 §§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.

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§1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

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§1630.6 Contractual or other arrangements.

(a) *In general.* It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(b) *Contractual or other arrangement defined.* The phrase *contractual or other arrangement or relationship* includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) *Application.* This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

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§1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

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§1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

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§1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

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

(d) An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

(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 (§1630.2(g)(1)(i)), or "record of" prong (§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 (§1630.2(g)(1)(iii)).

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§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 §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.

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§1630.11 Administration of tests.

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

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§1630.12 Retaliation and coercion.

(a) *Retaliation.* It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) *Coercion, interference or intimidation.* It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

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§1630.13 Prohibited medical examinations and inquiries.

(a) *Pre-employment examination or inquiry.* Except as permitted by §1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) *Examination or inquiry of employees.* Except as permitted by §1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

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§1630.14 Medical examinations and inquiries specifically permitted.

(a) *Acceptable pre-employment inquiry.* A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(b) *Employment entrance examination.* A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the

results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(1) Information obtained under paragraph (b) of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

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

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

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

(3) Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See §1630.15(b) Defenses to charges of discriminatory application of selection criteria.)

(c) *Examination of employees.* A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

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

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

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

(d) *Other acceptable examinations and inquiries.* A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

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

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

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

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§1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) *Disparate treatment charges.* It may be a defense to a charge of disparate treatment brought under §§1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) *Charges of discriminatory application of selection criteria*—(1) *In general.* It may be a defense to a charge of discrimination, as described in §1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) *Direct threat as a qualification standard.* The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See §1630.2(r) defining direct threat.)

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination, as described in §1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(e) *Conflict with other Federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) *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.

(g) *Additional defenses.* It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by §1630.14 or §1630.16.

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§1630.16 Specific activities permitted.

(a) *Religious entities.* A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, on the basis of his or her disability.

(b) *Regulation of alcohol and drugs.* A covered entity:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(c) *Drug testing*—(1) *General policy.* For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its job applicants or employees is not a violation of §1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation employees.* This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) *Confidentiality.* Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §1630.14(b) (2) and (3) of this part.

(d) *Regulation of smoking.* A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) *Infectious and communicable diseases; food handling jobs*—(1) *In general.* Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) *Effect on State or other laws.* This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) *Health insurance, life insurance, and other benefit plans*—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

[56 FR 35734, July 26, 1991, 76 FR 17003, Mar. 25, 2011]

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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 §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 §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 §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 §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 §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 §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 §1630.2(g)(1)(i) or §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 §1630.2(l) does not apply to the definition of 'disability' under §1630.2(g)(1)(i) or §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 §§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 §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 §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 §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 §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); §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 §1630.2(l)(2) and §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. The determination of whether an individual with a disability is "qualified" should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in the Rehabilitation Act caselaw as determining whether the individual is "otherwise qualified" for the position. See Senate Report at 33; House Labor Report at 64-65. (See §1630.9 Not Making Reasonable Accommodation).

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential

functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position. House Labor Report at 55.

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

Section 1630.2(n) Essential Functions

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

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

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

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

The second factor in determining whether a function is essential is the number of other employees available to perform that job function or among whom the performance of that job function can be distributed. This may be a factor either because the total number of available employees is low, or because of the fluctuating demands of the business operation. For example, if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited. In such a situation, functions that might not be essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done. See *Treadwell* v. *Alexander,* 707 F.2d 473 (11th Cir. 1983).

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

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

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

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

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

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

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.

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

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

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

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

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

An employer or other covered entity may also restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour. Likewise, as a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually.

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

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

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

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

Section 1630.2(p) Undue Hardship

An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's or other covered entity's business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The "undue hardship" provision takes into account the financial realities of the particular employer or other

covered entity. However, the concept of undue hardship is not limited to financial difficulty. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. See Senate Report at 35; House Labor Report at 67.

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

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

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

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

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, *i.e.,* high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) The duration of the risk;

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

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also *Strathie* v. *Department of Transportation,* 716 F.2d 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an

applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56; House Labor Report at 73-74; House Judiciary Report at 45. See also *Mantolete* v. *Bolger,* 767 F.2d 1416 (9th Cir. 1985); *Bentivegna* v. *U.S. Department of Labor,* 694 F.2d 619 (9th Cir.1982).

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

Section 1630.3 (a) through (c) Illegal Use of Drugs

Part 1630 provides that an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of this part when the employer or other covered entity acts on the basis of such use. Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.

Employers, for example, may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination. The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. See Conference Report at 64.

Individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs are not excluded from the definitions of the terms "disability" and "qualified individual with a disability." Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definitions of those terms. The term "rehabilitation program" refers to both in-patient and out-patient programs, as well as to appropriate employee assistance programs, professionally recognized self-help programs, such as Narcotics Anonymous, or other programs that provide professional (not necessarily medical) assistance and counseling for individuals who illegally use drugs. See Conference Report at 64; see also House Labor Report at 77; House Judiciary Report at 47.

It should be noted that this provision simply provides that certain individuals are not excluded from the definitions of "disability" and "qualified individual with a disability." Consequently, such individuals are still required to establish that they satisfy the requirements of these definitions in order to be protected by the ADA and this part. An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to demonstrate that he or she meets the definition of "disability" as defined in this part.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. (See §1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

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 §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.

Thus, for example, it would be a violation of this part for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. It would be a violation of this part for an employer to adopt a separate track of job promotion or progression for employees with disabilities based on a presumption that employees with disabilities are uninterested in, or incapable of, performing particular jobs. Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges. It would also be a violation of this part to deny employment to an applicant or employee with a disability based on generalized fears about the safety of an individual with such a disability, or based on generalized assumptions about the absenteeism rate of an individual with such a disability.

In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

So, for example, it would be permissible for an employer to offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g. limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28-29; House Labor Report at 58-59; House Judiciary Report at 36.

Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees, or reduces the amount of medical insurance coverage that it will provide to all employees, is not in violation of this part, even if the benefits reduction has an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons are in violation of this part. See *Alexander* v. *Choate,* 469 U.S. 287 (1985). See Senate Report at 85; House Labor Report at 137. (See also, the discussion at §1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans).

Section 1630.6 Contractual or Other Arrangements

An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. This provision does not affect the determination of whether or not one is a "covered entity" or "employer" as defined in §1630.2.

This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect.

Part 1630 notes that this provision applies to parties on either side of the contractual or other relationship. This is intended to highlight that an employer whose employees provide services to others, like an employer whose employees receive services, must ensure that those employees are not discriminated against on the basis of disability. For example, a copier company whose service representative is a dwarf could be required to provide a stepstool, as a reasonable accommodation, to enable him to perform the necessary repairs. However, the employer would not be required, as a reasonable accommodation, to make structural changes to its customer's inaccessible premises.

The existence of the contractual relationship adds no new obligations under part 1630. The employer, therefore, is not liable through the contractual arrangement for any discrimination by the contractor against the contractors own employees or applicants, although the contractor, as an employer, may be liable for such discrimination.

An employer or other covered entity, on the other hand, cannot evade the obligations imposed by this part by engaging in a contractual or other relationship. For example, an employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement. See Conference Report at 59; House Labor Report at 59-61; House Judiciary Report at 36-37.

To illustrate, assume that an employer is seeking to contract with a company to provide training for its employees. Any responsibilities of reasonable accommodation applicable to the employer in providing the training remain with that employer even if it contracts with another company for this service. Thus, if the training company were planning to conduct the training at an inaccessible location, thereby making it impossible for an employee who uses a wheelchair to attend, the employer would have a duty to make reasonable accommodation unless to do so would impose an undue hardship. Under these circumstances, appropriate accommodations might include (1) having the training company identify accessible training sites and relocate the training program; (2) having the training company make the training site accessible; (3) directly making the training site accessible or providing the training company with the means by which to make the site accessible; (4) identifying and contracting with another training company that uses accessible sites; or (5) any other accommodation that would result in making the training available to the employee.

As another illustration, assume that instead of contracting with a training company, the employer contracts with a hotel to host a conference for its employees. The employer will have a duty to ascertain and ensure the accessibility of the hotel and its conference facilities. To fulfill this obligation the employer could, for example, inspect the hotel first-hand or ask a local disability group to inspect the hotel. Alternatively, the employer could ensure that the contract with the hotel specifies it will provide accessible guest rooms for those who need them and that all rooms to be used for the conference, including exhibit and meeting rooms, are accessible. If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory, for the cost of any accommodation needed to provide access to the hotel and conference, and for any other costs accrued by the employer. (In addition, the hotel may also be independently liable under title III of the ADA). However, this would not relieve the employer of its responsibility under this part nor shield it from charges of discrimination by its own employees. See House Labor Report at 40; House Judiciary Report at 37.

Section 1630.8 Relationship or Association With an Individual With a Disability

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

This provision also applies to other benefits and privileges of employment. For example, an employer that provides health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report at 61-62; House Judiciary Report at 38-39.

Section 1630.9 Not Making Reasonable Accommodation

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, *e.g.,* specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

It should be noted, however, that the provision of such items may be required as a reasonable accommodation where such items are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office.

The term "supported employment," which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional ("job coach") to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as "supported employment." For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of an individual with a disability as a reasonable accommodation. However, an employer would not be required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of §1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. That individual is not entitled to a reasonable accommodation because the individual is not "otherwise qualified" for the position.

On the other hand, if the individual has graduated from an accredited law school and passed the bar examination, the individual would be "otherwise qualified." The law firm would thus be required to provide a reasonable accommodation, such as a machine that magnifies print, to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. See Senate Report at 33-34; House Labor Report at 64-65.

The reasonable accommodation that is required by this part should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an employee disabled by a back impairment with a state-of-the art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. See Senate Report at 35; House Labor Report at 66; see also *Carter* v. *Bennett,* 840 F.2d 63 (DC Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of an individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.

See Senate Report at 34; House Labor Report at 65.

Process of Determining the Appropriate Reasonable Accommodation

Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to

accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34-35; House Labor Report at 65-67.

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from State or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that, as provided in §1630.9(c) of this part, the failure to obtain or receive technical assistance from the Federal agencies that administer the ADA will not excuse the employer from its reasonable accommodation obligation.

Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. It should also be noted that the individual's willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation should the individual for any reason be unable or unwilling to continue to provide the accommodation.

Reasonable Accommodation Process Illustrated

The following example illustrates the informal reasonable accommodation process. Suppose a Sack Handler position requires that the employee pick up fifty pound sacks and carry them from the company loading dock to the storage room, and that a sack handler who is disabled by a back impairment requests a reasonable accommodation. Upon receiving the request, the employer analyzes the Sack Handler job and determines that the essential function and purpose of the job is not the requirement that the job holder physically lift and carry the sacks, but the requirement that the job holder cause the sack to move from the loading dock to the storage room.

The employer then meets with the sack handler to ascertain precisely the barrier posed by the individual's specific disability to the performance of the job's essential function of relocating the sacks. At this meeting the employer learns that the individual can, in fact, lift the sacks to waist level, but is prevented by his or her disability from carrying the sacks from the loading dock to the storage room. The employer and the individual agree that any of a number of potential accommodations, such as the provision of a dolly, hand truck, or cart, could enable the individual to transport the sacks that he or she has lifted.

Upon further consideration, however, it is determined that the provision of a cart is not a feasible effective option. No carts are currently available at the company, and those that can be purchased by the company are the wrong shape to hold many of the bulky and irregularly shaped sacks that must be moved. Both the dolly and the hand truck, on the other hand, appear to be effective options. Both are readily available to the company, and either will enable the individual to relocate the sacks that he or she has lifted. The sack handler indicates his or her preference for the dolly. In consideration of this expressed preference, and because the employer feels that the dolly will allow the individual to move more sacks at a time and so be more efficient than would a hand truck, the employer ultimately provides the sack handler with a dolly in fulfillment of the obligation to make reasonable accommodation.

Section 1630.9(b)

This provision states that an employer or other covered entity cannot prefer or select a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual's need for an accommodation cannot enter into the employer's or other covered entity's decision regarding hiring, discharge,

promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d)

The purpose of this provision is to clarify that an employer or other covered entity may not compel an individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided would not be required to accept a reader as an accommodation. However, if the individual were not able to read unaided and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 65; House Judiciary Report at 71-72.

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 §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 §1630.2(l); appendix to §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 1630.11 Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an

accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. When the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (*e.g.,* through an interview, or through education license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. (See §1630.9 Not Making Reasonable Accommodation) See Senate Report at 37-38; House Labor Report at 70-72; House Judiciary Report at 42; see also *Stutts* v. *Freeman,* 694 F.2d 666 (11th Cir. 1983); *Crane* v. *Dole,* 617 F. Supp. 156 (D.D.C. 1985).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 39; House Labor Report at 75; House Judiciary Report at 44.

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation. For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category. So, for example, it would not be permitted for an employer to request that an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration.

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function. If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Rather, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

An employer is permitted to ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer within a reasonable established time period prior to the administration of the test. The employer may also request that documentation of the need for the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats. (See §1630.11 Administration of Tests).

Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. (See §1630.9 Not Making Reasonable Accommodation: Process of Determining the Appropriate Reasonable Accommodation).

As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by this part. (See §1630.1 (b) and (c) Applicability and Construction).

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59-60; Senate Report at 39; House Labor Report at 73-74; House Judiciary Report at 43.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating this part.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for State administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to State workers' compensation offices or second injury funds in accordance with State workers' compensation laws without violating this part.

Consistent with this section and with §1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in §1630.16(f).

Section 1630.14(c) Examination of Employees

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers or other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part. This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by Federal, State, or local law that are consistent with the ADA and this part (or in the case of a Federal standard, with section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include Federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74-75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 75; House Judiciary Report at 43-44.

Section 1630.15 Defenses

The section on defenses in part 1630 is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See *Prewitt* v. *U.S. Postal Service,* 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15 (b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, *i.e.,* that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in §1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (*e.g.,* no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at §1630.5 Limiting, Segregating and Classifying, and §1630.10 Qualification Standards, Tests, and Other Selection Criteria.

Section 1630.15(d) Defense To Not Making Reasonable Accommodation

An employer or other covered entity alleged to have discriminated because it did not make a reasonable accommodation, as required by this part, may offer as a defense that it would have been an undue hardship to make the accommodation.

It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship, as defined in §1630.2(p), and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite. See House Judiciary Report at 42.

The concept of undue hardship that has evolved under section 504 of the Rehabilitation Act and is embodied in this part is unlike the "undue hardship" defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the "de minimis" title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68-69; House Judiciary Report at 40-41.

Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business' thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

It should be noted, moreover, that the employer would not be able to show undue hardship if the disruption to its employees were the result of those employees fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.

Section 1630.15(e) Defense—Conflicting Federal Laws and Regulations

There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

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.

Section 1630.16 Specific Activities Permitted

Section 1630.16(a) Religious Entities

Religious organizations are not exempt from title I of the ADA or this part. A religious corporation, association, educational institution, or society may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider individuals with disabilities who are qualified and who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria. See Senate Report at 42; House Labor Report at 76-77; House Judiciary Report at 46.

Section 1630.16(b) Regulation of Alcohol and Drugs

This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds all of its other employees. Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part. As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of part 1630 when the employer acts on the basis of such use.

Section 1630.16(c) Drug Testing

This provision reflects title I's neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual's medical condition beyond whether the individual is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47.

Section 1630.16(e) Infectious and Communicable Diseases; Food Handling Jobs

This provision addressing food handling jobs applies the "direct threat" analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.

If no such reasonable accommodation is possible, the employer may refuse to assign, or to continue to assign the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual. However, if the individual is a current employee, the employer would be required to consider the accommodation of reassignment to a vacant position not involving food handling for which the individual is qualified. Conference Report at 61-63. (See §1630.2(r) Direct Threat).

Section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans

This provision is a limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans. It does not apply to those who establish, sponsor, observe or administer plans not involving benefits, such as liability insurance plans.

The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This provision is not intended to disrupt the current regulatory structure for self-insured employers. These employers may establish, sponsor, observe, or administer the terms of a bona fide benefit plan not subject to State laws that regulate insurance. This provision is also not intended to disrupt the current nature of insurance underwriting, or current insurance industry practices in sales, underwriting, pricing, administrative and other services, claims and similar insurance related activities based on classification of risks as regulated by the States.

The activities permitted by this provision do not violate part 1630 even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part. Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted.

However, an employer or other covered entity cannot deny an individual with a disability who is qualified equal access to insurance or subject an individual with a disability who is qualified to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks. Part 1630 requires that decisions not based on risk classification be made in conformity with non-discrimination requirements. See Senate Report at 84-86; House Labor Report at 136-138; House Judiciary Report at 70-71. See the discussion of §1630.5 Limiting, Segregating and Classifying.

[56 FR 35734, July 26, 1991, as amended at 65 FR 36327, June 8, 2000; 76 FR 17003, Mar. 25, 2011]

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Technical Assistance Manual: Title I of the ADA

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

January 1992 EEOC-M-1A

ADA Technical Assistance Manual Addendum (10/29/02)

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INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) is issuing this Technical Assistance Manual as part of an active technical assistance program to help employers, other covered entities, and persons with disabilities learn about their obligations and rights

under the employment provisions of the Americans with Disabilities Act (Title I of the ADA). ADA requirements for nondiscrimination in employment become effective for employers with 25 or more employees and other covered entities on July 26, 1992, and for employers with 15 to 24 employees on July 26, 1994.

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

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

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

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

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

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

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

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

Introduction and Purpose

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

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

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

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

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

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

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

HOW TO USE THIS MANUAL

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

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

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

Chapter II.Looks at the definitions of "an individual with a disability" and a "qualified individual with a disability," drawing upon guidance set out in EEOC's Title I regulation and interpretive appendix. These definitions are important, because an individual is only protected by the ADA if s/he meets both definitions. In addition, the second definition incorporates the ADA's basic employment nondiscrimination requirement, by defining a "qualified" individual as a person who can "perform the essential functions of a job . . . with or without reasonable accommodation." Chapter II also provides practical guidance on identifying "essential" job functions.

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

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

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

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

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

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

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

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

I. TITLE I: AN OVERVIEW OF LEGAL REQUIREMENTS

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

Who Must Comply with Title I of the ADA?

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

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

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

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

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

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

Special Situations

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

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

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

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

Who Is Exempt?

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

Who Is Protected by Title I?

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

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

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

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

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

(See Chapter II.)

Individuals Specifically not Protected by the ADA

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

Persons who currently use drugs illegally

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

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

Other specific exclusions

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

Employment Practices Regulated by Title I of the ADA

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

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

Actions which Constitute Discrimination

1. The ADA specifies types of actions that may constitute discrimination. These actions are discussed more fully in the following chapters, as indicated:
2. Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability. (See Chapter VII.)
3. Denying employment opportunities to a qualified individual because s/he has a relationship or association with a person with a disability. (See Chapter VII.)
4. Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the business. (See Chapters III. and VII.)
5. Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability unless they are job-related and necessary for the business. (See Chapter IV.)
6. Failing to use employment tests in the most effective manner to measure actual abilities. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or speaking skills of an employee or applicant with a disability (unless those are the skills the test is designed to measure). (See Chapter V.)
7. Denying an employment opportunity to a qualified individual because s/he has a relationship or association with an individual with a disability. (See Chapter VII.)
8. Discriminating against an individual because s/he has opposed an employment practice of the employer or filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the Act. (See Chapter X.)

Reasonable Accommodation and the Undue Hardship Limitation

Reasonable Accommodation

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

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

Some examples of reasonable accommodation include:

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

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

Undue Hardship

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

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

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

Health or Safety Defense

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

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

Pre-employment Inquiries and Medical Examinations

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

Drug and Alcohol Use

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

Enforcement and Remedies

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

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

Posting Notices

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

Coordination of Overlapping Federal Requirements

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

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

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

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

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

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

II. WHO IS PROTECTED BY THE ADA?

INDIVIDUAL WITH A DISABILITY
QUALIFIED INDIVIDUAL WITH A DISABILITY

2.1 Introduction

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

2.2 Individual With a Disability

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

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

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

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

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

(i) A Physical or Mental Impairment

A physical impairment is defined by the ADA as:

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

A mental impairment is defined by the ADA as:

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

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

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

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

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

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

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

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

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

(ii) Major Life Activities

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

- walking
- seeing
- speaking
- hearing
- breathing
- learning
- performing manual tasks
- caring for oneself
- working

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

(iii) Substantially Limits

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

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

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

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

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

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

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

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

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

Temporary Impairments

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

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

Substantially Limited in Working

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

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

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

For example: A person who cannot qualify as a commercial airline pilot because of a minor vision impairment, but who could qualify as a co-pilot or a pilot for a courier service, would not be considered substantially limited in working just because he could not

perform a particular job. Similarly, a baseball pitcher who develops a bad elbow and can no longer pitch would not be substantially limited in working because he could no longer perform the specialized job of pitching in baseball.

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

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

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

For example: A person would be considered significantly restricted in a "class of jobs" if a back condition prevents him from working in any heavy labor job. A person would be considered significantly limited in the ability to perform "a broad range of jobs in various classes" if she has an allergy to a substance found in most high-rise office buildings in the geographic area in which she could reasonably seek work, and the allergy caused extreme difficulty in breathing. In this case, she would be substantially limited in the ability to perform the many different kinds of jobs that are performed in high-rise buildings. By contrast, a person who has a severe allergy to a substance in the particular office in which she works, but who is able to work in many other offices that do not contain this substance, would not be significantly restricted in working.

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

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

Specific Exclusions

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

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

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

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

2.2(b) Record of a Substantially Limiting Condition

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

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

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

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

employment record] containing such information to make an adverse employment decision about a person who currently is qualified to perform a job, the action is subject to challenge as a discriminatory practice.)

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

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

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

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

2.2(c) Regarded as Substantially Limited

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

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

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

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

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

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

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

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

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

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

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

2.3 Qualified Individual with a Disability

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

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

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

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

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

For example: The first step in determining whether an accountant who has cerebral palsy is qualified for a certified public accountant job is to determine if the person is a licensed CPA. If not, s/he is not qualified. Or, if it is a company's policy that all its managers have at least three years' experience working with the company, an individual with a disability who has worked for two years for the company would not be qualified for a managerial position.

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

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

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

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

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

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

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

2.3(a) Identifying the Essential Functions of a Job

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

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

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

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

1. The position exists to perform the function.

For example:

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

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

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

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

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

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

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

a. The employer's judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The amount of time spent performing the function

For example: If an employee spends most of the time or a majority of the time operating one machine, this would be evidence that operating this machine was an essential function.

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

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

For example:

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

e. The terms of a collective bargaining agreement

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

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

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

g. Other relevant factors

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

For example:

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

Changing Essential Job Functions

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

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

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

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

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

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

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

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

Some job analysis methods ask current employees and their supervisors to rate the importance of general characteristics necessary to perform a job, such as "strength," "endurance," or "intelligence," without linking these characteristics to specific job functions or specific tasks that are part of a function. Such general information may not identify, for example, whether upper body or lower body "strength" is required, or whether muscular endurance or cardiovascular "endurance" is needed to perform a particular

job function. Such information, by itself, would not be sufficient to determine whether an individual who has particular limitations can perform an essential function with or without an accommodation.

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

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

For example:

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

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

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

Many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation. However, if an individual with a disability who is otherwise qualified cannot perform one or more essential job functions because of his or her disability, the employer, in assessing whether the person is qualified to do the job, must consider whether there are modifications or adjustments that would enable the person to perform these functions. Such modifications or adjustments are called "reasonable accommodations."

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

III.THE REASONABLE ACCOMMODATION OBLIGATION

3.1 Overview of Legal Obligations

- An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business.
- Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.
- The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes.
- An employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation, unless it would cause an undue hardship.
- An employer does not have to make an accommodation for an individual who is not otherwise qualified for a position.
- Generally, it is the obligation of an individual with a disability to request a reasonable accommodation.

- A qualified individual with a disability has the right to refuse an accommodation. However, if the individual cannot perform the essential functions of the job without the accommodation, s/he may not be qualified for the job.
- If the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of providing the accommodation or paying that portion of the cost which would constitute an undue hardship.

3.2 Why Is a Reasonable Accommodation Necessary?

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

People with disabilities are restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that make it difficult to get into and around a work site or to use necessary work equipment. Some are excluded or limited by the way people communicate with each other. Others are excluded because of rigid work schedules that allow no flexibility for people with special needs caused by disability. Many are excluded only by barriers in other people's minds; these include unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers.

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

3.3 What Is a Reasonable Accommodation?

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

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

Reasonable Accommodation in the Application Process

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

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

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

Accommodations to Perform the Essential Functions of a Job

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

Accommodations to Ensure Equal Benefits of Employment

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

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

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

3.4 Some Basic Principles of Reasonable Accommodation

A reasonable accommodation must be an effective accommodation. It must provide an opportunity for a person with a disability to achieve the same level of performance or to enjoy benefits or privileges equal to those of an average similarly-situated non-disabled person. However, the accommodation does not have to ensure equal results or provide exactly the same benefits or privileges.

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

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

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

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

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

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

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

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

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

3.5 Some Examples of Reasonable Accommodation

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

- making facilities readily accessible to and usable by an individual with a disability;
- restructuring a job by reallocating or redistributing marginal job functions;
- altering when or how an essential job function is performed;
- part-time or modified work schedules;
- obtaining or modifying equipment or devices;

- modifying examinations, training materials or policies;
- providing qualified readers and interpreters;
- reassignment to a vacant position;
- permitting use of accrued paid leave or unpaid leave for necessary treatment;
- providing reserved parking for a person with a mobility impairment; and
- allowing an employee to provide equipment or devices that an employer is not required to provide.

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

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

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

For example: If it is an essential function of a job to press a foot pedal a certain number of times a minute and an individual with a disability applying for the job has some limitation that makes this difficult or impossible, the accommodation process should focus on ways that this person might be able to do the job function, not on the nature of her disability or on how persons with this kind of disability generally might be able to perform the job.

3.6 Who Is Entitled to a Reasonable Accommodation?

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

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

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

When is an Employer Obligated to Make a Reasonable Accommodation?

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

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

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

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

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

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

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

Documentation of Need for Accommodation

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

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

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

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

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

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

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

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

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

3.8 A process for identifying a reasonable accommodation

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

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

2. Consult with the individual with a disability to find out his or her specific physical or mental abilities and limitations as they relate to the essential job functions. Identify the barriers to job performance and assess how these barriers could be overcome with an accommodation.

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

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

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

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

Examples of the Reasonable Accommodation Process:

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

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

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

3.9 The Undue Hardship Limitation

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

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

Accordingly, whether a particular accommodation will impose an undue hardship must always be determined on a case-by-case basis. An accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.

The concept of undue hardship includes any action that is:

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

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

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

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

If an employer has only one facility, the cost and impact of the accommodation will be considered in relation to the effect on expenses and resources of that facility. However, if the facility is part of a larger entity that is covered by the ADA, factors 3. and 4. below also will be considered in determinations of undue hardship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other Cost Issues

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

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

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

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

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

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

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

3.10 Examples of Reasonable Accommodations

1. Making Facilities Accessible and Usable

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

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

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

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

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

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

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

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

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

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

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

Accessibility to Perform the Essential Functions of the Job

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

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

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

Requirements for Renovation or New Construction

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

Title III of the ADA requires that any alterations to, or new construction of "commercial facilities," as well as places of public accommodation, made after January 26, 1992, must conform to the "ADA Accessibility Guidelines" (incorporated in Department of Justice Title III regulations). "Commercial facilities" are defined as any nonresidential facility whose operations affect commerce, including office buildings, factories and warehouses; therefore, the facilities of most employers will be subject to this requirement. An alteration is any change that affects the "usability" of a facility; it does not include normal maintenance, such as painting, roofing or changes to mechanical or electrical systems, unless the changes affect the "usability" of the facility.

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

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

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

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

2. Job Restructuring

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

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

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

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

Although an employer is not required to reallocate essential job functions, it may be a reasonable accommodation to modify the essential functions of a job by changing when or how they are done.

For example:

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

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

3. Modified Work Schedules

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

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

Some examples of modified work schedules as a reasonable accommodation:

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

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

4. Flexible Leave Policies

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

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

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

5. Reassignment to a Vacant Position

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

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

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

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

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

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

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

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

6. Acquisition or Modification of Equipment and Devices

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

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

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

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

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

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

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

In some cases, it may be a reasonable accommodation to allow an applicant or employee to provide and use equipment that an employer would not be obligated to provide.

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

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

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

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

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

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

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

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

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

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

a. Tests and Examinations

Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions, rather than reflecting limitations caused by the disability. The ADA requires that tests be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless that is the job-related skill the test is designed to measure.

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

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

b. Training

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

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

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

- modifying the manner in which training is provided.

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

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

c. Other Policies

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

8. Providing Qualified Readers

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

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

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

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

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

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

9. Providing Qualified Interpreters

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

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

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

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

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

10. Other Accommodations

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

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

3.11 Financial and Technical Assistance for Accommodations

a. Financial Assistance

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

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

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

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

An eligible small business is one with gross receipts of $1 million or less for the taxable year, or 30 or fewer full time employees.

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

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

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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May 4, 2015

/s/Stephanie E. Lewis
Stephanie E. Lewis

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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