Billing Code 6750-06 **GPO Access**

Equal Employment Opportunity Commission

29 CFR Part 1630

Equal Employment Opportunity for Individuals with Disabilities

AGENCY: Equal Employment Opportunity Commission

ACTION: Final Rule

SUMMARY: On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. Section 106 of the ADA requires that the Equal Employment Opportunity Commission (EEOC) issue substantive regulations implementing title I (Employment) within one year of the date of enactment of the Act. Pursuant to this mandate, the Commission is publishing a new part 1630 to its regulations to implement title I and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to employment. New part 1630 prohibits discrimination against qualified individuals with disabilities in all aspects of employment.

EFFECTIVE DATE: July 26, 1992.

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Copies of this final rule and interpretive appendix may be obtained by calling the Office of Communications and Legislative Affairs at (202) 663-4900. Copies in alternate formats may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4398 or (202) 663-4395 (voice) or (202) 663-4399 (TDD). The alternate formats available are: large print, braille, electronic file on computer disk, and audio-tape.

SUPPLEMENTARY INFORMATION:

Rulemaking History

The Commission actively solicited and considered public comment in the development of part 1630. On August 1, 1990, the Commission published an advance notice of proposed rulemaking (ANPRM), 55 FR 31192, informing the public that the Commission had begun the process of developing substantive regulations pursuant to title I of the ADA and inviting comment from interested groups and individuals. The comment period ended on August 31, 1990. In response to the ANPRM, the Commission received 138 comments from various disability rights organizations, employer groups, and individuals. Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2400 representatives from disability rights organizations and employer groups participated in these meetings.

On February 28, 1991, the Commission published a notice of proposed rulemaking (NPRM), 56 FR 8578, setting forth proposed part 1630 for public comment. The comment period ended April 29, 1991. In response to the NPRM, the Commission received 697 timely comments from interested groups and individuals. In many instances, a comment was submitted on behalf of several parties and represented the views of numerous groups, employers, or individuals with disabilities. The comments have been analyzed and considered in the development of this final rule.

Overview of Regulations

The format of part 1630 reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR part 104. Accordingly, in developing part 1630, the Commission has been guided by the Section 504 regulations and the case law interpreting those regulations.

It is the intent of Congress that the regulations implementing the ADA be comprehensive and easily understood. Part 1630, therefore, defines terms not previously defined in the regulations implementing Section 504 of the Rehabilitation Act, such as "substantially limits," "essential functions," and "reasonable accommodation." Of necessity, many of the determinations that may be required by this part must be made on a case-by-case basis. Where possible, part 1630 establishes parameters to serve as guidelines in such inquiries.

The Commission is also issuing interpretive guidance concurrently

with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. Therefore, part 1630 is accompanied by an Appendix. This Appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The Appendix addresses the major provisions of part 1630 and explains the major concepts of disability rights. Further, the Appendix cites to the authority, such as the legislative history of the ADA and case law interpreting Section 504 of the Rehabilitation Act, that provides the basis and purpose of the rule and interpretative guidance.

More detailed guidance on specific issues will be forthcoming in the Commission's Compliance Manual. Several Compliance Manual sections and policy guidances on ADA issues are currently under development and are expected to be issued prior to the effective date of the Act. Among the issues to be addressed in depth are the theories of discrimination; definitions of disability and of qualified individual with a disability; reasonable accommodation and undue hardship, including the scope of reassignment; and pre-employment inquiries.

To assist us in the development of this guidance, the Commission requested comment in the NPRM from disability rights organizations, employers, unions, state agencies concerned with employment or workers compensation practices, and interested individuals on specific questions about insurance, workers' compensation, and collective bargaining agreements. Many commenters responded to these questions, and several commenters addressed other matters pertinent to these areas. The Commission has considered these comments in the development of the final rule and will continue to consider them as it develops further ADA guidance.

In the NPRM, the Commission raised questions about a number of insurance-related matters. Specifically, the Commission asked commenters to discuss risk assessment and classification, the relationship between "risk" and "cost," and whether employers should consider the effects that changes in insurance coverage will have on individuals with disabilities before making those changes. Many commenters provided information about insurance practices and explained some of the considerations that affect insurance decisions. In addition, some commenters discussed their experiences with insurance plans and coverage. The commenters presented a wide range of opinions on insurance-related matters,

and the Commission will consider the comments as it continues to analyze these complex matters.

The Commission received a large number of comments concerning inquiries about an individual's workers' compensation history. Many employers asserted that such inquiries are job related and consistent with business necessity. Several individuals with disabilities and disability rights organizations, however, argued that such inquiries are prohibited pre-employment inquiries and are not job related and consistent with business necessity. The Commission has addressed this issue in the interpretive guidance accompanying section 1630.14(a) and will discuss the matter further in future guidance.

There was little controversy about the submission of medical information to workers' compensation offices. A number of employers and employer groups pointed out that the workers' compensation offices of many states request medical information in connection with the administration of second-injury funds. Further, they noted that the disclosure of medical information may be necessary to the defense of a workers' compensation claim. The Commission has responded to these comments by amending the interpretive guidance accompanying section 1630.14(b). This amendment, discussed below, notes that the submission of medical information to workers' compensation offices in accordance with state workers' compensation laws is not inconsistent with section 1630.14(b). The Commission will address this area in greater detail and will discuss other issues concerning workers' compensation matters in future guidances, including the policy guidance on pre-employment inquiries.

With respect to collective bargaining agreements, the Commission asked commenters to discuss the relationship between collective bargaining agreements and such matters as undue hardship, reassignment to a vacant position, the determination of what constitutes a "vacant" position, and the confidentiality requirements of the ADA. The comments that we received reflected a wide variety of views. For example, some commenters argued that it would always be an undue hardship for an employer to provide a reasonable accommodation that conflicted with the provisions of a collective bargaining agreement. Other commenters, however, argued that an accommodation's effect on an agreement should not be considered when assessing undue hardship. Similarly, some commenters stated that the appropriateness of reassignment to a vacant position should depend upon the provisions of a collective

bargaining agreement while others asserted that an agreement cannot limit the right to reassignment. Many commenters discussed the relationship between an agreement's seniority provisions and an employer's reasonable accommodation obligations.

In response to comments, the Commission has amended section 1630.2(n)(3) to include "the terms of a collective bargaining agreement" in the types of evidence relevant to determining the essential functions of a position. The Commission has made a corresponding change to the interpretive guidance on section 1630.2(n)(3). In addition, the Commission has amended the interpretive guidance on section 1630.15(d) to note that the terms of a collective bargaining agreement may be relevant to determining whether an accommodation would pose an undue hardship on the operation of a covered entity's business.

The divergent views expressed in the public comments demonstrate the complexity of employment-related issues concerning insurance, workers' compensation, and collective bargaining agreement matters. These highly complex issues require extensive research and analysis and warrant further consideration. Accordingly, the Commission has decided to address the issues in depth in future Compliance Manual sections and policy guidances. The Commission will consider the public comments that it received in response to the NPRM as it develops further guidance on the application of title I of the ADA to these matters.

The Commission has also decided to address burdens-of-proof issues in future guidance documents, including the Compliance Manual section on the theories of discrimination. Many commenters discussed the allocation of the various burdens of proof under title I of the ADA and asked the Commission to clarify those burdens. The comments in this area addressed such matters as determining whether a person is a qualified individual with a disability, job relatedness and business necessity, and undue hardship. The Commission will consider these comments as it prepares further guidance in this area.

A discussion of other significant comments and an explanation of the changes made in part 1630 since publication of the NPRM follows.

Section-by-Section Analysis of Comments and Revisions

Section 1630.1 Purpose, applicability, and construction

The Commission has made a technical correction to section 1630.1(a) by adding section 506(e) to the list of statutory provisions implemented by this part. Section 506(e) of the ADA provides that the failure to receive technical assistance from the federal agencies that administer the ADA is not a defense to failing to meet the obligations of title I.

Some commenters asked the Commission to note that the ADA does not preempt state claims, such as state tort claims, that confer greater remedies than are available under the ADA. The Commission has added a paragraph to that effect in the Appendix discussion of sections 1630.1(b) and (c). This interpretation is consistent with the legislative history of the Act. See H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 69-70 (1990) [hereinafter referred to as House Judiciary Report].

In addition, the Commission has made a technical amendment to the Appendix discussion to note that the ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. The Commission has also amended the discussion to refer to a direct threat that cannot be eliminated "or reduced" through reasonable accommodation. This language is consistent with the regulatory definition of direct threat. (See section 1630.2(r), below.)

Section 1630.2 Definitions

Section 1630.2(h) Physical or mental impairment

The Commission has amended the interpretive guidance accompanying section 1630.2(h) to note that the definition of the term "impairment" does not include characteristic predisposition to illness or disease.

In addition, the Commission has specifically noted in the interpretive guidance that pregnancy is not an impairment. This change responds to the numerous questions that the Commission has received concerning whether pregnancy is a disability covered by the ADA. Pregnancy, by itself, is not an impairment and is therefore not a disability.

Section 1630.2(j) Substantially limits

The Commission has revised the interpretive guidance accompanying section 1630.2(j) to make clear that the determination of whether

an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989) [hereinafter referred to as Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 52 (1990) [hereinafter referred to as House Labor Report]; House Judiciary Report at 28. The Commission has also revised the examples in the third paragraph of this section's guidance. The examples now focus on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures. These revisions respond to comments from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

In an amendment to the paragraph concerning the factors to consider when determining whether an impairment is substantially limiting, the Commission has provided a second example of an impairment's "impact." This example notes that a traumatic head injury's affect on cognitive functions is the "impact" of that impairment.

Many commenters addressed the provisions concerning the definition of "substantially limits" with respect to the major life activity of working (section 1630.2(j)(3)). Some employers generally supported the definition but argued that it should be applied narrowly. Other employers argued that the definition is too broad. Disability rights groups and individuals with disabilities, on the other hand, argued that the definition is too narrow, unduly limits coverage, and places an onerous burden on individuals seeking to establish that they are covered by the ADA. The Commission has responded to these comments by making a number of clarifications in this area.

The Commission has revised section 1630.2(j)(3)(ii) and the accompanying interpretive guidance to note that the listed factors "may" be considered when determining whether an individual is substantially limited in working. This revision clarifies that the factors are relevant to, but are not required elements of, a showing of a substantial limitation in working.

Disability rights groups asked the Commission to clarify that "substantially limited in working" applies only when an individual is not substantially limited in any other major life activity. In

addition, several other commenters indicated confusion about whether and when the ability to work should be considered when assessing if an individual has a disability. In response to these comments, the Commission has amended the interpretive guidance by adding a new paragraph clarifying the circumstances under which one should determine whether an individual is substantially limited in the major life activity of working. This paragraph makes clear that a determination of whether an individual is substantially limited in the ability to work should be made only when the individual is not disabled in any other major life activity. Thus, individuals need not establish that they are substantially limited in working if they already have established that they are, have a record of, or are regarded as being substantially limited in another major life activity.

The proposed interpretive guidance in this area provided an example concerning a surgeon with a slight hand impairment. Several commenters expressed concern about this example. Many of these comments indicated that the example confused, rather than clarified, the matter. The Commission, therefore, has deleted this example. To explain further the application of the "substantially limited in working" concept, the Commission has provided another example (concerning a commercial airline pilot) in the interpretive guidance.

In addition, the Commission has clarified that the terms "numbers and types of jobs" (see section 1630.2(j)(3)(ii)(B)) and "numbers and types of other jobs" (see section 1630.2(j)(3)(ii)(C)) do not require an onerous evidentiary showing.

In the proposed Appendix, after the interpretive guidance accompanying section 1630.2(l), the Commission included a discussion entitled "Frequently Disabling Impairments." Many commenters expressed concern about this discussion. In response to these comments, and to avoid confusion, the Commission has revised the discussion and has deleted the list of frequently disabling impairments. The revised discussion now appears in the interpretive guidance accompanying section 1630.2(j).

Section 1630.2(l) Is regarded as having such an impairment

Section 1630.2(l)(3) has been changed to refer to "a substantially limiting impairment" rather than "such an impairment." This change clarifies that an individual meets the definition of the term "disability" when a covered entity treats the individual as having

a substantially limiting impairment. That is, section 1630.2(l)(3) refers to any substantially limiting impairment, rather than just to one of the impairments described in sections 1630.2(l)(1) or (2).

The proposed interpretive guidance on section 1630.2(l) stated that, when determining whether an individual is regarded as substantially limited in working, "it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used." The Commission specifically requested comment on this proposal, and many commenters addressed this issue. The Commission has decided to eliminate this assumption and to revise the interpretive guidance. The guidance now explains that an individual meets the "regarded as" part of the definition of disability if he or she can show that a covered entity made an employment decision because of a perception of a disability based on "myth, fear, or stereotype." This is consistent with the legislative history of the ADA. See House Judiciary Report at 30.

Section 1630.2(m) Qualified individual with a disability

Under the proposed part 1630, the first step in determining whether an individual with a disability is a qualified individual with a disability was to determine whether the individual "satisfies the requisite skill, experience and education requirements of the employment position" the individual holds or desires. Many employers and employer groups asserted that the proposed regulation unduly limited job prerequisites to skill, experience, and education requirements and did not permit employers to consider other job-related qualifications. To clarify that the reference to skill, experience, and education requirements was not intended to be an exhaustive list of permissible qualification requirements, the Commission has revised the phrase to include "skill, experience, education, and other job-related requirements." This revision recognizes that other types of job-related requirements may be relevant to determining whether an individual is qualified for a position.

Many individuals with disabilities and disability rights groups asked the Commission to emphasize that the determination of whether a person is a qualified individual with a disability must be made at the time of the employment action in question and cannot be based on speculation that the individual will become unable to perform the job in the future or may cause increased health

insurance or workers' compensation costs. The Commission has amended the interpretive guidance on section 1630.2(m) to reflect this point. This guidance is consistent with the legislative history of the Act. See Senate Report at 26, House Labor Report at 55, 136; House Judiciary Report at 34, 71.

Section 1630.2(n) Essential functions

Many employers and employer groups objected to the use of the terms "primary" and "intrinsic" in the definition of essential functions. To avoid confusion about the meanings of "primary" and "intrinsic," the Commission has deleted these terms from the definition. The final regulation defines essential functions as "fundamental job duties" and notes that essential functions do not include the marginal functions of a position.

The proposed interpretive guidance accompanying section 1630.2(n)(2)(ii) noted that one of the factors in determining whether a function is essential is the number of employees available to perform a job function or among whom the performance of that function can be distributed. The proposed guidance explained that "[t]his may be a factor either because the total number of employees is low, or because of the fluctuating demands of the business operations." Some employers and employer groups expressed concern that this language could be interpreted as requiring an assessment of whether a job function could be distributed among all employees in any job at any level. The Commission has amended the interpretive guidance on this factor to clarify that the factor refers only to distribution among "available" employees.

Section 1630.2(n)(3) lists several kinds of evidence that are relevant to determining whether a particular job function is essential. Some employers and unions asked the Commission to recognize that collective bargaining agreements may help to identify a position's essential functions. In response to these comments, the Commission has added "[t]he terms of a collective bargaining agreement" to the list. In addition, the Commission has amended the interpretive guidance to note specifically that this type of evidence is relevant to the determination of essential functions. This addition is consistent with the legislative history of the Act. See Senate Report at 32; House Labor Report at 63.

Proposed section 1630.2(n)(3) referred to the evidence on the list

as evidence "that may be considered in determining whether a particular function is essential." The Commission has revised this section to refer to evidence "of" whether a particular function is essential. The Commission made this revision in response to concerns about the meaning of the phrase "may be considered." In that regard, some commenters questioned whether the phrase meant that some of the listed evidence might not be considered when determining whether a function is essential to a position. This revision clarifies that all of the types of evidence on the list, when available, are relevant to the determination of a position's essential functions. As the final rule and interpretive guidance make clear, the list is not an exhaustive list of all types of relevant evidence. Other types of available evidence may also be relevant to the determination.

The Commission has amended the interpretive guidance concerning section 1630.2(n)(3)(ii) to make clear that covered entities are not required to develop and maintain written job descriptions. Such job descriptions are relevant to a determination of a position's essential functions, but they are not required by part 1630.

Several commenters suggested that the Commission establish a rebuttable presumption in favor of the employer's judgment concerning what functions are essential. The Commission has not done so. On that point, the Commission notes that the House Committee on the Judiciary specifically rejected an amendment that would have created such a presumption. See House Judiciary Report at 33-34.

The last paragraph of the interpretive guidance on section 1630.2(n) notes that the inquiry into what constitutes a position's essential functions is not intended to second guess an employer's business judgment regarding production standards, whether qualitative or quantitative. In response to several comments, the Commission has revised this paragraph to incorporate examples of qualitative production standards.

Section 1630.2(o) Reasonable accommodation

The Commission has deleted the reference to undue hardship from the definition of reasonable accommodation. This is a technical change reflecting that undue hardship is a defense to, rather than an aspect of, reasonable accommodation. As some commenters have noted, a defense to a term should not be part of the term's

definition. Accordingly, we have separated the concept of undue hardship from the definition of reasonable accommodation. This change does not affect the obligations of employers or the rights of individuals with disabilities. Accordingly, a covered entity remains obligated to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless to do so would impose an undue hardship on the operation of the covered entity's business. See section 1630.9.

With respect to section 1630.2(o)(1)(i), some commenters expressed confusion about the use of the phrase "qualified individual with a disability." In that regard, they noted that the phrase has a specific definition under this part (see section 1630.2(m)) and questioned whether an individual must meet that definition to request an accommodation with regard to the application process. The Commission has substituted the phrase "qualified applicant with a disability" for "qualified individual with a disability." This change clarifies that an individual with a disability who requests a reasonable accommodation to participate in the application process must be eligible only with respect to the application process.

The Commission has modified section 1630.2(o)(1)(iii) to state that reasonable accommodation includes modifications or adjustments that enable employees with disabilities to enjoy benefits and privileges that are "equal" to (rather than "the same" as) the benefits and privileges that are enjoyed by other employees. This change clarifies that such modifications or adjustments must ensure that individuals with disabilities receive equal access to the benefits and privileges afforded to other employees but may not be able to ensure that the individuals receive the same results of those benefits and privileges or precisely the same benefits and privileges.

Many commenters discussed whether the provision of daily attendant care is a form of reasonable accommodation. Employers and employer groups asserted that reasonable accommodation does not include such assistance. Disability rights groups and individuals with disabilities, however, asserted that such assistance is a form of reasonable accommodation but that this part did not make that clear. To clarify the extent of the reasonable accommodation obligation with respect to daily attendant care, the Commission has amended the interpretive guidance on section 1630.2(o) to make clear that it may be a reasonable accommodation to provide personal

assistants to help with specified duties related to the job.

The Commission also has amended the interpretive guidance to note that allowing an individual with a disability to provide and use equipment, aids, or services that an employer is not required to provide may also be a form of reasonable accommodation. Some individuals with disabilities and disability rights groups asked the Commission to make this clear.

The interpretive guidance points out that reasonable accommodation may include making non-work areas accessible to individuals with disabilities. Many commenters asked the Commission to include rest rooms in the examples of accessible areas that may be required as reasonable accommodations. In response to those comments, the Commission has added rest rooms to the examples.

In response to other comments, the Commission has added a paragraph to the guidance concerning job restructuring as a form of reasonable accommodation. The new paragraph notes that job restructuring may involve changing when or how an essential function is performed.

Several commenters asked the Commission to provide additional guidance concerning the reasonable accommodation of reassignment to a vacant position. Specifically, commenters asked the Commission to clarify how long an employer must wait for a vacancy to arise when considering reassignment and to explain whether the employer is required to maintain the salary of an individual who is reassigned from a higher-paying position to a lower-paying one. The Commission has amended the discussion of reassignment to refer to reassignment to a position that is vacant "within a reasonable amount of time ... in light of the totality of the circumstances." In addition, the Commission has noted that an employer is not required to maintain the salaries of reassigned individuals with disabilities if it does not maintain the salaries of individuals who are not disabled.

Section 1630.2(p) Undue hardship

The Commission has substituted "facility" or "facilities" for "site" or "sites" in section 1630.2(p)(2) and has deleted the definition of the term "site." Many employers and employer groups expressed concern about the use and meaning of the term "site." The final regulation's use of the terms "facility" and "facilities" is consistent with the language of the statute.

The Commission has amended the last paragraph of the interpretive guidance accompanying section 1630.2(p) to note that, when the cost of a requested accommodation would result in an undue hardship and outside funding is not available, an individual with a disability should be given the option of paying the portion of the cost that constitutes an undue hardship. This amendment is consistent with the legislative history of the Act. See Senate Report at 36; House Labor Report at 69.

Several employers and employer groups asked the Commission to expand the list of factors to be considered when determining if an accommodation would impose an undue hardship on a covered entity by adding another factor: the relationship of an accommodation's cost to the value of the position at issue, as measured by the compensation paid to the holder of the position. Congress, however, specifically rejected this type of factor. See House Judiciary Report at 41 (noting that the House Judiciary Committee rejected an amendment proposing that an accommodation costing more than ten percent of the employee's salary be treated as an undue hardship). The Commission, therefore, has not added this to the list.

Section 1630.2(q) Qualification standards

The Commission has deleted the reference to direct threat from the definition of qualification standards. This revision is consistent with the revisions the Commission has made to sections 1630.10 and 1630.15(b). (See discussion below).

Section 1630.2(r) Direct threat

Many disability rights groups and individuals with disabilities asserted that the definition of direct threat should not include a reference to the health or safety of the individual with a disability. They expressed concern that the reference to "risk to self" would result in direct threat determinations that are based on negative stereotypes and paternalistic views about what is best for individuals with disabilities. Alternatively, the commenters asked the Commission to clarify that any assessment of risk must be based on the individual's present condition and not on speculation about the individual's future condition. They also asked the Commission to specify evidence other than medical knowledge that may be relevant to the determination of direct threat.

The final regulation retains the reference to the health or safety

of the individual with a disability. As the Appendix notes, this is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act.

To clarify the direct threat standard, the Commission has made four revisions to section 1630.2(r). First, the Commission has amended the first sentence of the definition of direct threat to refer to a significant risk of substantial harm that cannot be eliminated "or reduced" by reasonable accommodation. This amendment clarifies that the risk need not be eliminated entirely to fall below the direct threat definition; instead, the risk need only be reduced to the level at which there no longer exists a significant risk of substantial harm. In addition, the Commission has rephrased the second sentence of section 1630.2(r) to clarify that an employer's direct threat standard must apply to all individuals, not just to individuals with disabilities. Further, the Commission has made clear that a direct threat determination must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job." This clarifies that a determination that employment of an individual would pose a direct threat must involve an individualized inquiry and must be based on the individual's current condition. In addition, the Commission has added "the imminence of the potential harm" to the list of factors to be considered when determining whether employment of an individual would pose a direct threat. This change clarifies that both the probability of harm and the imminence of harm are relevant to direct threat determinations. This definition of direct threat is consistent with the legislative history of the Act. See Senate Report at 27, House Labor Report at 56-57, 73-75, House Judiciary Report at 45-46.

Further, the Commission has amended the interpretive guidance on section 1630.2(r) to highlight the individualized nature of the direct threat assessment. In addition, the Commission has cited examples of evidence other than medical knowledge that may be relevant to determining whether employment of an individual would pose a direct threat.

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

Many commenters asked the Commission to clarify that the term "rehabilitation program" includes self-help groups. In response to these comments, the Commission has amended the interpretive guidance in this area to include a reference to professionally

recognized self-help programs.

The Commission has added a paragraph to the guidance on section 1630.3 to note that individuals who are not excluded under this provision from the definitions of the terms "disability" and "qualified individual with a disability" must still establish that they meet those definitions to be protected by part 1630. Several employers and employer groups asked the Commission to clarify that individuals are not automatically covered by the ADA simply because they do not fall into one of the exclusions listed in this section.

The proposed interpretive guidance on section 1630.3 noted that employers are entitled to seek reasonable assurances that an individual is not currently engaging in the illegal use of drugs. In that regard, the guidance stated, "It is essential that the individual offer evidence, such as a drug test, to prove that he or she is not currently engaging" in such use. Many commenters interpreted this guidance to require individuals to come forward with evidence even in the absence of a request by the employer. The Commission has revised the interpretive guidance to clarify that such evidence is required only upon request.

1630.6 Contractual or other arrangements

The Commission has added a sentence to the first paragraph of the interpretive guidance on section 1630.6 to clarify that this section has no impact on whether one is a covered entity or employer as defined by section 1630.2.

The proposed interpretive guidance on contractual or other relationships noted that section 1630.6 applied to parties on either side of the relationship. To illustrate this point, the guidance stated that "a copier company would be required to ensure the provision of any reasonable accommodation necessary to enable its copier service representative with a disability to service a client's machine." Several employers objected to this example. In that respect, the commenters argued that the language of the example was too broad and could be interpreted as requiring employers to make all customers' premises accessible. The Commission has revised this example to provide a clearer, more concrete indication of the scope of the reasonable accommodation obligations in this area.

In addition, the Commission has clarified the interpretive guidance by noting that the existence of a contractual relationship adds no

new obligations "under this part."

1630.8 Relationship or association with an individual with a disability

The Commission has added the phrase "or otherwise discriminate against" to section 1630.8. This change clarifies that harassment or any other form of discrimination against a qualified individual because of the known disability of a person with whom the individual has a relationship or an association is also a prohibited form of discrimination.

The Commission has revised the first sentence of the interpretive guidance to refer to a person's relationship or association with an individual who has a "known" disability. This revision makes the language of the interpretive guidance consistent with the language of the regulation. In addition, to reflect current, preferred terminology, the Commission has substituted the term "people who have AIDS" for the term "AIDS patients." Finally, the Commission has added a paragraph to clarify that this provision applies to discrimination in other employment privileges and benefits, such as health insurance benefits.

1630.9 Not making reasonable accommodation

Section 1630.9(c) provides that "[a] covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance...." Some employers asked the Commission to revise this section and to state that the failure to receive technical assistance is a defense to not providing reasonable accommodation. The Commission has not made the requested revision. Section 1630.9(c) is consistent with section 506(e) of the ADA, which states that the failure to receive technical assistance from the federal agencies that administer the ADA does not excuse a covered entity from compliance with the requirements of the Act.

The first paragraph of the interpretive guidance accompanying section 1630.9 notes that the reasonable accommodation obligation does not require employers to provide adjustments or modifications that are primarily for the personal use of the individual with a disability. The Commission has amended this guidance to clarify that employers may be required to provide items that are customarily personal-use items where the items are specifically designed or required to meet job-related needs.

In addition, the Commission has amended the interpretive guidance to clarify that there must be a nexus between an individual's disability and the need for accommodation. Thus, the guidance notes that an individual with a disability is "otherwise qualified" if he or she is qualified for the job except that, "because of the disability," the individual needs reasonable accommodation to perform the essential functions of the job. Similarly, the guidance notes that employers are required to accommodate only the physical or mental limitations "resulting from the disability" that are known to the employer.

In response to commenters' requests for clarification, the Commission has noted that employers may require individuals with disabilities to provide documentation of the need for reasonable accommodation when the need for a requested accommodation is not obvious.

In addition, the Commission has amended the last paragraph of the interpretive guidance on the "Process of Determining the Appropriate Reasonable Accommodation." This amendment clarifies that an employer must consider allowing an individual with a disability to provide his or her own accommodation if the individual wishes to do so. The employer, however, may not require the individual to provide the accommodation.

1630.10 Qualification standards, tests, and other selection criteria

The Commission has added the phrase "on the basis of disability" to section 1630.10(a) to clarify that a selection criterion that is not job related and consistent with business necessity violates this section only when it screens out an individual with a disability (or a class of individuals with disabilities) on the basis of disability. That is, there must be a nexus between the exclusion and the disability. A selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section. The Commission has made similar changes to the interpretive guidance on this section.

Proposed section 1630.10(b) stated that a covered entity could use as a qualification standard the requirement that an individual not pose a direct threat to the health or safety of the individual or others. Many individuals with disabilities objected to the inclusion of the direct threat reference in this section and asked

the Commission to clarify that the direct threat standard must be raised by the covered entity as a defense. In that regard, they specifically asked the Commission to move the direct threat provision from section 1630.10 (qualification standards) to section 1630.15 (defenses). The Commission has deleted the direct threat provision from section 1630.10 and has moved it to section 1630.15. This is consistent with section 103 of the ADA, which refers to defenses and states (in section 103(b)) that the term "qualification standards" may include a requirement that an individual not pose a direct threat.

1630.11 Administration of tests

The Commission has revised the interpretive guidance concerning section 1630.11 to clarify that a request for an alternative test format or other testing accommodation generally should be made prior to the administration of the test or as soon as the individual with a disability becomes aware of the need for accommodation. In addition, the Commission has amended the last paragraph of the guidance on this section to note that an employer can require a written test of an applicant with dyslexia if the ability to read is "the skill the test is designed to measure." This language is consistent with the regulatory language, which refers to the skills a test purports to measure.

Some commenters noted that certain tests are designed to measure the speed with which an applicant performs a function. In response to these comments, the Commission has amended the interpretive guidance to state that an employer may require an applicant to complete a test within a specified time frame if speed is one of the skills being tested.

In response to comments, the Commission has amended the interpretive guidance accompanying section 1630.14(a) to clarify that employers may invite applicants to request accommodations for taking tests. (See section 1630.14(a), below)

1630.12 Retaliation and coercion

The Commission has amended section 1630.12 to clarify that this section also prohibits harassment.

1630.13 Prohibited medical examinations and inquiries

In response to the Commission's request for comment on certain

workers' compensation matters, many commenters addressed whether a covered entity may ask applicants about their history of workers' compensation claims. Many employers and employer groups argued that an inquiry about an individual's workers' compensation history is job related and consistent with business necessity. Disability rights groups and individuals with disabilities, however, asserted that such an inquiry could disclose the existence of a disability. In response to comments and to clarify this matter, the Commission has amended the interpretive guidance accompanying section 1630.13(a). The amendment states that an employer may not inquire about an individual's workers' compensation history at the pre-offer stage.

The Commission has made a technical change to section 1630.13(b) by deleting the phrase "unless the examination or inquiry is shown to be job-related and consistent with business necessity" from the section. This change does not affect the substantive provisions of section 1630.13(b). The Commission has incorporated the job-relatedness and business-necessity requirement into a new section 1630.14(c), which clarifies the scope of permissible examinations or inquiries of employees. (See section 1630.14(c), below.)

1630.14 Medical examinations and inquiries specifically permitted

Section 1630.14(a) Acceptable pre-employment inquiry

Proposed section 1630.14(a) stated that a covered entity may make pre-employment inquiries into an applicant's ability to perform job-related functions. The interpretive guidance accompanying this section noted that an employer may ask an individual whether he or she can perform a job function with or without reasonable accommodation.

Many employers asked the Commission to provide additional guidance in this area. Specifically, the commenters asked whether an employer may ask how an individual will perform a job function when the individual's known disability appears to interfere with or prevent performance of job-related functions. To clarify this matter, the Commission has amended section 1630.14(a) to state that a covered entity "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." The Commission has amended the interpretive guidance accompanying section 1630.14(a) to reflect this change.

Many commenters asked the Commission to state that employers may inquire, before tests are taken, whether candidates will require any reasonable accommodations to take the tests. They asked the Commission to acknowledge that such inquiries constitute permissible pre-employment inquiries. In response to these comments, the Commission has added a new paragraph to the interpretive guidance on section 1630.14(a). This paragraph clarifies that employers may ask candidates to inform them of the need for reasonable accommodation within a reasonable time before the administration of the test and may request documentation verifying the need for accommodation.

The Commission has received many comments from law enforcement and other public safety agencies concerning the administration of physical agility tests. In response to those comments, the Commission has added a new paragraph clarifying that such tests are not medical examinations.

Many employers and employer groups have asked the Commission to discuss whether employers may invite applicants to self-identify as individuals with disabilities. In that regard, many of the commenters noted that Section 503 of the Rehabilitation Act imposes certain obligations on government contractors. The interpretive guidance accompanying sections 1630.1(b) and (c) notes that "title I of the ADA would not be a defense to failing to collect information required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act." To reiterate this point, the Commission has amended the interpretive guidance accompanying section 1630.14(a) to note specifically that this section does not restrict employers from 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.

Section 1630.14(b) Employment entrance examinations

Section 1630.14(b) has been amended to include the phrase "(and/or inquiry)" after references to medical examinations. Some commenters were concerned that the regulation as drafted prohibited covered entities from making any medical inquiries or administering questionnaires that did not constitute examinations. This change clarifies that the term "employment entrance examinations" includes medical inquiries as well as medical examinations.

Section 1630.14(b)(2) has been revised to state that the results of

employment entrance examinations "shall not be used for any purpose inconsistent with this part." This language is consistent with the language used in section 1630.14(c)(2).

The second paragraph of the proposed interpretive guidance on this section referred to "relevant" physical and psychological criteria. Some commenters questioned the use of the term "relevant" and expressed concern about its meaning. The Commission has deleted this term from the paragraph.

Many commenters addressed the confidentiality provisions of this section. They noted that it may be necessary to disclose medical information in defense of workers' compensation claims or during the course of other legal proceedings. In addition, they pointed out that the workers' compensation offices of many states request such information for the administration of second-injury funds or for other administrative purposes.

The Commission has revised the last paragraph of the interpretive guidance on section 1630.14(b) to reflect that the information obtained during a permitted employment entrance examination or inquiry may be used only "in a manner not inconsistent with this part." In addition, the Commission has added language clarifying that it is permissible to submit the information to state workers' compensation offices.

Several commenters asked the Commission to clarify whether information obtained from employment entrance examinations and inquiries may be used for insurance purposes. In response to these comments, the Commission has noted in the interpretive guidance that such information may be used for insurance purposes described in section 1630.16(f).

Section 1630.14(c) Examination of employees

The Commission has added a new section 1630.14(c), Examination of employees, that clarifies the scope of permissible medical examinations and inquiries. Several employers and employer groups expressed concern that the proposed version of part 1630 did not make it clear that covered entities may require employee medical examinations, such as fitness-for-duty examinations, that are job related and consistent with business necessity. New section 1630.14(c) clarifies this by expressly permitting covered entities to require employee medical examinations and inquiries that are job related and consistent with business necessity. The information

obtained from such examinations or inquiries must be treated as a confidential medical record. This section also incorporates the last sentence of proposed section 1630.14(c). The remainder of proposed section 1630.14(c) has become section 1630.14(d).

To comport with this technical change in the regulation, the Commission has made corresponding changes in the interpretive guidance. Thus, the Commission has moved the second paragraph of the proposed guidance on section 1630.13(b) to the guidance on section 1630.14(c). In addition, the Commission has reworded the paragraph to note that this provision permits (rather than does not prohibit) certain medical examinations and inquiries.

Some commenters asked the Commission to clarify whether employers may make inquiries or require medical examinations in connection with the reasonable accommodation process. The Commission has noted in the interpretive guidance that such inquiries and examinations are permissible when they are necessary to the reasonable accommodation process described in this part.

1630.15 Defenses

The Commission has added a sentence to the interpretive guidance on section 1630.15(a) to clarify that the assertion that an insurance plan does not cover an individual's disability or that the disability would cause increased insurance or workers' compensation costs does not constitute a legitimate, nondiscriminatory reason for disparate treatment of an individual with a disability. This clarification, made in response to many comments from individuals with disabilities and disability rights groups, is consistent with the legislative history of the ADA. See Senate Report at 85; House Labor Report at 136; House Judiciary Report at 71.

The Commission has amended section 1630.15(b) by stating that the term "qualification standard" may include a requirement that an individual not pose a direct threat. As noted above, this is consistent with section 103 of the ADA and responds to many comments from individuals with disabilities.

The Commission has made a technical correction to section 1630.15(c) by changing the phrase "an individual or class of individuals with disabilities" to "an individual with a disability or a class of individuals with disabilities."

Several employers and employer groups asked the Commission to

acknowledge that undue hardship considerations about reasonable accommodations at temporary work sites may be different from the considerations relevant to permanent work sites. In response to these comments, the Commission has amended the interpretive guidance on section 1630.15(d) to note that an accommodation that poses an undue hardship in a particular job setting, such as a temporary construction site, may not pose an undue hardship in another setting. This guidance is consistent with the legislative history of the ADA. See House Labor Report at 69-70; House Judiciary Report at 41-42.

The Commission also has amended the interpretive guidance to note that the terms of a collective bargaining agreement may be relevant to the determination of whether a requested accommodation would pose an undue hardship on the operation of a covered entity's business. This amendment, which responds to commenters' requests that the Commission recognize the relevancy of collective bargaining agreements, is consistent with the legislative history of the Act. See Senate Report at 32; House Labor Report at 63.

Section 1630.2(p)(2)(v) provides that the impact of an accommodation on the ability of other employees to perform their duties is one of the factors to be considered when determining whether the accommodation would impose an undue hardship on a covered entity. Many commenters addressed whether an accommodation's impact on the morale of other employees may be relevant to a determination of undue hardship. Some employers and employer groups asserted that a negative impact on employee morale should be considered an undue hardship. Disability rights groups and individuals with disabilities, however, argued that undue hardship determinations must not be based on the morale of other employees. It is the Commission's view that a negative effect on morale, by itself, is not sufficient to meet the undue hardship standard. Accordingly, the Commission has noted in the guidance on section 1630.15(d) that an employer cannot establish undue hardship by showing only that an accommodation would have a negative impact on employee morale.

1630.16 Specific activities permitted

The Commission has revised the second sentence of the interpretive guidance on section 1630.16(b) to state that an employer may hold individuals with alcoholism and individuals who engage in the illegal use of drugs to the same performance and conduct standards to which it holds "all of its" other employees. In addition, the

Commission has deleted the term "otherwise" from the third sentence of the guidance. These revisions clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards.

Many commenters asked the Commission to clarify that the drug testing provisions of section 1630.16(c) pertain only to tests to determine the illegal use of drugs. Accordingly, the Commission has amended section 1630.16(c)(1) to refer to the administration of "such" drug tests and section 1630.16(c)(3) to refer to information obtained from a "test to determine the illegal use of drugs." We have also made a change in the grammatical structure of the last sentence of section 1630.16(c)(1). We have made similar changes to the corresponding section of the interpretive guidance. In addition, the Commission has amended the interpretive guidance to state that such tests are neither encouraged, "authorized," nor prohibited. This amendment conforms the language of the guidance to the language of section 1630.16(c)(1).

The Commission has revised section 1630.16(e)(1) to refer to communicable diseases that "are" (rather than "may be") transmitted through the handling of food. Several commenters asked the Commission to make this technical change, which adopts the statutory language.

Several commenters also asked the Commission to conform the language of proposed sections 1630.16(f)(1) and (2) to the language of sections 501(c)(1) and (2) of the Act. The Commission has made this change. Thus, sections 1630.16(f)(1) and (2) now refer to risks that are "not inconsistent with State law."

Executive Order 12291 and Regulatory Flexibility Act

The Commission published a Preliminary Regulatory Impact Analysis on February 28, 1991 (56 FR 8578). Based on the Preliminary Regulatory Impact Analysis, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small business entities. The Commission is issuing this final rule at this time in the absence of a Final Regulatory Impact Analysis in order to meet the statutory deadline. The Commission's Preliminary Regulatory Impact Analysis was based upon existing data on the costs of reasonable accommodation. The Commission received few comments on this aspect of its rulemaking. Because of the complexity inherent in assessing the economic costs and benefits of this rule and the relative paucity of data on this

issue, the Commission will further study the economic impact of the regulation and intends to issue a Final Regulatory Impact Analysis prior to January 1, 1992. As indicated above, the Preliminary Regulatory Impact Analysis was published on February 28, 1991 (56 F.R. 8578) for comment. The Commission will also provide a copy to the public upon request by calling the Commission's Office of Communications and Legislative Affairs at (202) 663-4900. Commenters are urged to provide additional information as to the costs and benefits associated with this rule. This will further facilitate the development of a Final Regulatory Impact Analysis. Comments must be received by September 26, 1991. Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street, NW, Washington, D.C. 20507.

As a convenience to commenters, the Executive Secretariat will accept public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll-free number). Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat Staff at (202) 663-4078. (This is not a toll-free number).

Comments received will be available for public inspection in the EEOC Library, room 6502, by appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays from October 15, 1991, until the Final Regulatory Impact Analysis is published. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment call (202) 663-4630 (voice), (202) 663-4630 (TDD).

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Handicapped, Individuals with disabilities.

For the Commission,

Evan J. Kemp, Jr.

Chairman.

Accordingly, 29 CFR Chapter XIV is amended by adding part 1630 to read as follows:

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

Sec.

1630.1 Purpose, applicability, and construction.

1630.2 Definitions.

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

1630.4 Discrimination prohibited.

1630.5 Limiting, segregating, and classifying.

1630.6 Contractual or other arrangements.

1630.7 Standards, criteria, or methods of administration.

1630.8 Relationship or association with an individual with a disability.

1630.9 Not making reasonable accommodation.

1630.10 Qualification standards, tests, and other selection criteria.

1630.11 Administration of tests.

1630.12 Retaliation and coercion.

1630.13 Prohibited medical examinations and inquiries.

1630.14 Medical examinations and inquiries specifically permitted.

1630.15 Defenses.

1630.16 Specific activities permitted.

Appendix to part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act.

Authority: 42 U.S.C. 12116.

1630.1 Purpose, applicability, and construction.

(a) Purpose. The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) Applicability. This part applies to "covered entities" as defined at section 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), 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 are afforded by this part.

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) Disability means, with respect to an individual --

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

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.
(See section 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 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; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits. -- (1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an

individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

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

(i) The nature and severity of the impairment;

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

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

(3) With respect to the major life activity of "working" --

(i) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual 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. (See section 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 a qualified individual with a disability 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 qualified 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.

(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.

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 section 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.

1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

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

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

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

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

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

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

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

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

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

The term "discrimination" includes, but is not limited to, the acts described in sections 1630.5 through 1630.13 of this part.

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.

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.

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.

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.

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 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified 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 a qualified individual with a disability.

1630.10 Qualification standards, tests, and other selection criteria.

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.

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).

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.

1630.13 Prohibited medical examinations and inquiries.

(a) Pre-employment examination or inquiry. Except as permitted by section 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 section 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.

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 section 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.

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

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, because 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 section 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 section 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. 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.

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

Background

The ADA is a federal antidiscrimination 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 that 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 usually take the form of 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 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 needs 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 nor this regulation 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.

Introduction

The Equal Employment Opportunity Commission (the Commission or EEOC) is responsible for enforcement of title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. (1990), which prohibits employment discrimination on the basis of disability. The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. This Appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of

employment discrimination. The Appendix addresses the major provisions of this part and explains the major concepts of disability rights.

The terms "employer" or "employer or other covered entity" are used interchangeably throughout the 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 Americans with Disabilities Act was signed into law on July 26, 1990. It is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled. The purpose of title I and this part is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses the term "disabilities" rather than the term "handicaps" used in the Rehabilitation Act of 1973, 29 U.S.C. 701-796. Substantively, these terms are equivalent. As 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 ...." H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 26-27 (1990) [hereinafter House Judiciary Report]; see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter House Labor Report].

The use of the term "Americans" in the title of the ADA is not intended to imply that the Act only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality.

Section 1630.1(b) and (c) Applicability and Construction
Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than 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 collect information required to satisfy the affirmative action requirements of 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 House Labor Report at 135; 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. House Judiciary 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 are designed to protect the public health from individuals who pose a direct threat, that cannot be eliminated or reduced by reasonable accommodation, to the health or safety of others. However, the ADA does preempt inconsistent requirements established by state or local law for safety or security sensitive positions. See Senate Report at 27; 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 qualified individuals with disabilities 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 because of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA.

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 be further 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, becomes 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, 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. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment.
To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment
This term adopts 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. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

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. Similarly, the definition 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 Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

Section 1630.2(i) Major Life Activities
This term adopts the definition of the term "major life activities" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general

population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

Section 1630.2(j) Substantially Limits
Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it

significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance

of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) the geographical area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from

> which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985); E.E Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

Section 1630.2(k) Record of a Substantially Limiting Condition
The second part of the definition provides that an individual with a record of an impairment that substantially limits 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, this provision protects former cancer patients from discrimination based on their 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 learning disabled 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.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or 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.

The fact that an individual has a record of being a disabled

veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under part 1630. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in part 1630. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of part 1630, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

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

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
>
> (2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
>
> (3) the individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting.

If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from

actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and sterotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

Section 1630.2(m) Qualified Individual with a Disability
The ADA prohibits discrimination on the basis of disability against qualified individuals with disabilities. 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 section 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 section 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 is considered a "qualified individual with a

disability" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. 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 a qualified 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 qualified individual with a disability can perform are made a part of the position to be filled by the qualified 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 section 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 section 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 section 1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

Section 1630.4 Discrimination Prohibited
This provision prohibits discrimination against a qualified individual with a disability 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.

Part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

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 section 1630.4. Covered entities are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement.

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 section 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 section 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 contractor's 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 a qualified 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 section 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 qualified 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 (D.C. Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that are 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 a qualified 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 qualified 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 a qualified 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 qualified 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 section 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 a qualified 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 1630.10 Qualification Standards, Tests, and Other Selection Criteria
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 that criteria, as used by the employer, are job-related to 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, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.

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 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 section 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 1630.11 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. If, 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 section 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 section 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 section 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 section 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 section 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 section 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 a 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 section 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 section 1630.5 Limiting, Segregating and Classifying, and section 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 section 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 non-exclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

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 qualified individuals with disabilities 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 section 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 a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability 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 section 1630.5 Limiting, Segregating and Classifying.

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