AMERICANS WITH DISABILITIES

REFERENCE MANUAL

FOR

DIVISION OFFICE CIVIL RIGHTS PERSONNEL

MODULE 6

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FHWA Office of Civil Rights

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  - ✓ *SUBPART F COMPLIANCE PROCEDURES*
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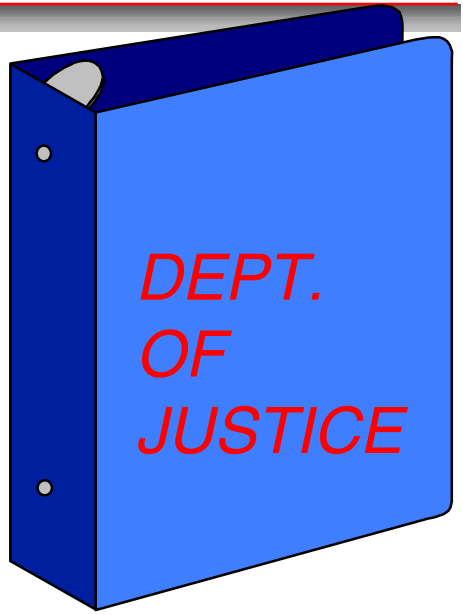
- *DOJ TECHNICAL ASSISTANCE MANUAL*



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- *TITLE II OF ADA - NONDISCRIMINATION IN STATE AND LOCAL GOVERNMENT SERVICES*
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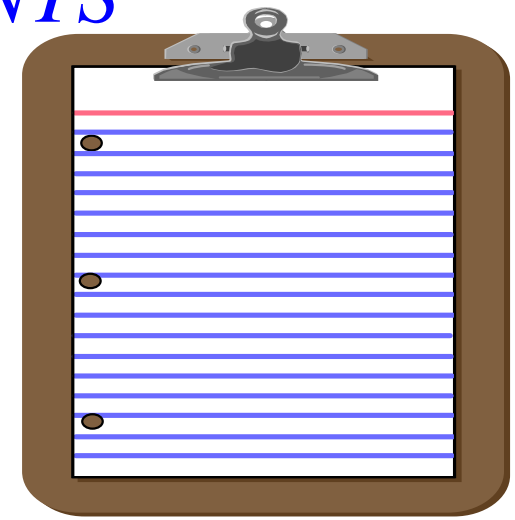
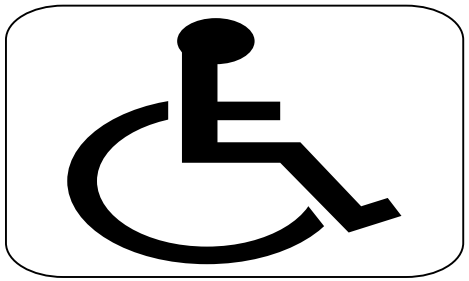
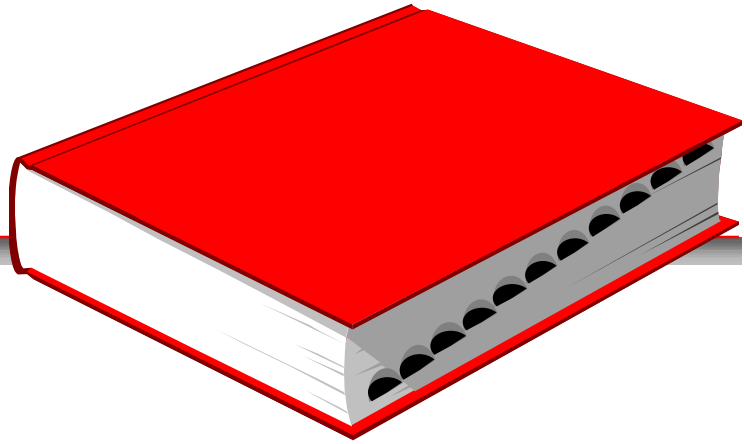


OVERVIEW



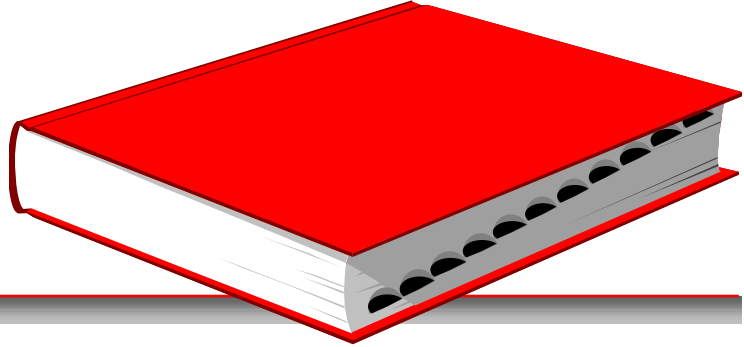
- *NO QUALIFIED INDIVIDUAL WITH A DISABILITY SHALL, BY REASON OF SUCH DISABILITY, BE EXCLUDED FROM PARTICIPATION IN OR BE DENIED THE BENEFITS OF THE SERVICES, PROGRAMS, OR ACTIVITIES OF A PUBLIC ENTITY.*

VOCABULARY



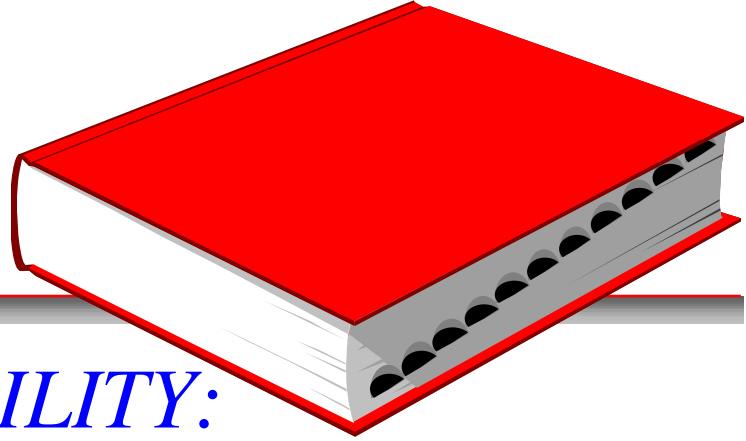
- *PUBLIC ENTITY:*
  - ✓ *ANY STATE OR LOCAL GOVERNMENT;*
  - ✓ *ANY DEPARTMENT, AGENCY, SPECIAL PURPOSE DISTRICT, OR OTHER INSTRUMENTALITY OF A STATE OR LOCAL GOVERNMENT; OR*
  - ✓ *CERTAIN COMMUTER AUTHORITIES AS WELL AS AMTRAK.*

MORE....



- *QUALIFIED INDIVIDUAL WITH A DISABILITY:*
  - ✓ *INDIVIDUALS WHO HAVE A PHYSICAL OR MENTAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE MAJOR LIFE ACTIVITIES.*
  - ✓ *INDIVIDUALS WHO HAVE A RECORD; AND*
  - ✓ *INDIVIDUALS WHO ARE REGARDED AS HAVING...*

MORE....



- *PROGRAM ACCESSIBILITY:*
  - ✓ *A PUBLIC ENTITY MAY NOT DENY THE BENEFITS OF ITS PROGRAMS, ACTIVITIES, AND SERVICES TO INDIVIDUALS WITH DISABILITIES.*
- *REASONABLE MODIFICATION:*
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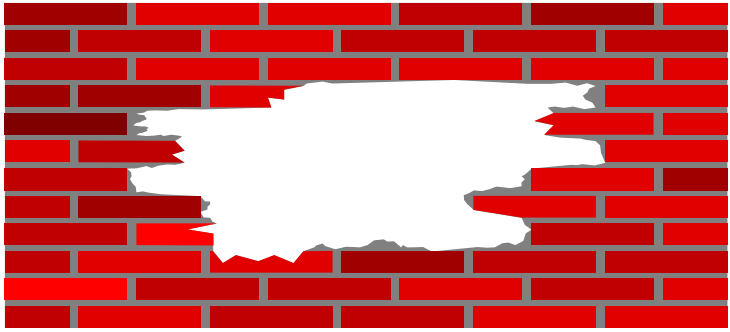
  - ✓ REDESIGN OF EQUIPMENT
  - ✓ ASSIGNMENT OF AIDE TO BENEFICIARIES
  - ✓ ALTERNATE SITE



MORE....

- *CURB RAMPS*
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MORE....

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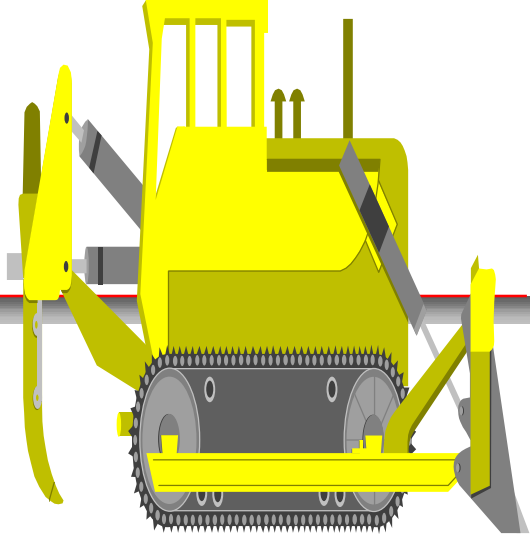
  - ✓ *EXISTING FACILITIES*
    - – *ADEQUATE NUMBER*
  - ✓ *NEW FACILITIES*
    - – *ADA ACCESSIBILITY GUIDELINES*

MORE.....



- *HISTORIC PRESERVATION*
- *NEW CONSTRUCTION*
  - ✓ *PUBLIC ENTITIES - ADAAG OR UFAS*
  - ✓ *PRIVATE ENTITIES - ADAAG*
- *TIME PERIOD - JANUARY 26, 1995*

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  - ✓ CURB RAMPS MUST BE INSTALLED
- FIELDER V. AMERICAN MULTI-CINEMA, INC.
  - ✓ ADA TA MANUAL IS REGULATION
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- FERGUSON V. CITY OF PHOENIX
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- *OCR INTERIM PROCEDURES EXTERNAL COMPLAINTS*
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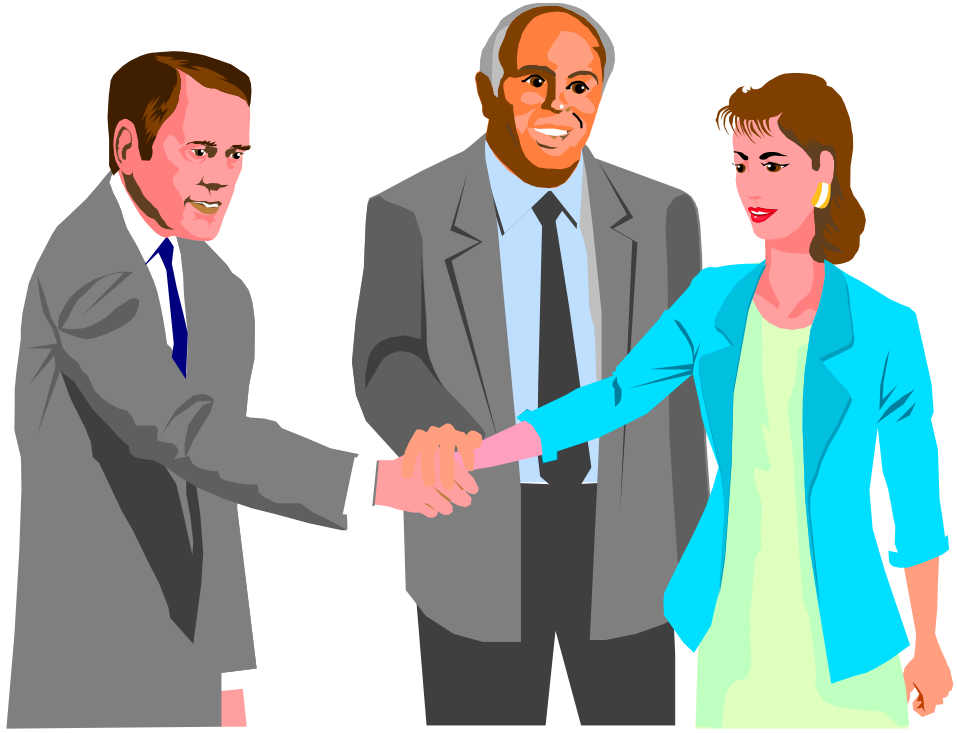
    - → *IF YES, REFER TO STA. IF NO, REFER TO HQ OCR*
  - ✓ *COORDINATE AND INVESTIGATE*
  - ✓ *FOLLOW UP STA INVESTIGATIONS; REVIEW REPORT & FORWARD WITH RECOMMENDATIONS TO ROCR*
  - ✓ *MAINTAIN LIST & STATUS OF PENDING COMPLAINTS*

PROCESSING COMPLAINTS

- *COMPLAINTS FILED WITH STAs*
  - ✓ *INVESTIGATED BY STAs, PREPARE REPORT & MAKE DETERMINATION; STAs NOTIFY D.O.*
  - ✓ *INVESTIGATIONS BY STAs FOLLOW FHWA APROVED PROCEDURE*
- *COMPLAINTS FILED WITH FHWA/USDOT & FORWARDED TO STAs*
  - ✓ *FINAL DETERMINATION BYH FHWA OCR*

PROCESSING COMPLAINTS

- *STAs SHALL ATTEMPT TO INFORMALLY RESOLVE ALL COMPLAINTS*



WHERE TO GET MORE INFORMATION

- *U.S.. DEPARTMENT OF JUSTICE*
  - ✓ *800 - 514-0301 (VOICE)*
  - ✓ *800 - 514-0383 (TDD)*
- *U.S.. DEPARTMENT OF TRANSPORTATION*
  - ✓ *202 - 366-1656 (VOICE)*
  - ✓ *202 - 366-0153 (TDD)*
- *HTTP://WWW.USDOJ.GOV/CRT/ADA*

AMERICANS DISABILITIES ACT REFERENCE MATERIAL

Tab 2

U.S. Department of Justice ADA Title II Technical Assistance Manual (November 1993)

U.S. Department of Justice
Civil Rights Division
Public Access Section

The Americans with Disabilities Act

Title II Technical Assistance Manual

Covering State and Local Government Programs and Services

November 1993

Introduction

This technical assistance manual addresses the requirements of title II of the Americans with Disabilities Act, which applies to the operations of State and local governments. It is one of a series of publications issued by Federal agencies under section 506 of the ADA to assist individuals and entities in understanding their rights and duties under the Act.

This manual is part of a broader program of technical assistance conducted by the Department of Justice to promote voluntary compliance with the requirements not only of title II, but also of title III of the ADA, which applies to public accommodations, commercial facilities, and private entities offering certain examinations and courses.

The purpose of this technical assistance manual is to present the ADA's requirements for State and local governments in a format that will be useful to the widest possible audience. The guidance provided in the Department's regulations and accompanying preambles has been carefully reorganized to provide a focused, systematic description of the ADA's requirements. The manual attempts to avoid an overly legalistic style without sacrificing completeness. In order to promote readability and understanding, the text makes liberal use of questions and answers and illustrations.

The manual is divided into nine major subject matter headings with numerous numbered subheadings. Each numbered heading and subheading is listed in a quick reference table of contents at the beginning of the manual.

Contents

II-1.0000 COVERAGE

Regulatory references: 28 CFR 35.102-35.104.

II-1.1000 General. Title II of the ADA covers programs, activities, and services of public entities. It is divided into two subtitles. This manual focuses on subtitle A of title II, which is implemented by the Department of Justice's title II regulation. Subtitle B, covering public transportation, and the Department of Transportation's regulation implementing that subtitle, are not addressed in this manual.

Subtitle A is intended to protect qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It additionally extends the prohibition of discrimination on the basis of disability established by section 504 of the Rehabilitation Act of 1973, as amended, to all activities of State and local governments, including those that do not receive Federal financial assistance. By law, the Department of Justice's title II regulation adopts the general prohibitions of discrimination established under section 504, and incorporates specific prohibitions of discrimination from the ADA.

Subtitle B is intended to clarify the requirements of section 504 for public transportation entities that receive Federal financial assistance. Also it extends coverage to all public entities that provide public transportation, whether or not they receive Federal financial assistance. It establishes detailed and complex standards for the operation of public transit systems, including commuter and intercity rail (AMTRAK). The Department of Transportation is responsible for the implementation of the second subtitle of Title II and issued a regulation implementing that subtitle.

II-1.2000 Public entity. A public entity covered by title II is defined as —

1) Any State or local government;

2) Any department, agency, special purpose district, or other instrumentality of a State or local government; or

3) Certain commuter authorities as well as AMTRAK.

As defined, the term "public entity" does not include the Federal Government. Title II, therefore, does not apply to the Federal Government, which is covered by sections 501 and 504 of the Rehabilitation Act of 1973.

Title II is intended to apply to *all* programs, activities, and services provided or operated by State and local governments. Currently, section 504 of the Rehabilitation Act only applies to programs or activities receiving Federal financial assistance. Because many State and local government operations, such as courts, licensing, and legislative facilities and proceedings do not receive Federal funds, they are beyond the reach of section 504.

In some cases it is difficult to determine whether a particular entity that is providing a public service, such as a library, museum, or volunteer fire department, is in fact a public entity. Where an

entity appears to have both public and private features, it is necessary to examine the relationship between the entity and the governmental unit to determine whether the entity is public or private. Factors to be considered in this determination include —

1) Whether the entity is operated with public funds;

2) Whether the entity's employees are considered government employees;

3) Whether the entity receives significant assistance from the government by provision of property or equipment; and

4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

II-1.3000 Relationship to title III. Public entities are not subject to title III of the ADA, which covers only *private* entities. Conversely, private entities are not subject to title II. In many situations, however, public entities have a close relationship to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles.

ILLUSTRATION 1: A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to title III and must meet those obligations. The State department of parks, a public entity, is subject to title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its title II obligations, even though the restaurant is not directly subject to title II.

ILLUSTRATION 2: A city owns a downtown office building occupied by its department of human resources. The building's first floor, however, is leased to a restaurant, a newsstand, and a travel agency. The city, as a public entity and landlord of the office building, is subject to title II. As a public entity, it is not subject to title III, even though its tenants are public accommodations that are covered by title III.

ILLUSTRATION 3: A city engages in a joint venture with a private corporation to build a new professional sports stadium. Where public and private entities act jointly, the public entity must ensure that the relevant requirements of title II are met; and the private entity must ensure compliance with title III. Consequently, the new stadium would have to be built in compliance with the accessibility guidelines of both titles II and III. In cases where the standards differ, the stadium would have to meet the standard that provides the highest degree of access to individuals with disabilities.

ILLUSTRATION 4: A private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities. These particular homes provide a significant enough level of social services to be considered places of public accommodation under title III. The State agency must ensure that its con-

tracts are carried out in accordance with title II, and the private entity must ensure that the homes comply with title III.

II-1.4000 Relationship to other laws

II-1.4100 Rehabilitation Act. Title II provides protections to individuals with disabilities that are at least equal to those provided by the nondiscrimination provisions of title V of the Rehabilitation Act. Title V includes such provisions as section 501, which prohibits discrimination on the basis of disability in Federal employment; section 503, which addresses the employment practices of Federal contractors; and section 504, which covers all programs receiving Federal financial assistance and all the operations of Federal Executive agencies. Title II may not be interpreted to provide a lesser degree of protection to individuals with disabilities than is provided under these laws.

II-1.4200 Other Federal and State laws. Title II does not disturb other Federal laws or any State laws that provide protection for individuals with disabilities at a level greater or equal to that provided by the ADA. It does, however, prevail over any conflicting State laws.

II-2.0000 QUALIFIED INDIVIDUALS WITH DISABILITIES

Regulatory references: 28 CFR 35.104.

II-2.1000 General. Title II of the ADA prohibits discrimination against any "qualified individual with a disability." Whether a particular individual is protected by title II requires a careful analysis first, of whether an individual is an "individual with a disability," and then whether that individual is "qualified."

People commonly refer to disabilities or disabling conditions in a broad sense. For example, poverty or lack of education may impose real limitations on an individual's opportunities. Likewise, being only five feet in height may prove to be an insurmountable barrier to an individual whose ambition is to play professional basketball. Although one might loosely characterize these conditions as "disabilities" in relation to the aspirations of the particular individual, the disabilities reached by title II are limited to those that meet the ADA's legal definition — those that place substantial limitations on an individual's major life activities.

Title II protects three categories of individuals with disabilities:

1) Individuals who *have* a physical or mental impairment that substantially limits one or more major life activities;

2) Individuals who have a *record* of a physical or mental impairment that substantially limited one or more of the individual's major life activities; and

3) Individuals who are *regarded as having* such an impairment, whether they have the impairment or not.

II-2.2000 Physical or mental impairments. The first category of persons covered by the definition of an individual with a disability is restricted to those with "physical or mental impairments." Physical impairments include —

1) Physiological disorders or conditions;

2) Cosmetic disfigurement; or

3) Anatomical loss

affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.

Specific examples of physical impairments include orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

Mental impairments include mental or psychological disorders, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Simple physical characteristics such as the color of one's eyes, hair, or skin; baldness; left-handedness; or age do not constitute physical impairments. Similarly, disadvantages attributable to environmental, cultural, or economic factors are not the type of impairments covered by title II. Moreover, 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.

Does title II prohibit discrimination against individuals based on their sexual orientation? No. The phrase "physical or mental impairment" does not include homosexuality or bisexuality.

II-2.3000 Drug addiction as an impairment. Drug addiction is an impairment under the ADA. A public entity, however, may base a decision to withhold services or benefits in most cases on the fact that an addict is engaged in the current and illegal use of drugs.

What is "illegal use of drugs"? Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. It does not include use of controlled substances pursuant to a valid prescription, or other uses that are authorized by the Controlled Substances Act or other Federal law. Alcohol is not a "controlled substance," but alcoholism is a disability.

What is "current use"? "Current use" is the illegal use of controlled substances that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem. A public entity should review carefully all the facts surrounding its belief that an individual is currently taking illegal drugs to ensure that its belief is a reasonable one.

Does title II protect drug addicts who no longer take controlled substances? Yes. Title II prohibits discrimination against drug addicts based solely on the fact that they previously illegally used controlled substances. Protected individuals include persons who have successfully completed a supervised drug rehabilitation program or have otherwise been rehabilitated successfully and who are not engaging in current illegal use of drugs. Additionally, discrimination is prohibited against an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs. Finally, a person who is erroneously regarded as engaging in current illegal use of drugs is protected.

Is drug testing permitted under the ADA? Yes. Public entities may utilize reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

II-2.4000 Substantial limitation of a major life activity. To constitute a "disability," a condition must substantially limit a major life activity. Major life activities include such activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

When does an impairment "substantially limit" a major life activity? There is no absolute standard for determining when an impairment is a substantial limitation. Some impairments obviously or by their nature substantially limit the ability of an individual to engage in a major life activity.

> ILLUSTRATION 1: A person who is deaf is substantially limited in the major life activity of hearing. A person with a minor hearing impairment, on the other hand, may not be substantially limited.

> ILLUSTRATION 2: A person with traumatic brain injury may be substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

An impairment substantially interferes with the accomplishment of a major life activity when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.

> ILLUSTRATION 1: A person with a minor vision impairment, such as 20/40 vision, does not have a substantial impairment of the major life activity of seeing.

> ILLUSTRATION 2: A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

Are "temporary" mental or physical impairments covered by title II? Yes, if the impairment substantially limits a major life activity. The issue of whether a temporary impairment is significant enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

> ILLUSTRATION: During a house fire, M received burns affecting his hands and arms. While it is expected that, with treatment, M will eventually recover full use of his hands, in the meantime he requires assistance in performing basic tasks required to care for himself such as eating and dressing. Because M's burns are expected to substantially limit a major life activity (caring for one's self) for a significant period of time, M would be considered to have a disability covered by title II.

If a person's impairment is greatly lessened or eliminated through the use of aids or devices, would the person still be considered an individual with a disability? Whether a person has a disability is assessed without regard to the availability of mitigating measures, such as reasonable modifications, auxiliary aids and services, services and devices of a personal nature, or medication. For example, a person with severe hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that, if untreated, would substantially limit a major life activity, are still individuals with disabilities under the ADA, even if the debilitating consequences of the impairment are controlled by medication.

II-2.5000 Record of a physical or mental impairment that substantially limited a major life activity. The ADA protects not only those individuals with disabilities who actually have a physical or mental impairment that substantially limits a major life activity, but also those with a record of such an impairment. This protected group includes —

1) A person who has a history of an impairment that substantially limited a major life activity but who has recovered from the impairment. Examples of individuals who have a history of an impairment are persons who have histories of mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer.

2) Persons who have been misclassified as having an impairment. Examples include persons who have been erroneously diagnosed as mentally retarded or mentally ill.

II-2.6000 "Regarded as." The ADA also protects certain persons who are regarded by a public entity as having a physical or mental impairment that substantially limits a major life activity, whether or not that person actually has an impairment. Three typical situations are covered by this category:

1) An individual who has a physical or mental impairment that does not substantially limit major life activities, but who is treated as if the impairment does substantially limit a major life activity;

ILLUSTRATION: A, an individual with mild diabetes controlled by medication, is barred by the staff of a county-sponsored summer camp from participation in certain sports because of her diabetes. Even though A does not actually have an impairment that substantially limits a major life activity, she is protected under the ADA because she is treated as though she does.

2) An individual who has a physical or mental impairment that substantially limits major life activities *only* as a result of the attitudes of others towards the impairment;

ILLUSTRATION: B, a three-year old child born with a prominent facial disfigurement, has been refused admittance to a county-run day care program on the grounds that her presence in the program might upset the other children. B is an individual with a physical impairment that substantially limits her major life activities only as the result of the attitudes of others toward her impairment.

3) An individual who has no impairments but who is treated by a public entity as having an impairment that substantially limits a major life activity.

ILLUSTRATION: C is excluded from a county-sponsored soccer team because the coach believes rumors that C is infected with the HIV virus. Even though these rumors are untrue, C is protected under the ADA, because he is being subjected to discrimination by the county based on the belief that he has an impairment that substantially limits major life activities (*i.e.*, the belief that he is infected with HIV).

II-2.7000 Exclusions. The following conditions are specifically excluded from the definition of "disability": transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

II-2.8000 Qualified individual with a disability. In order to be an individual protected by title II, the individual must be a "qualified" individual with a disability. To be qualified, the individual with a disability must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, activities, or services with or without —

1) Reasonable modifications to a public entity's rules, policies, or practices;

2) Removal of architectural, communication, or transportation barriers; or

3) Provision of auxiliary aids and services.

The "essential eligibility requirements" for participation in many activities of public entities may be minimal. For example, most public entities provide information about their programs, activities, and services upon request. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. However, under other circumstances, the "essential eligibility requirements" imposed by a public entity may be quite stringent.

ILLUSTRATION: The medical school at a public university may require those admitted to its program to have successfully completed specified undergraduate science courses.

Can a visitor, spectator, family member, or associate of a program participant be a qualified individual with a disability under title II? Yes. Title II protects any qualified individual with a disability involved in any capacity in a public entity's programs, activities, or services.

ILLUSTRATION: Public schools generally operate programs and activities that are open to students' parents, such as parent-teacher conferences, school plays, athletic events, and graduation ceremonies. A parent who is a qualified individual with a disability with regard to these activities would be entitled to title II protection.

Can health and safety factors be taken into account in determining who is qualified? Yes. An individual who poses a direct threat to the health or safety of others will not be "qualified."

What is a "direct threat"? A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. The public entity's determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.

How does one determine whether a direct threat exists? The determination must be based on an individualized assessment that relies on current medical evidence, or on the best available objective evidence, to assess —

1) The nature, duration, and severity of the risk;

2) The probability that the potential injury will actually occur; and,

3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

Making this assessment will not usually require the services of a physician. Medical guidance may be obtained from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

ILLUSTRATION: An adult individual with tuberculosis wishes to tutor elementary school children in a volunteer mentor program operated by a local public school board. Title II permits the board to refuse to allow the individual to participate on the grounds that the mentor's condition would be a direct threat to the health or safety of the children participating in the program, if the condition is contagious and the threat cannot be mitigated or eliminated by reasonable modifications in policies, practices, or procedures.

II-3.0000 GENERAL REQUIREMENTS

Regulatory references: 28 CFR 35.130-35.135.

II-3.1000 General. Most requirements of title II are based on section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicap in federally assisted programs and activities. Section 504 also applies to programs and activities "conducted" by Federal Executive agencies. The ADA similarly extends section 504's nondiscrimination requirement to *all* activities of State and local governments, not only those that receive Federal financial assistance.

Section 504 was implemented in 1977 for federally assisted programs in regulations issued by the Department of Health, Education, and Welfare. Later, other Federal agencies issued their own regulations for the programs and activities that they funded. Public entities should be familiar with those regulations from their experience in applying for Federal grant programs. As mandated by the ADA, the requirements for public entities under title II are consistent with and, in many areas, identical to the requirements of the section 504 regulations.

The ADA, however, also mandates that the title II regulations be consistent with the concepts of the ADA. Therefore, the title II regulations include language that is adapted from other parts of the ADA but not specifically found in section 504 regulations.

II-3.2000 Denial of participation. The ADA, like other civil rights statutes, prohibits the denial of services or benefits on specified discriminatory grounds. Just as a government office cannot refuse to issue food stamps or other benefits to an individual on the basis of his or her race, it cannot refuse to provide benefits solely because an individual has a disability.

> ILLUSTRATION: A city cannot refuse to admit an individual to a city council meeting that is open to the public merely because the individual is deaf.

II-3.3000 Equality in participation/benefits. The ADA provides for equality of opportunity, but does not guarantee equality of results. The foundation of many of the specific requirements in the Department's regulations is the principle that individuals with disabilities must be provided an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services.

> ILLUSTRATION 1: A deaf individual does not receive an equal opportunity to benefit from attending a city council meeting if he or she does not have access to what is said.
>
> ILLUSTRATION 2: An individual who uses a wheelchair will not have an equal opportunity to participate in a program if applications must be filed in a second-floor office of a building without an elevator, because he or she would not be able to reach the office.
>
> ILLUSTRATION 3: Use of printed information alone is not "equally effective" for individuals with vision impairments who cannot read written material.

On the other hand, as long as persons with disabilities are afforded an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services, the ADA's guarantee of equal opportunity is not violated.

ILLUSTRATION 4: A person who uses a wheelchair seeks to run for a State elective office. State law requires the candidate to collect petition signatures in order to qualify for placement on the primary election ballot. Going door-to-door to collect signatures is difficult or, in many cases, impossible for the candidate because of the general inaccessibility of private homes. The law, however, provides over five months to collect the signatures and allows them to be collected by persons other than the candidate both through the mail and at any site where registered voters congregate. With these features, the law affords an equally effective opportunity for the individual who uses a wheelchair to seek placement on the ballot and to participate in the primary election process.

Also, the ADA generally does not require a State or local government entity to provide additional services for individuals with disabilities that are not provided for individuals without disabilities.

ILLUSTRATION 5: The ADA does not require a city government to provide snow removal service for the private driveways of residents with disabilities, if the city does not provide such service for residents without disabilities.

Specific requirements for physical access to programs and communications are discussed in detail below, but the general principle underlying these obligations is the mandate for an equal opportunity to participate in and benefit from a public entity's services, programs, and activities.

II-3.4000 Separate benefit/integrated setting. A primary goal of the ADA is the equal participation of individuals with disabilities in the "mainstream" of American society. The major principles of mainstreaming are —

1) Individuals with disabilities must be integrated to the maximum extent appropriate.

2) Separate programs are permitted where necessary to ensure equal opportunity. A separate program must be appropriate to the particular individual.

3) Individuals with disabilities cannot be excluded from the regular program, or required to accept special services or benefits.

II-3.4100 Separate programs. A public entity may offer separate or special programs when necessary to provide individuals with disabilities an equal opportunity to benefit from the programs. Such programs must, however, be specifically designed to meet the needs of the individuals with disabilities for whom they are provided.

ILLUSTRATION 1: Museums generally do not allow visitors to touch exhibits because handling can cause damage to the objects. A municipal museum may offer a special tour for individuals with vision impairments on which they are permitted to touch and handle specific objects on a limited basis. (It cannot, however, exclude a blind person from the standard museum tour.)

ILLUSTRATION 2: A city recreation department may sponsor a separate basketball league for individuals who use wheelchairs.

II-3.4200 Relationship to "program accessibility" requirement. The integrated setting requirement may conflict with the obligation to provide program accessibility, which may not necessarily mandate physical access to all parts of all facilities (see II-5.0000). Provision of services to individuals with disabilities in a different location, for example, is one method of achieving program accessibility. Public entities should make every effort to ensure that alternative methods of providing program access do not result in unnecessary segregation.

ILLUSTRATION: A school system should provide for wheelchair access at schools dispersed throughout its service area so that children who use wheelchairs can attend school at locations comparable in convenience to those available to other children. Also, where "magnet" schools, or schools offering different curricula or instruction techniques are available, the range of choice provided to students with disabilities must be comparable to that offered to other students.

II-3.4300 Right to participate in the regular program. Even if a separate or special program for individuals with disabilities is offered, a public entity cannot deny a qualified individual with a disability participation in its regular program.

Qualified individuals with disabilities are entitled to participate in regular programs, even if the public entity could reasonably believe that they cannot benefit from the regular program.

ILLUSTRATION: A museum cannot exclude a person who is blind from a tour because of assumptions about his or her inability to appreciate and benefit from the tour experience. Similarly, a deaf person may not be excluded from a museum concert because of a belief that deaf persons cannot enjoy the music.

The fact that a public entity offers special programs does not affect the right of an individual with a disability to participate in regular programs. The requirements for providing access to the regular program, including the requirement that the individual be "qualified" for the program, still apply.

ILLUSTRATION: Where a State offers special drivers' licenses with limitations or restrictions for individuals with disabilities, an individual with a disability is not eligible for an unrestricted license, unless he or she meets the essential eligibility requirements for the unrestricted license.

BUT: If an individual is qualified for the regular program, he or she cannot be excluded from that program simply because a special program is available.

Individuals with disabilities may not be required to accept special "benefits" if they choose not to do so.

ILLUSTRATION: A State that provides optional special automobile license plates for individuals with disabilities and requires appropriate documentation for eligibility for the special

plates cannot require an individual who qualifies for a special plate to present documentation or accept a special plate, if he or she applies for a plate without the special designation.

II-3.4400 Modifications in the regular program. When a public entity offers a special program for individuals with a particular disability, but an individual with that disability elects to participate in the regular program rather than in the separate program, the public entity may still have obligations to provide an opportunity for that individual to benefit from the regular program. The fact that a separate program is offered may be a factor in determining the extent of the obligations under the regular program, but only if the separate program is appropriate to the needs of the particular individual with a disability.

ILLUSTRATION: If a museum provides a sign language interpreter for one of its regularly scheduled tours, the availability of the signed tour may be a factor in determining whether it would be an undue burden to provide an interpreter for a deaf person who wants to take the tour at a different time.

BUT: The availability of the signed tour would not affect the museum's obligation to provide an interpreter for a different tour, or the museum's obligation to provide a different auxiliary aid, such as an assistive listening device, for an individual with impaired hearing who does not use sign language.

II-3.5000 Eligibility criteria

II-3.5100 General. A public entity may not impose eligibility criteria for participation in its programs, services, or activities that either screen out or tend to screen out persons with disabilities, unless it can show that such requirements are necessary for the provision of the service, program, or activity.

ILLUSTRATION 1: The director of a county recreation program prohibits persons who use wheelchairs from participating in county-sponsored scuba diving classes because he believes that persons who use wheelchairs probably cannot swim well enough to participate. An unnecessary blanket exclusion of this nature would violate the ADA.

ILLUSTRATION 2: A community college requires students with certain disabilities to be accompanied to class by attendants, even when such individuals prefer to attend classes unaccompanied. The college also requires individuals with disabilities to provide extensive medical histories, although such histories are not required from other students. Unless the college can demonstrate that it is necessary for some compelling reason to adopt these policies, the policies would not be permitted by the ADA.

II-3.5200 Safety. A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on real risks, not on speculation, stereotypes, or generalizations about individuals with disabilities.

ILLUSTRATION: A county recreation program may require that all participants in its scuba program pass a swimming test, if it can demonstrate that being able to swim is necessary for safe

participation in the class. This is permitted even if requiring such a test would tend to screen out people with certain kinds of disabilities.

II-3.5300 Unnecessary inquiries. A public entity may not make unnecessary inquiries into the existence of a disability.

ILLUSTRATION: A municipal recreation department summer camp requires parents to fill out a questionnaire and to submit medical documentation regarding their children's ability to participate in various camp activities. The questionnaire is acceptable, if the recreation department can demonstrate that each piece of information requested is needed to ensure safe participation in camp activities. The Department, however, may not use this information to screen out children with disabilities from admittance to the camp.

II-3.5400 Surcharges. Although compliance may result in some additional cost, a public entity may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses.

ILLUSTRATION: A community college provides interpreter services to deaf students, removes a limited number of architectural barriers, and relocates inaccessible courses and activities to more accessible locations. The college cannot place a surcharge on either an individual student with a disability (such as a deaf student who benefited from interpreter services) or on groups of students with disabilities (such as students with mobility impairments who benefited from barrier removal). It may, however, adjust its tuition or fees for all students.

II-3.6000 Reasonable modifications

II-3.6100 General. A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate, however, that the modifications would fundamentally alter the nature of its service, program, or activity, it is not required to make the modification.

ILLUSTRATION 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

ILLUSTRATION 2: A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

ILLUSTRATION 3: A county ordinance prohibits the use of golf carts on public highways. An individual with a mobility impairment uses a golf cart as a mobility device. Allowing use of the golf cart as a mobility device on the shoulders of public highways where pedestrians are permitted, in limited circumstances that do not involve a significant risk to the health or safety of others, is a reasonable modification of the county policy.

II-3.6200 Personal services and devices. A public entity is not required to provide individuals with disabilities with personal or individually prescribed devices, such as wheelchairs, prescription eyeglasses, or hearing aids, or to provide services of a personal nature, such as assistance in eating, toileting, or dressing. Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities.

II-3.7000 Contracting and licensing

II-3.7100 Contracting. A public entity may not discriminate on the basis of disability in contracting for the purchase of goods and services.

ILLUSTRATION 1: A municipal government may not refuse to contract with a cleaning service company to clean its government buildings because the company is owned by an individual with disabilities or employs individuals with disabilities.

II-3.7200 Licensing. A public entity may not discriminate on the basis of disability in its licensing, certification, and regulatory activities. A person is a "qualified individual with a disability" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification.

The phrase "essential eligibility requirements" is particularly important in the context of State licensing requirements. While many programs and activities of public entities do not have significant qualification requirements, licensing programs often do require applicants to demonstrate specific skills, knowledge, and abilities. Public entities may not discriminate against qualified individuals with disabilities who apply for licenses, but may consider factors related to the disability in determining whether the individual is "qualified."

ILLUSTRATION: An individual is not "qualified" for a driver's license unless he or she can operate a motor vehicle safely. A public entity may establish requirements, such as vision requirements, that would exclude some individuals with disabilities, if those requirements are essential for the safe operation of a motor vehicle.

BUT: The public entity may only adopt "essential" requirements for safe operation of a motor vehicle. Denying a license to all individuals who have missing limbs, for example, would be discriminatory if an individual who could operate a vehicle safely without use of the missing limb were denied a license. A public entity, however, could impose appropriate restrictions as a condition to obtaining a license, such as requiring an individual who is unable to use foot controls to use hand controls when operating a vehicle.

A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity to accommodate an individual with a disability. Whether a specific requirement is "essential" will depend on the facts of the particular case. Where a public entity administers licensing examinations, it must provide auxiliary aids for applicants with disabilities and administer the examinations in accessible locations.

In addition, a public entity may not establish requirements for the programs or activities of licensees that would result in discrimination against qualified individuals with disabilities. For example, a public entity's safety standards may not require the licensee to discriminate against qualified individuals with disabilities in its employment practices.

> ILLUSTRATION: A State prohibits the licensing of transportation companies that employ individuals with missing limbs as drivers. XYZ company refuses to hire an individual with a missing limb who is "qualified" to perform the essential functions of the job, because he is able to drive safely with hand controls. The State's licensing requirements violate title II.
>
> BUT: The State is not accountable for discrimination in the employment or other practices of XYZ company, if those practices are not the result of requirements or policies established by the State.

Although licensing standards are covered by title II, the licensee's activities themselves are not covered. An activity does not become a "program or activity" of a public entity merely because it is licensed by the public entity.

II-3.8000 Illegal use of drugs. Discrimination based on an individual's current illegal use of drugs is not prohibited (see II-2.3000). Although individuals currently using illegal drugs are not protected from discrimination, the ADA does prohibit denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services.

> ILLUSTRATION 1: A hospital emergency room may not refuse to provide emergency services to an individual because the individual is using drugs.
>
> ILLUSTRATION 2: A municipal medical facility that specializes in care of burn patients may not refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Because abstention from the use of drugs is an essential condition for participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings, a drug rehabilitation or treatment program may deny participation to individuals who use drugs while they are in the program.

> ILLUSTRATION: A residential drug and alcohol treatment program may expel an individual for using drugs in a treatment center.

II-3.9000 Discrimination on the basis of association. A State or local government may not discriminate against individuals or entities because of their known relationship or association with persons who have disabilities. This prohibition applies to cases where the public entity has knowledge of both the individual's disability and his or her relationship to another individual or entity. In addition to familial relationships, the prohibition covers any type of association between the individual or entity that is discriminated against and the individual or individuals with disabilities, if the discrimination is actually based on the disability.

ILLUSTRATION 1: A county recreation center may not refuse admission to a summer camp program to a child whose brother has HIV disease.

ILLUSTRATION 2: A local government could not refuse to allow a theater company to use a school auditorium on the grounds that the company has recently performed at an HIV hospice.

ILLUSTRATION 3: If a county-owned sports arena refuses to admit G, an individual with cerebral palsy, as well as H (his sister) because G has cerebral palsy, the arena would be illegally discriminating against H on the basis of her association with G.

II-3.10000 Maintenance of accessible features. Public entities must maintain in working order equipment and features of facilities that are required to provide ready access to individuals with disabilities. Isolated or temporary interruptions in access due to maintenance and repair of accessible features are not prohibited.

Where a public entity must provide an accessible route, the route must remain accessible and not blocked by obstacles such as furniture, filing cabinets, or potted plants. An isolated instance of placement of an object on an accessible route, however, would not be a violation, if the object is promptly removed. Similarly, accessible doors must be unlocked when the public entity is open for business.

Mechanical failures in equipment such as elevators or automatic doors will occur from time to time. The obligation to ensure that facilities are readily accessible to and usable by individuals with disabilities would be violated, if repairs are not made promptly or if improper or inadequate maintenance causes repeated and persistent failures.

ILLUSTRATION 1: It would be a violation for a building manager of a three-story building to turn off the only passenger elevator in order to save energy during the hours when the building is open.

ILLUSTRATION 2: A public high school has a lift to provide access for persons with mobility impairments to an auditorium stage. The lift is not working. If the lift normally is functional and reasonable steps have been taken to repair the lift, then the school has not violated its obligations to maintain accessible features. On the other hand, if the lift frequently does not work and reasonable steps have not been taken to maintain the lift, then the school has violated the maintenance of accessible features requirement.

ILLUSTRATION 3: Because of lack of space, a city office manager places tables and file cabinets in the hallways, which interferes with the usability of the hallway by individuals who use wheelchairs. By rendering a previously accessible hallway inaccessible, the city has violated the maintenance requirement, if that hallway is part of a required accessible route.

II-3.11000 Retaliation or coercion. Individuals who exercise their rights under the ADA, or assist others in exercising their rights, are protected from retaliation. The prohibition against retaliation or coercion applies broadly to any individual or entity that seeks to prevent an individual from exercising his or her rights or to retaliate against him or her for having exercised those rights. Any form of retaliation or coercion, including threats, intimidation, or interference, is prohibited if it interferes with the exercise of rights under the Act.

ILLUSTRATION 1: A, a private individual, harasses X, an individual with cerebral palsy, in an effort to prevent X from attending a concert in a State park. A has violated the ADA.

ILLUSTRATION 2: A State tax official delays a tax refund for M, because M testified in a title II grievance proceeding involving the inaccessibility of the tax information office. The State has illegally retaliated against M in violation of title II.

II-3.12000 Smoking. A public entity may prohibit smoking, or may impose restrictions on smoking, in its facilities.

II-4.0000 EMPLOYMENT

Regulatory references: 28 CFR 35.140.

II-4.1000 General. Beginning January 26, 1992, title II prohibits all public entities, regardless of size of workforce, from discriminating in their employment practices against qualified individuals with disabilities.

II-4.2000 Relationship among title II and other Federal laws that prohibit employment discrimination by public entities on the basis of disability. In addition to title II's employment coverage, title I of the ADA and section 504 of the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities by certain public entities.

Title I of the ADA, which is primarily enforced by the Equal Employment Opportunity Commission (EEOC), prohibits job discrimination —

1) Effective July 26, 1992, by State and local employers with 25 or more employees; and

2) Effective July 26, 1994, by State and local employers with 15 or more employees.

Section 504 of the Rehabilitation Act prohibits discrimination in employment in programs or activities that receive Federal financial assistance, including federally funded State or local programs or activities. Each Federal agency that extends financial assistance is responsible for enforcement of section 504 in the programs it funds.

What standards are used to determine compliance under title II? For those public entities that are subject to title I of the ADA, title II adopts the standards of title I. In all other cases, the section 504 standards for employment apply. On October 29, 1992, legislation reauthorizing the Rehabilitation Act of 1973 was signed by the President. The law amended section 504 to conform its provisions barring employment discrimination to those applied under title I of the ADA. Thus, employment standards under section 504 are now identical to those under title I.

II-4.3000 Basic employment requirements. The following sections set forth examples of the basic title II employment requirements. Additional information on employment issues is available in "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act," issued by the EEOC. (For information about obtaining this document or other information about title I, contact the EEOC at 800-669-3362 (voice) or 800-800-3302 (TDD)).

II-4.3100 Nondiscriminatory practices and policies. As of January 26, 1992, all public entities must ensure that their employment practices and policies do not discriminate on the basis of disability against qualified individuals with disabilities in every aspect of employment, including recruitment, hiring, promotion, demotion, layoff and return from layoff, compensation, job assignments, job classifications, paid or unpaid leave, fringe benefits, training, and employer-sponsored activities, including recreational or social programs.

II-4.3200 Reasonable accommodation. All public entities must make "reasonable accommodation" to the known physical or mental limitations of otherwise qualified applicants or employees with disabilities, unless the public entity can show that the accommodation would impose an "undue hardship" on the operation of its program.

"Reasonable accommodation" means any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. Examples include —

1) Acquiring or modifying equipment or devices;

2) Job restructuring;

3) Part-time or modified work schedules;

4) Providing readers or interpreters;

5) Making the workplace accessible to and usable by individuals with disabilities.

However, any particular change or adjustment would not be required if, under the circumstances involved, it would result in an undue hardship.

"Undue hardship" means significant difficulty or expense relative to the operation of a public entity's program. Where a particular accommodation would result in an undue hardship, the public entity must determine if another accommodation is available that would not result in an undue hardship.

II-4.3300 Nondiscrimination in selection criteria and the administration of tests. Public entities may not use employment selection criteria that have the effect of subjecting individuals with disabilities to discrimination. In addition, public entities are required to ensure that, where necessary to avoid discrimination, employment tests are modified so that the test results reflect job skills or aptitude or whatever the test purports to measure, rather than the applicant's or employee's hearing, visual, speaking, or manual skills (unless the test is designed to measure hearing, visual, speaking, or manual skills).

II-4.3400 Preemployment medical examinations and medical inquiries. During the hiring process, public entities may ask about an applicant's ability to perform job-related functions but may not ask whether an applicant is disabled or about the nature or severity of an applicant's disability.

Public entities may not conduct preemployment medical examinations, but they may condition a job offer on the results of a medical examination conducted prior to an individual's entrance on duty if —

1) All entering employees in the same job category, regardless of disability, are required to take the same medical examination, and

2) The results of the medical examination are not used to impermissibly discriminate on the basis of disability.

The results of a medical entrance examination must be kept confidential and maintained in separate medical files.

II-5.0000 PROGRAM ACCESSIBILITY

Regulatory references: 28 CFR 35.149-35.150.

II-5.1000 General. A public entity may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. A public entity's services, programs, or activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to all existing facilities of a public entity. Public entities, however, are not necessarily required to make each of their existing facilities accessible.

> ILLUSTRATION 1: When a city holds a public meeting in an existing building, it must provide ready access to, and use of, the meeting facilities to individuals with disabilities. The city is not required to make all areas in the building accessible, as long as the meeting room is accessible. Accessible telephones and bathrooms should also be provided where these services are available for use of meeting attendees.

> ILLUSTRATION 2: D, a defendant in a civil suit, has a respiratory condition that prevents her from climbing steps. Civil suits are routinely heard in a courtroom on the second floor of the courthouse. The courthouse has no elevator or other means of access to the second floor. The public entity must relocate the proceedings to an accessible ground floor courtroom or take alternative steps, including moving the proceedings to another building, in order to allow D to participate in the civil suit.

> ILLUSTRATION 3: A State provides ten rest areas approximately 50 miles apart along an interstate highway. Program accessibility requires that an accessible toilet room for each sex with at least one accessible stall, or a unisex bathroom, be provided at each rest area.

Is a public entity relieved of its obligation to make its programs accessible if no individual with a disability is known to live in a particular area? No. The absence of individuals with disabilities living in an area cannot be used as the test of whether programs and activities must be accessible.

> ILLUSTRATION: A rural school district has only one elementary school and it is located in a one-room schoolhouse accessible only by steps. The school board asserts that there are no students in the district who use wheelchairs. Students, however, who currently do not have a disability may become individuals with disabilities through, for example, accidents or disease. In addition, persons other than students, such as parents and other school visitors, may be qualified individuals with disabilities who are entitled to participate in school programs. Consequently, the apparent lack of students with disabilities in a school district's service area does not excuse the school district from taking whatever appropriate steps are necessary to ensure that its programs, services, and activities are accessible to qualified individuals with disabilities.

Can back doors and freight elevators be used to satisfy the program accessibility requirement? Yes, but only as a last resort and only if such an arrangement provides accessibility comparable to that provided to persons without disabilities, who generally use front doors and passenger elevators.

For example, a back door is acceptable if it is kept unlocked during the same hours the front door remains unlocked; the passageway to and from the floor is accessible, well-lit, and neat and clean; and the individual with a mobility impairment does not have to travel excessive distances or through nonpublic areas such as kitchens and storerooms to gain access. A freight elevator would be acceptable if it were upgraded so as to be usable by passengers generally and if the passageways leading to and from the elevator are well-lit and neat and clean.

Are there any limitations on the program accessibility requirement? Yes. A public entity does not have to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. This determination can only be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The determination that undue burdens would result must be based on all resources available for use in the program. If an action would result in such an alteration or such burdens, the public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

II-5.2000 Methods for providing program accessibility. Public entities may achieve program accessibility by a number of methods. In many situations, providing access to facilities through structural methods, such as alteration of existing facilities and acquisition or construction of additional facilities, may be the most efficient method of providing program accessibility. The public entity may, however, pursue alternatives to structural changes in order to achieve program accessibility. Nonstructural methods include acquisition or redesign of equipment, assignment of aides to beneficiaries, and provision of services at alternate accessible sites.

ILLUSTRATION 1: The office building housing a public welfare agency may only be entered by climbing a flight of stairs. If an individual with a mobility impairment seeks information about welfare benefits, the agency can provide the information in an accessible ground floor location or in another accessible building.

ILLUSTRATION 2: A public library's open stacks are located on upper floors having no elevator. As an alternative to installing a lift or elevator, library staff may retrieve books for patrons who use wheelchairs. The aides must be available during the operating hours of the library.

ILLUSTRATION 3: A public university that conducts a French course in an inaccessible building may relocate the course to a building that is readily accessible.

When choosing a method of providing program access, a public entity must give priority to the one that results in the most integrated setting appropriate to encourage interaction among all users, including individuals with disabilities.

ILLUSTRATION: A rural, one-room library has an entrance with several steps. The library can make its services accessible in several ways. It may construct a simple wooden ramp quickly and at relatively low cost. Alternatively, individuals with mobility impairments may be provided access to the library's services through a bookmobile, by special messenger

service, through use of clerical aides, or by any other method that makes the resources of the library "readily accessible." Priority should be given, however, to constructing a ramp because that is the method that offers library services to individuals with disabilities and others in the same setting.

Is carrying an individual with a disability considered an acceptable method of achieving program access? Generally, it is not. Carrying persons with mobility impairments to provide program accessibility is permitted in only two cases. First, when program accessibility in existing facilities can be achieved only through structural alterations (that is, physical changes to the facilities), carrying may serve as a temporary expedient until construction is completed. Second, carrying is permitted in manifestly exceptional cases if (a) carriers are formally instructed on the safest and least humiliating means of carrying and (b) the service is provided in a reliable manner. Carrying is contrary to the goal of providing accessible programs, which is to foster independence.

How is "program accessibility" under title II different than "readily achievable barrier removal" under title III? Unlike private entities under title III, public entities are not required to remove barriers from each facility, even if removal is readily achievable. A public entity must make its "programs" accessible. Physical changes to a building are required only when there is no other feasible way to make the program accessible.

In contrast, barriers must be removed from places of public accommodation under title III where such removal is "readily achievable," without regard to whether the public accommodation's services can be made accessible through other methods.

II-5.3000 Curb ramps. Public entities that have responsibility or authority over streets, roads, or walkways must prepare a schedule for providing curb ramps where pedestrian walkways cross curbs. Public entities must give priority to walkways serving State and local government offices and facilities, transportation, places of public accommodation, and employees, followed by walkways serving other areas. This schedule must be included as part of a transition plan (see II-8.3000).

To promote both efficiency and accessibility, public entities may choose to construct curb ramps at every point where a pedestrian walkway intersects a curb. However, public entities are not necessarily required to construct a curb ramp at every such intersection.

Alternative routes to buildings that make use of existing curb cuts may be acceptable under the concept of program accessibility in the limited circumstances where individuals with disabilities need only travel a marginally longer route. In addition, the fundamental alteration and undue burdens limitations may limit the number of curb ramps required.

To achieve or maintain program accessibility, it may be appropriate to establish an ongoing procedure for installing curb ramps upon request in areas frequented by individuals with disabilities as residents, employees, or visitors.

What are walkways? Pedestrian walkways include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks.

II-5.4000 Existing parking lots or garages. A public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

II-5.5000 Historic preservation programs. Special program accessibility requirements and limitations apply to historic preservation programs. Historic preservation programs are programs conducted by a public entity that have preservation of historic properties as a primary purpose. An historic property is a property that is listed or eligible for listing in the National Register of Historic Places or a property designated as historic under State or local law.

In achieving program accessibility in historic preservation programs, a public entity must give priority to methods that provide physical access to individuals with disabilities. Physical access is particularly important in an historic preservation program, because a primary benefit of the program is uniquely the experience of the historic property itself.

Are there any special limitations on measures required to achieve program accessibility in historic preservation programs in addition to the general fundamental alteration / undue financial and administrative burdens limitations? Yes, a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. In cases where physical access cannot be provided because of either this special limitation, or because an undue financial burden or fundamental alteration would result, alternative measures to achieve program accessibility must be undertaken.

> ILLUSTRATION: Installing an elevator in an historic house museum to provide access to the second floor bedrooms would destroy architectural features of historic significance on the first floor. Providing an audio-visual display of the contents of the upstairs rooms in an accessible location on the first floor would be an alternative way of achieving program accessibility.

Does the special limitation apply to programs that are not historic preservation programs, but just happen to be located in historic properties? No. In these cases, nonstructural methods of providing program accessibility, such as relocating all or part of a program or making home visits, are available to ensure accessibility, and no special limitation protecting the historic structure is provided.

II-5.6000 Time periods for achieving program accessibility. Public entities must achieve program accessibility by January 26, 1992. If structural changes are needed to achieve program accessibility, they must be made as expeditiously as possible, but in no event later than January 26, 1995. This three-year time period is not a grace period; all changes must be accomplished as expeditiously as possible. A public entity that employs 50 or more persons must develop a transition plan by July 26, 1992, setting forth the steps necessary to complete such changes. For guidance on transition plan requirements, see II-8.3000.

II-6.0000 NEW CONSTRUCTION AND ALTERATIONS

Regulatory references: 28 CFR 35.151.

II-6.1000 General. All facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity must be readily accessible and usable by individuals with disabilities, if the construction or alteration is begun after January 26, 1992.

What is "readily accessible and usable?" This means that the facility must be designed, constructed, or altered in strict compliance with a design standard. The regulation gives a choice of two standards that may be used (see II-6.2000).

II-6.2000 Choice of design standard: UFAS or ADAAG

II-6.2100 General. Public entities may choose from two design standards for new construction and alterations. They can choose either the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which is the standard that must be used for public accommodations and commercial facilities under title III of the ADA. If ADAAG is chosen, however, public entities are not entitled to the elevator exemption (which permits certain buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

Many public entities that are recipients of Federal funds are already subject to UFAS, which is the accessibility standard referenced in most section 504 regulations.

On December 21, 1992, the Access Board published proposed title II accessibility guidelines that will generally adopt ADAAG for State and local government facilities. The proposed guidelines also set specific requirements for judicial, legislative, and regulatory facilities; detention and correctional facilities; accessible residential housing; and public rights-of-way. The proposed guidelines are subject to a 90-day comment period. It is anticipated that the Department of Justice will amend its title II rule to eliminate the choice between ADAAG and UFAS and, instead, mandate that public entities follow the amended ADAAG.

Which standard is stricter, UFAS or ADAAG? The many differences between the standards are highlighted below. In some areas, UFAS may appear to be more stringent. In other areas ADAAG may appear to be more stringent. Because of the many differences, one standard is not stricter than the other.

Can a public entity follow ADAAG on one floor of a new building and then follow UFAS on the next floor? No. Each facility or project must follow one standard completely.

Can a public entity follow UFAS for one alteration project and then follow ADAAG for another alteration project in the same building? No. All alterations in the same building must be done in accordance with the same standard.

II-6.3000 Major differences between ADAAG and UFAS. Set forth below is a summary of some of the major differences between ADAAG and UFAS.

II-6.3100 General principles

1) *Work areas*

ADAAG: Requires that areas used only by employees as work areas be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. There is, then, only a limited application of the standards to work areas (§4.1.1(3)).

UFAS: Contains no special limited requirement for work areas. The UFAS standards apply (as provided in the Architectural Barriers Act) in all areas frequented by the public or which "may result in employment ... of physically handicapped persons" (§1).

2) *Equivalent facilitation*

ADAAG: Departures from particular standards are permitted where alternatives will provide substantially equivalent or greater access (§2.2).

UFAS: UFAS itself does not contain a statement concerning equivalent facilitation. However, section 504 regulations, as well as the Department's title II regulation (28 CFR 35.151(c)), state that departures are permitted where it is "clearly evident that equivalent access" is provided.

3) *Exemption from application of standards in new construction*

ADAAG: Contains a structural impracticability exception for new construction: full compliance with the new construction standards is not required in the rare case where the terrain prevents compliance (§4.1.1(5)(a)).

UFAS: Does not contain a structural impracticability exception (or any other exception) for new construction.

4) *Exemption from application of standards in alterations*

ADAAG: For alterations, application of standards is not required where it would be "technically infeasible" (i.e., where application of the standards would involve removal of a load-bearing structural member or where existing physical or site restraints prevent compliance). Cost is not a factor (§4.1.6(1)(j)).

UFAS: Application of standards is not required for alterations where "structurally impracticable," i.e., where removal of a load-bearing structural member is involved or where the result would be an increased cost of 50 percent or more of the value of

the element involved (§§4.1.6(3); 3.5 ("structural impractibility")). Cost *is* a factor. (Note that the similar term, "structural impracticability," is used in ADAAG (see item #3 above), but in ADAAG it is used in relation to new construction. In UFAS, it is used in relation to alterations, and it has a different meaning.)

5) *Alterations triggering additional requirements*

ADAAG: Alterations to primary function areas (where major activities take place) trigger a "path of travel" requirement, that is, a requirement to make the path of travel from the entrance to the altered area — and telephones, restrooms, and drinking fountains serving the altered area — accessible (§4.1.6(2)). But, under the Department of Justice title III rule, a public entity is not required to spend more than 20% of the cost of the original alteration on making the path of travel accessible, even if this cost limitation results in less than full accessibility (28 CFR 36.403(f)).

UFAS: If a building undergoes a "substantial alteration" (where the total cost of all alterations in a 12-month period amounts to 50% or more of the value of the building), the public entity must provide an accessible route from public transportation, parking, streets, and sidewalks to all accessible parts of the building; an accessible entrance; and accessible restrooms (§4.1.6(3)).

6) *Additions*

ADAAG: Each addition to an existing building is regarded as an alteration subject to the ADAAG alterations requirements (including triggering of path of travel obligations, if applicable). If the addition does not have an accessible entrance, the path of travel obligation *may* require an accessible route from the addition through the existing building, including its entrance and exterior approaches, subject to the 20% disproportionality limitation. Moreover, to the extent that a space or element is newly constructed as part of an addition, it is also regarded as new construction and must comply with the applicable new construction provisions of ADAAG (§4.1.5).

UFAS: Has specific requirements for additions, including requirements for entrances, routes, restrooms, and common areas. An accessible route from the addition through the existing building, including its entrance, is *required* if the addition does not have an accessible entrance (§4.1.5).

II-6.3200 Elements. The following requirements apply in new construction, unless otherwise indicated.

1) *Van parking*

ADAAG: One in every eight accessible spaces must be wide enough and high enough for a van lift to be deployed. The space must be marked as "van accessible" with a supplementary sign. Alternatively, "universal parking" is permitted, in which all spaces can accommodate van widths (§4.1.2(5)(b)).

UFAS: Van parking is not required. Universal parking is not addressed.

2) *Valet parking*

ADAAG: Facilities with valet parking must have an accessible passenger loading zone on an accessible route to the exterior of the facility (§4.1.2(5)(e)).

UFAS: No requirements for valet parking.

3) *Signs*

ADAAG:

• Signs designating permanent rooms and spaces (men's and women's rooms; room numbers; exit signs) must have raised and Brailled letters; must comply with finish and contrast standards; and must be mounted at a certain height and location (§4.1.3(16)(a)).

• Signs that provide direction to or information about functional spaces of a building (e.g. "cafeteria this way;" "copy room") need not comply with requirements for raised and Brailled letters, but they must comply with requirements for character proportion, finish, and contrast. If suspended or projected overhead, they must also comply with character height requirements (§4.1.3(16)(b)).

• Building directories and other signs providing temporary information (such as current occupant's name) do not have to comply with any ADAAG requirements (§4.1.3(16)).

• Has requirements not only for the standard international symbol of accessibility, but also for symbols of accessibility identifying volume control telephones, text telephones, and assistive listening systems (§§4.1.2(7); 4.30.7).

UFAS:

• Signs designating permanent rooms and spaces must be raised (Braille is not required) and must be mounted at a certain height and location (§4.1.2(15)).

• *All* other signs (including temporary signs) must comply with requirements for letter proportion and color contrast, but not with requirements for raised letters or mounting height (§4.1.2(15)).

• Requires only the standard international symbol of accessibility (§4.30.5).

4) *Entrances*

ADAAG: At least 50 percent of all public entrances must be accessible with

certain qualifications. In addition, there must be accessible entrances to enclosed parking, pedestrian tunnels, and elevated walkways (§4.1.3(8)).

UFAS: At least one principal entrance at each grade floor level must be accessible. In addition, there must be an accessible entrance to transportation facilities, passenger loading zones, accessible parking, taxis, streets, sidewalks, and interior accessible areas, if the building has entrances that normally serve those functions (§4.1.2(8)) . (This latter requirement could result in all entrances having to be accessible in many cases.)

5) *Areas of rescue assistance or places of refuge*

ADAAG: Areas of rescue assistance (safe areas in which to await help in an emergency) are generally required on each floor, other than the ground floor, of a multistory building. An accessible egress route or an area of rescue assistance is required for each exit required by the local fire code. Specific requirements are provided for such features as location, size, stairway width, and two-way communications. Areas of rescue assistance are not required in buildings with supervised automatic sprinkler systems, nor are they required in alterations (§4.1.3(9)).

UFAS: Accessible routes must serve as a means of egress or connect to an accessible "place of refuge." No specific requirements for places of refuge are included. Rather, UFAS refers to local administrative authority for specific provisions on location, size, etc. UFAS requires more than one means of accessible egress when more than one exit is required (§4.3.10).

6) *Water fountains*

ADAAG: Where there is more than one fountain on a floor, 50% must be accessible to persons using wheelchairs. If there is only one drinking fountain on a floor, it must be accessible both to individuals who use wheelchairs and to individuals who have trouble bending or stooping (for example, a "hi-lo fountain" or fountain and water cooler may be used) (§4.1.3(10)).

UFAS: Approximately 50% on each floor must be accessible. If there is only one fountain on a floor, it must be accessible to individuals who use wheelchairs (§4.1.3(9)).

7) *Storage and shelves*

ADAAG: One of each type of fixed storage facility must be accessible. Self-service shelves and displays must be on an accessible route but need not comply with reach-range requirements (§4.1.3(12)).

UFAS: Has the same requirements as ADAAG for fixed storage, but does *not* contain the reach requirement exemption for self-service shelves and displays (§4.1.2(11)).

8) *Volume controls*

ADAAG: All accessible public phones must be equipped with volume controls. In addition, 25%, but never less than one, of all other public phones must have volume controls (§4.1.3(17)(b)).

UFAS: At least one accessible telephone must have a volume control (§4.1.2(16)(b)).

9) *Telecommunication Devices for the Deaf (TDD's)*

ADAAG: One TDD (also known as a "text telephone") must be provided inside any building that has at least one interior pay phone and four or more public pay telephones, counting both interior and exterior phones. In addition, one TDD or text telephone (per facility) must be provided whenever there is an interior public pay phone in a stadium or arena; convention center; hotel with a convention center; covered shopping mall; or hospital emergency, recovery, or waiting room (§4.1.3(17)(c)).

UFAS: No requirement for TDD's.

10) *Assembly areas*

ADAAG:

• Wheelchair seating: Requirements triggered in any assembly area with fixed seating that seats four or more people. The number of wheelchair locations required depends upon the size of the assembly area. When the area has over 300 seats, there are requirements for dispersal of wheelchair seating. ADAAG also contains requirements for aisle seats without armrests (or with removable armrests) and fixed seating for companions located adjacent to each wheelchair seating area (§4.1.3(19)(a)).

• Assistive listening systems: Certain fixed seating assembly areas that accommodate 50 or more people or have audio-amplification systems must have permanently installed assistive listening systems. Other assembly areas must have permanent systems or an adequate number of electrical outlets or other wiring to support a portable system. A special sign indicating the availability of the system is required. The minimum number of receivers must be equal to four percent of the total number of seats, but never less than two (§4.1.3(19)(b)).

UFAS:

• Wheelchair seating: No requirements for wheelchair seating are triggered, unless the assembly area has 50 or more seats. Seating must be dispersed and provide comparable lines of sight (§4.1.2(18)(a)).

• Assistive listening systems: Assembly areas with audio-amplification systems must have a listening system that serves a reasonable number of people, but at least two. If it has no amplification system or is used primarily as meeting or conference room, it must have a permanent or portable system. No special signs are required (§4.1.2(18)(b)).

11) *Automated teller machines (ATM's)*

ADAAG: Where ATM's are provided, each must be accessible, except that only one need comply when two or more ATM's are at the same location. Accessible machines must have, among other features, accessible controls and instructions and other information accessible to persons with sight impairments (§4.1.3(20)).

UFAS: No requirements for ATM's.

12) *Bathrooms*

ADAAG: Every public and common use bathroom must be accessible. Generally only one stall must be accessible (standard five-by-five feet). When there are six or more stalls, there must be one accessible stall and one stall that is three feet wide (§§4.1.3(11); 4.22.4).

UFAS: Same general requirements but no requirement for an additional three-foot-wide stall (§§4.1.2(10); 4.22.4).

13) *Detectable warnings*

ADAAG: Required on curb ramps, hazardous vehicular areas, and reflecting pools, but not on doors to hazardous areas. The warnings must be truncated domes (§4.29).

UFAS: "Tactile warnings" (uses different terminology) required *only* on doors to hazardous areas. Must be a textured surface on the door handle or hardware (§4.29).

14) *Carpet and carpet tile*

ADAAG: Same standards for carpet and carpet tile: maximum pile height of 1/2" (§4.5.3).

UFAS: Carpet must have maximum pile height of 1/2". Carpet tile must have maximum combined thickness of pile, cushion, and backing height of 1/2" (§4.5.3).

15) *Curb ramps*

ADAAG: Curb ramps must have detectable warnings (which must be raised truncated domes) (§4.7.7).

UFAS: No requirement for detectable warnings on curb ramps.

16) *Elevator hoistway floor designations and car controls*

ADAAG: Must have raised and Brailled characters (§§4.10.5; 4.10.12).

UFAS: Must have raised characters; no requirement for Braille (§§4.10.5; 4.10.12).

17) *Visual alarms*

ADAAG: Contains details about features required on visual alarms for individuals with hearing impairments, including type of lamp, color, intensity, and location. Flash rate must be at a minimum of 1Hz and maximum of 3Hz (§4.28.3).

UFAS: Contains much less detail. Allows faster flash rate of up to 5Hz (§4.28.3).

18) *Elevators and platform lifts in new construction and alterations*

ADAAG: The elevator exemption for two-story places of public accommodation or commercial facilities does not apply to buildings and facilities subject to title II. Therefore, elevators are required in all new multilevel buildings or facilities, but vertical access to elevator pits, elevator penthouses, mechanical rooms, and piping or equipment catwalks is not required. Platform lifts may be used instead of elevators under certain conditions in new construction and may always be used in alterations (§4.1.3(5)). Individuals must be able to enter unassisted, operate, and exit the lift without assistance (4.11.3).

UFAS: Has same general requirement for elevators and exceptions similar to those in ADAAG. Platform lifts may be substituted for elevators in new construction or alterations "if no other alternative is feasible" (§4.1.2(5)). Lifts must facilitate unassisted entry and exit (but not "operation" of the lift as in ADAAG) (§4.11.3).

II-6.3300 Types of facilities

1) *Historic buildings*

ADAAG: Contains procedures for buildings eligible for listing in the National Register of Historic Places under the National Historic Preservation Act and for historic buildings designated under State or local law (§4.1.7).

UFAS: Contains requirements for buildings eligible for listing in the National Register of Historic Places under the National Historic Preservation Act that are also subject to the Architectural Barriers Act. UFAS does not contain provisions applicable to buildings and facilities that are designated as "historic" under State or local law. (Under title II, the UFAS provisions may be applied to any building that is

eligible for listing on the National Register of Historic Places, regardless of whether it is also subject to the Architectural Barriers Act.) (§4.1.7).

2) *Residential facilities/transient lodging*

ADAAG:

• Hotels, motels, dormitories, and other similar establishments: Four percent of the first 100 rooms and approximately two percent of rooms in excess of 100 must be accessible to both persons with hearing impairments (i.e., contain visual alarms, visual notification devices, volume-control telephones, and an accessible electrical outlet for a text telephone) and to persons with mobility impairments. Moreover, a similar percentage of additional rooms must be accessible to persons with hearing impairments. In addition, where there are more than 50 rooms, approximately one percent of rooms must be accessible rooms with a special roll-in/transfer shower. There are special provisions for alterations (§§9.1-9.4).

• Homeless shelters, halfway houses, and similar social service establishments: Homeless shelters and other social service entities must provide the same percentage of accessible sleeping accommodations as above. At least one type of amenity in each common area must be accessible. Alterations are subject to less stringent standards (§9.5).

UFAS: Contains requirements for residential occupancies with technical requirements for "dwelling units." No requirements for sleeping rooms for individuals with hearing impairments. No requirements for roll-in showers as in ADAAG. No standards for alterations (§§4.1.4(11); 4.34).

3) *Restaurants*

ADAAG: In restaurants, generally all dining areas and five percent of fixed tables (but not less than one) must be accessible. While raised or sunken dining areas must be accessible, inaccessible mezzanines are permitted under certain conditions. Contains requirements for counters and bars, access aisles, food service lines, tableware and condiment areas, raised speaker's platforms, and vending machine areas (but not controls). Contains some less stringent requirements for alterations (§5).

UFAS: Less detailed requirements. Does not address counters and bars. Raised platforms are allowed if same service and decor are provided. Vending machines and controls are covered. No special, less stringent requirements for alterations (§5).

4) *Medical or health care facilities*

ADAAG: In medical care facilities, all public and common use areas must be accessible. In general purpose hospitals and in psychiatric and detoxification facilities, 10 percent of patient bedrooms and toilets must be accessible. The required

percentage is 100 percent for special facilities treating conditions that affect mobility, and 50 percent for long-term care facilities and nursing homes. Uses terms clarified by the Department of Health and Human Services to describe types of facilities. Some descriptive information was added. Contains special, less stringent requirements for alterations (§6).

UFAS: Uses different terms to describe types of facilities. Required clearances in rooms exceed ADAAG requirements. No special, less stringent requirements for alterations (§6).

5) *Mercantile*

ADAAG:

Counters:

• At least one of each type of sales or service counter where a cash register is located must be accessible. Accessible counters must be dispersed throughout the facility. Auxiliary counters are permissible in alterations (§7.2(1)).

• At counters without cash registers, such as bank teller windows and ticketing counters, three alternatives are possible: (1) a portion of the counter may be lowered, (2) an auxiliary counter may be provided, or (3) equivalent facilitation may be provided by installing a folding shelf on the front of a counter to provide a work surface for a person using a wheelchair (§7.2(2)).

Check-out aisles:

• At least one of each design of check-out aisle must be accessible, and, in many cases, additional check-out aisles are required to be accessible (i.e., from 20 to 40 percent) depending on the number of check-out aisles and the size of the facility. There are less stringent standards for alterations (§7.3).

UFAS:

Much less detail. At service counters, must provide an accessible portion of the counter or a nearby accessible counter. At least one check-out aisle must be accessible (§7).

6) *Jails and prisons*

ADAAG: No scoping requirements indicating how many cells need to be accessible.

UFAS: Five percent of residential units in jails, prisons, reformatories, and other detention or correctional facilities must be accessible (§4.1.4(9)(c)).

II-6.4000 Leased buildings. Public entities are encouraged, but not required, to lease accessible space. The availability of accessible private commercial space will steadily increase over time as the title III requirements for new construction and alterations take effect. Although a public entity is not required to lease accessible space, once it occupies a facility, it must provide access to all of the programs conducted in that space (see II-5.0000). Thus, the more accessible the space is to begin with, the easier and less costly it will be later on to make programs available to individuals with disabilities and to provide reasonable accommodations for employees who may need them.

II-6.5000 Alterations to historic properties. Alterations to historic properties must comply with the specific provisions governing historic properties in ADAAG or UFAS, to the maximum extent feasible. Under those provisions, alterations should be done in full compliance with the alterations standards for other types of buildings. However, if following the usual standards would threaten or destroy the historic significance of a feature of the building, alternative standards may be used. The decision to use alternative standards for that feature must be made in consultation with the appropriate historic advisory board designated in ADAAG or UFAS, and interested persons should be invited to participate in the decisionmaking process.

What are "historic properties?" These are properties listed or eligible for listing in the National Register of Historic Places, or properties designated as historic under State or local law.

What are the alternative requirements? The alternative requirements for historic buildings or facilities provide a minimal level of access. For example —

1) An accessible route is only required from one site access point (such as the parking lot).

2) A ramp may be steeper than is ordinarily permitted.

3) The accessible entrance does not need to be the one used by the general public.

4) Only one accessible toilet is required and it may be unisex.

5) Accessible routes are only required on the level of the accessible entrance.

But what if complying with even these minimal alternative requirements will threaten or destroy the historic significance? In such a case, which is rare, the public entity need not make the structural changes required by UFAS or ADAAG. But, if structural modifications that comply with UFAS or ADAAG cannot be undertaken, the Department's regulation requires that "program accessibility" be provided.

> ILLUSTRATION: A town owns a one-story historic house and decides to make certain alterations in it so that the house can be used as a museum. The town architect concludes that most of the normal standards for alterations can be applied during the renovation process without threatening or destroying historic features. There appears, however, to be a problem if one of the interior doors is widened, because historic decorative features on the door might be destroyed. The town architect consults the standards and determines that the appropriate historic body with jurisdiction over the particular historic home is the State Historic Preserva-

tion Officer. The architect then sets up a meeting with that officer, to which the local disability group and the designated title II coordinator are invited.

At the meeting the participants agree with the town architect's conclusion that the normal alterations standards cannot be applied to the interior door. They then review the special alternative requirements, which require an accessible route throughout the level of the accessible entrance. The meeting participants determine that application of the alternative minimal requirements is likewise not possible.

In this situation, the town is not required to widen the interior door. Instead, the town provides access to the program offered in that room by making available a video presentation of the items within the inaccessible room. The video can be viewed in a nearby accessible room in the museum.

II-6.6000 Curb ramps. When streets, roads, or highways are newly built or altered, they must have ramps or sloped areas wherever there are curbs or other barriers to entry from a sidewalk or path. Likewise, when new sidewalks or paths are built or are altered, they must contain curb ramps or sloped areas wherever they intersect with streets, roads, or highways.

II-7.0000 COMMUNICATIONS

Regulatory references: 28 CFR 35.160-35.164.

II-7.1000 Equally effective communication. A public entity must ensure that its communications with individuals with disabilities are as effective as communications with others. This obligation, however, does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of its services, programs, or activities, or in undue financial and administrative burdens.

In order to provide equal access, a public accommodation is required to make available appropriate auxiliary aids and services where necessary to ensure effective communication.

What are auxiliary aids and services? Auxiliary aids and services include a wide range of services and devices that promote effective communication.

Examples of auxiliary aids and services for individuals who are deaf or hard of hearing include qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, and exchange of written notes.

Examples for individuals with vision impairments include qualified readers, taped texts, audio recordings, Brailled materials, large print materials, and assistance in locating items.

Examples for individuals with speech impairments include TDD's, computer terminals, speech synthesizers, and communication boards.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved.

> ILLUSTRATION 1: Some individuals who have difficulty communicating because of a speech impairment can be understood if individuals dealing with them merely listen carefully and take the extra time that is necessary.
>
> ILLUSTRATION 2: For individuals with vision impairments, employees can provide oral directions or read written instructions. In many simple transactions, such as paying bills or filing applications, communications provided through such simple methods will be as effective as the communications provided to other individuals in similar transactions.

Many transactions with public entities, however, involve more complex or extensive communications than can be provided through such simple methods. Sign language or oral interpreters, for example, may be required when the information being communicated in a transaction with a deaf individual is complex, or is exchanged for a lengthy period of time. Factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

ILLUSTRATION 1: A municipal hospital emergency room must be able to communicate with patients about symptoms and patients must be able to understand information provided about their conditions and treatment. In this situation, an interpreter is likely to be necessary for communications with individuals who are deaf.

ILLUSTRATION 2: Because of the importance of effective communication in State and local court proceedings, special attention must be given to the communications needs of individuals with disabilities involved in such proceedings. Qualified interpreters will usually be necessary to ensure effective communication with parties, jurors, and witnesses who have hearing impairments and use sign language. For individuals with hearing impairments who do not use sign language, other types of auxiliary aids or services, such as assistive listening devices or computer-assisted transcription services, which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays, may be required.

Must public service announcements or other television programming produced by public entities be captioned? Audio portions of television and videotape programming produced by public entities are subject to the requirement to provide equally effective communication for individuals with hearing impairments. Closed captioning of such programs is sufficient to meet this requirement.

Must tax bills from public entities be available in Braille and/or large print? What about other documents? Tax bills and other written communications provided by public entities are subject to the requirement for effective communication. Thus, where a public entity provides information in written form, it must, when requested, make that information available to individuals with vision impairments in a form that is usable by them. "Large print" versions of written documents may be produced on a copier with enlargement capacities. Brailled versions of documents produced by computers may be produced with a Braille printer, or audio tapes may be provided for individuals who are unable to read large print or do not use Braille.

II-7.1100 Primary consideration. When an auxiliary aid or service is required, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. "Primary consideration" means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens.

It is important to consult with the individual to determine the most appropriate auxiliary aid or service, because the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective. Some individuals who were deaf at birth or who lost their hearing before acquiring language, for example, use sign language as their primary form of communication and may be uncomfortable or not proficient with written English, making use of a notepad an ineffective means of communication.

Individuals who lose their hearing later in life, on the other hand, may not be familiar with sign language and can communicate effectively through writing. For these individuals, use of a word processor with a videotext display may provide effective communication in transactions that are

long or complex, and computer-assisted simultaneous transcription may be necessary in courtroom proceedings. Individuals with less severe hearing impairments are often able to communicate most effectively with voice amplification provided by an assistive listening device.

For individuals with vision impairments, appropriate auxiliary aids include readers, audio recordings, Brailled materials, and large print materials. Brailled materials, however, are ineffective for many individuals with vision impairments who do not read Braille, just as large print materials would be ineffective for individuals with severely impaired vision who rely on Braille or on audio communications. Thus, the requirement for consultation and primary consideration to the individual's expressed choice applies to information provided in visual formats as well as to aurally communicated information.

II-7.1200 Qualified interpreter. There are a number of sign language systems in use by individuals who use sign language. (The most common systems of sign language are American Sign Language and signed English.) Individuals who use a particular system may not communicate effectively through an interpreter who uses a different system. When an interpreter is required, therefore, the public entity should provide a qualified interpreter, that is, an interpreter who is able to sign to the individual who is deaf what is being said by the hearing person and who can voice to the hearing person what is being signed by the individual who is deaf. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.

May friends or relatives be asked to interpret? Often, friends or relatives of the individual can provide interpreting services, but the public entity may not require the individual to provide his or her own interpreter, because it is the responsibility of the public entity to provide a qualified interpreter. Also, in many situations, requiring a friend or family member to interpret may not be appropriate, because his or her presence at the transaction may violate the individual's right to confidentiality, or because the friend or family member may have an interest in the transaction that is different from that of the individual involved. The obligation to provide "impartial" interpreting services requires that, upon request, the public entity provide an interpreter who does not have a personal relationship to the individual with a disability.

Are certified interpreters considered to be more qualified than interpreters without certification? Certification is not required in order for an interpreter to be considered to have the skills necessary to facilitate communication. Regardless of the professionalism or skills that a certified interpreter may possess, that particular individual may not feel comfortable or possess the proper vocabulary necessary for interpreting for a computer class, for example. Another equally skilled, but noncertified interpreter might have the necessary vocabulary, thus making the noncertified person the qualified interpreter for that particular situation.

Can a public entity use a staff member who signs "pretty well" as an interpreter for meetings with individuals who use sign language to communicate? Signing and interpreting are not the same thing. Being able to sign does not mean that a person can process spoken communication into the proper signs, nor does it mean that he or she possesses the proper skills to observe someone signing and change their signed or fingerspelled communication into spoken words. The interpreter must be able to interpret both receptively and expressively.

II-7.2000 Telephone communications. Public entities that communicate by telephone must provide equally effective communication to individuals with disabilities, including hearing and speech impairments. If telephone relay services, such as those required by title IV of the ADA, are available, these services generally may be used to meet this requirement.

Relay services involve a relay operator who uses both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user. Where such services are available, public employees must be instructed to accept and handle relayed calls in the normal course of business.

II-7.3000 Emergency telephone services

II-7.3100 General. Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services—including "911" services—are clearly an important public service whose reliability can be a matter of life or death. Public entities must ensure that these services, including 911 services, are accessible to persons with impaired hearing and speech.

State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access. (However, if an individual places a call to the emergency service through a relay service, the emergency service should accept the call rather than require the caller to hang up and call the emergency service directly without using the relay.) A public entity may, however, operate its own relay service within its emergency system, provided that the services for nonvoice calls are as effective as those provided for voice calls.

What emergency telephone services are covered by title II? The term "telephone emergency services" applies to basic emergency services — police, fire, and ambulance — that are provided by public entities, including 911 (or, in some cases, seven-digit) systems. Direct access must be provided to all services included in the system, including services such as emergency poison control information. Emergency services that are not provided by public entities are not subject to the requirement for "direct access."

What is "direct access? "Direct access" means that emergency telephone services can directly receive calls from TDD's and computer modem users without relying on outside relay services or third party services.

Does title II require that telephone emergency service systems be compatible with all formats used for nonvoice communications? No. At present, telephone emergency services must only be compatible with the Baudot format. Until it can be technically proven that communications in another format can operate in a reliable and compatible manner in a given telephone emergency environment, a public entity would not be required to provide direct access to computer modems using formats other than Baudot.

Are any additional dialing or space bar requirements permissible for 911 systems? No. Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

A caller, however, is not prohibited from announcing to the answerer that the call is being made on a TDD by pressing the space bar or keys. A caller may transmit tones if he or she chooses to do so. However, a public entity may not *require* such a transmission.

II-7.3200 911 lines. Where a 911 telephone line is available, a separate seven-digit telephone line must not be substituted as the sole means for nonvoice users to access 911 services. A public entity may, however, provide a separate seven-digit line for use exclusively by nonvoice calls in addition to providing direct access for such calls to the 911 line. Where such a separate line is provided, callers using TDD's or computer modems would have the option of calling either 911 or the seven-digit number.

II-7.3300 Seven-digit lines. Where a 911 line is not available and the public entity provides emergency services through a seven-digit number, it may provide two separate lines — one for voice calls, and another for nonvoice calls — rather than providing direct access for nonvoice calls to the line used for voice calls, provided that the services for nonvoice calls are as effective as those offered for voice calls in terms of time response and availability in hours. Also, the public entity must ensure that the nonvoice number is publicized as effectively as the voice number, and is displayed as prominently as the voice number wherever the emergency numbers are listed.

II-7.3400 Voice amplification. Public entities are encouraged, but not required, to provide voice amplification for the operator's voice. In an emergency, a person who has a hearing loss may be using a telephone that does not have an amplification device. Installation of speech amplification devices on the handsets of operators would be one way to respond to this situation.

II-8.0000 ADMINISTRATIVE REQUIREMENTS

Regulatory references: 28 CFR 35.105-35.107; 35.150(c) and (d).

II-8.1000 General. Title II requires that public entities take several steps designed to achieve compliance. These include the preparation of a self-evaluation. In addition, public entities with 50 or more employees are required to —

1) Develop a grievance procedure;

2) Designate an individual to oversee title II compliance;

3) Develop a transition plan if structural changes are necessary for achieving program accessibility; and

4) Retain the self-evaluation for three years.

How does a public entity determine whether it has "50 or more employees"? Determining the number of employees will be based on a governmentwide total of employees, rather than by counting the number of employees of a subunit, department, or division of the local government. Part-time employees are included in the determination.

> ILLUSTRATION: Town X has 55 employees (including 20 part-time employees). Its police department has 10 employees, and its fire department has eight employees. The police and fire department are subject to title II's administrative requirements applicable to public entities with 50 or more employees because Town X, as a whole, has 50 or more employees.

Because all States have at least 50 employees, all State departments, agencies, and other divisional units are subject to title II's administrative requirements applicable to public entities with 50 or more employees.

II-8.2000 Self-evaluation. All public entities subject to title II of the ADA must complete a self-evaluation by January 26, 1993 (one year from the effective date of the Department's regulation).

Does the fact that a public entity has not completed its self-evaluation until January 26, 1993, excuse interim compliance? No. A public entity is required to comply with the requirements of title II on January 26, 1992, whether or not it has completed its self-evaluation.

Which public entities must retain a copy of the self-evaluation? A public entity that employs 50 or more employees must retain its self-evaluation for three years. Other public entities are not required to retain their self-evaluations but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with title II's requirements.

What if a public entity already did a self-evaluation as part of its obligations under section 504 of the Rehabilitation Act of 1973? The title II self-evaluation requirement applies only to those policies and practices that previously had not been included in a self-evaluation required by section 504.

Because most section 504 self-evaluations were done many years ago, however, the Department expects that many public entities will re-examine all their policies and practices. Programs and functions may have changed significantly since the section 504 self-evaluation was completed. Actions that were taken to comply with section 504 may not have been implemented fully or may no longer be effective. In addition, section 504's coverage has been changed by statutory amendment, particularly the Civil Rights Restoration Act of 1987, which expanded the definition of a covered "program or activity." Therefore, public entities should ensure that all programs, activities, and services are examined fully, except where there is evidence that all policies were previously scrutinized under section 504.

What should a self-evaluation contain? A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with title II's requirements. As part of the self-evaluation, a public entity should:

1) Identify all of the public entity's programs, activities, and services; and

2) Review all the policies and practices that govern the administration of the public entity's programs, activities, and services.

Normally, a public entity's policies and practices are reflected in its laws, ordinances, regulations, administrative manuals or guides, policy directives, and memoranda. Other practices, however, may not be recorded and may be based on local custom.

Once a public entity has identified its policies and practices, it should analyze whether these policies and practices adversely affect the full participation of individuals with disabilities in its programs, activities, and services. In this regard, a public entity should be mindful that although its policies and practices may appear harmless, they may result in denying individuals with disabilities the full participation of its programs, activities, or services. Areas that need careful examination include the following:

1) A public entity must examine each program to determine whether any physical barriers to access exist. It should identify steps that need to be taken to enable these programs to be made accessible when viewed in their entirety. If structural changes are necessary, they should be included in the transition plan (see II-8.3000).

2) A public entity must review its policies and practices to determine whether any exclude or limit the participation of individuals with disabilities in its programs, activities, or services. Such policies or practices must be modified, unless they are necessary for the operation or provision of the program, service, or activity. The self-evaluation should identify policy modifications to be implemented and include complete justifications for any exclusionary or limiting policies or practices that will not be modified.

3) A public entity should review its policies to ensure that it communicates with applicants, participants, and members of the public with disabilities in a manner that is as effective as its communications with others. If a public entity communicates with applicants and

beneficiaries by telephone, it should ensure that TDD's or equally effective telecommunication systems are used to communicate with individuals with impaired hearing or speech. Finally, if a public entity provides telephone emergency services, it should review its policies to ensure direct access to individuals who use TDD's and computer modems.

4) A public entity should review its policies to ensure that they include provisions for readers for individuals with visual impairments; interpreters or other alternative communication measures, as appropriate, for individuals with hearing impairments; and amanuenses for individuals with manual impairments. A method for securing these services should be developed, including guidance on when and where these services will be provided. Where equipment is used as part of a public entity's program, activity, or service, an assessment should be made to ensure that the equipment is usable by individuals with disabilities, particularly individuals with hearing, visual, and manual impairments. In addition, a public entity should have policies that ensure that its equipment is maintained in operable working order.

5) A review should be made of the procedures to evacuate individuals with disabilities during an emergency. This may require the installation of visual and audible warning signals and special procedures for assisting individuals with disabilities from a facility during an emergency.

6) A review should be conducted of a public entity's written and audio-visual materials to ensure that individuals with disabilities are not portrayed in an offensive or demeaning manner.

7) If a public entity operates historic preservation programs, it should review its policies to ensure that it gives priority to methods that provide physical access to individuals with disabilities.

8) A public entity should review its policies to ensure that its decisions concerning a fundamental alteration in the nature of a program, activity, or service, or a decision that an undue financial and administrative burden will be imposed by title II, are made properly and expeditiously.

9) A public entity should review its policies and procedures to ensure that individuals with mobility impairments are provided access to public meetings.

10) A public entity should review its employment practices to ensure that they comply with other applicable nondiscrimination requirements, including section 504 of the Rehabilitation Act and the ADA regulation issued by the Equal Employment Opportunity Commission.

11) A public entity should review its building and construction policies to ensure that the construction of each new facility or part of a facility, or the alteration of existing facilities after January 26, 1992, conforms to the standards designated under the title II regulation.

12) A review should be made to ascertain whether measures have been taken to ensure that employees of a public entity are familiar with the policies and practices for the full participation of individuals with disabilities. If appropriate, training should be provided to employees.

13) If a public entity limits or denies participation in its programs, activities, or services based on drug usage, it should make sure that such policies do not discriminate against *former* drug users, as opposed to individuals who are currently engaged in illegal use of drugs.

If a public entity identifies policies and practices that deny or limit the participation of individuals with disabilities in its programs, activities, and services, when should it make changes? Once a public entity has identified policies and practices that deny or limit the participation of individuals with disabilities in its programs, activities, and services, it should take immediate remedial action to eliminate the impediments to full and equivalent participation. Structural modifications that are required for program accessibility should be made as expeditiously as possible but no later than January 26, 1995.

Is there a requirement for public hearings on a public entity's self-evaluation? No, but public entities are required to accept comments from the public on the self-evaluation and are strongly encouraged to consult with individuals with disabilities and organizations that represent them to assist in the self-evaluation process. Many individuals with disabilities have unique perspectives on a public entity's programs, activities, and services. For example, individuals with mobility impairments can readily identify barriers preventing their full enjoyment of the public entity's programs, activities, and services. Similarly, individuals with hearing impairments can identify the communication barriers that hamper participation in a public entity's programs, activities, and services.

II-8.3000 Transition plan. Where structural modifications are required to achieve program accessibility, a public entity with 50 or more employees must do a transition plan by July 26, 1992, that provides for the removal of these barriers. Any structural modifications must be completed as expeditiously as possible, but, in any event, by January 26, 1995.

What if a public entity has already done a transition plan under section 504 of the Rehabilitation Act of 1973? If a public entity previously completed a section 504 transition plan, then, at a minimum, a title II transition plan must cover those barriers to accessibility that were not addressed by its prior transition plan. Although not required, it may be simpler to include all of a public entity's operations in its transition plan rather than identifying and excluding those barriers that were addressed in its previous plan.

Must the transition plan be made available to the public? If a public entity has 50 or more employees, a copy of the transition plan must be made available for public inspection.

What are the elements of an acceptable transition plan? A transition plan should contain at a minimum —

1) A list of the physical barriers in a public entity's facilities that limit the accessibility of its programs, activities, or services to individuals with disabilities;

2) A detailed outline of the methods to be utilized to remove these barriers and make the facilities accessible;

3) The schedule for taking the necessary steps to achieve compliance with title II. If the time period for achieving compliance is longer than one year, the plan should identify the interim steps that will be taken during each year of the transition period; and,

4) The name of the official responsible for the plan's implementation.

II-8.4000 Notice to the public. A public entity must provide information on title II's requirements to applicants, participants, beneficiaries, and other interested persons. The notice shall explain title II's applicability to the public entity's services, programs, or activities. A public entity shall provide such information as the head of the public entity determines to be necessary to apprise individuals of title II's prohibitions against discrimination.

What methods can be used to provide this information? Methods include the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the title II requirements for effective communication, including alternate formats, as appropriate.

II-8.5000 Designation of responsible employee and development of grievance procedures. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and fulfill its responsibilities under title II, including the investigation of complaints. A public entity shall make available the name, office address, and telephone number of any designated employee.

In addition, the public entity must adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by title II.

II-9.0000 INVESTIGATION OF COMPLAINTS AND ENFORCEMENT

Regulatory references: 28 CFR 35.170-35.190.

II-9.1000 General. Individuals wishing to file title II complaints may either file —

1) An administrative complaint with an appropriate Federal agency; or

2) A lawsuit in Federal district court.

If an individual files an administrative complaint, an appropriate Federal agency will investigate the allegations of discrimination. Should the agency conclude that the public entity violated title II, it will attempt to negotiate a settlement with the public entity to remedy the violations. If settlement efforts fail, the matter will be referred to the Department of Justice for a decision whether to institute litigation.

How does title II relate to section 504? Many public entities are subject to section 504 of the Rehabilitation Act as well as title II. Section 504 covers those public entities operating programs or activities that receive Federal financial assistance. Title II does not displace any existing section 504 jurisdiction.

The substantive standards adopted for title II are generally the same as those required under section 504 for federally assisted programs. In those situations where title II provides greater protection of the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II in processing complaints covered by both title II and section 504.

Individuals may continue to file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The funding agencies will be enforcing *both* title II and section 504, however, for recipients that are also public entities.

II-9.2000 Complaints. A person or a specific class of individuals or their representative may file a complaint alleging discrimination on the basis of disability.

What must be included in a complaint? First, a complaint must be in writing. Second, it should contain the name and address of the individual or the representative filing the complaint. Third, the complaint should describe the public entity's alleged discriminatory action in sufficient detail to inform the Federal agency of the nature and date of the alleged violation. Fourth, the complaint must be signed by the complainant or by someone authorized to do so on his or her behalf. Finally, complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Is there a time period in which a complaint must be filed? Yes. A complaint must be filed within 180 days of the date of the alleged act(s) of discrimination, unless the time for filing is extended by

the Federal agency for good cause. As long as the complaint is filed with any Federal agency, the 180-day requirement will be considered satisfied.

Where should a complaint be filed? A complaint may be filed with either —

1) Any Federal agency that provides funding to the public entity that is the subject of the complaint;

2) A Federal agency designated in the title II regulation to investigate title II complaints; or

3) The Department of Justice.

Complainants may file with a Federal funding agency that has section 504 jurisdiction, if known. If no Federal funding agency is known, then complainants should file with the appropriate designated agency. In any event, complaints may always be filed with the Department of Justice, which will refer the complaint to the appropriate agency. The Department's regulation designates eight Federal agencies to investigate title II complaints primarily in those cases where there is no Federal agency with section 504 jurisdiction.

How will employment complaints be handled? Individuals who believe that they have been discriminated against in employment by a State or local government in violation of title II may file a complaint —

1) With a Federal agency that provides financial assistance, if any, to the State or local program in which the alleged discrimination took place; or

2) With the EEOC, if the State or local government is also subject to title I of the ADA (see II-4.0000); or

3) With the Federal agency designated in the title II regulation to investigate complaints in the type of program in which the alleged discrimination took place.

As is the case with complaints related to nonemployment issues, employment complaints may be filed with the Department of Justice, which will refer the complaint to the appropriate agency.

Which are the designated Federal agencies and what are their areas of responsibility? The eight designated Federal agencies, the functional areas covered by these agencies, and the addresses for filing a complaint are the —

1) Department of Agriculture: All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services. Complaints should be sent to: Complaints Adjudication Division, Office of Civil Rights, Room 1353 - South Building, Department of Agriculture, 14th & Independence Avenue, S.W., Washington, D.C. 20250.

2) Department of Education: All programs, services, and regulatory activities relating to the

operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries. Complaints should be sent to the specific Regional Civil Rights Director responsible for the territory or to the headquarters: Office for Civil Rights, Department of Education, 330 C Street, S.W., Suite 5000, Washington, D.C. 20202-1100.

3) Department of Health and Human Services: All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and day care programs. Complaints should be sent to: Office for Civil Rights, Department of Health & Human Services, 330 Independence Avenue, S.W., Washington, D.C. 20201.

4) Department of Housing and Urban Development: All programs, services, and regulatory activities relating to State and local public housing, and housing assistance and referral. Complaints should be sent to: Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, S.W., Room 5100, Washington, D.C. 20410.

5) Department of the Interior: All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums. Complaints should be sent to: Office for Equal Opportunity, Office of the Secretary, Department of the Interior, 18th & C Streets, N.W., Washington, D.C. 20240.

6) Department of Justice: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); State and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies. Complaints should be sent to: Disability Rights Section, P.O. Box 66738, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20035-6738.

7) Department of Labor: All programs, services, and regulatory activities relating to labor and the work force. Complaints should be sent to: Directorate of Civil Rights, Department of Labor, 200 Constitution Avenue, N.W., Room N-4123, Washington, D.C. 20210.

8) Department of Transportation: All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing. Complaints should be sent to: Departmental Office of Civil Rights, Office of the Secretary, Department of Transportation, 400 7th Street, S.W., Room 10215, Washington, D.C. 20590.

Where should a complaint be filed if more than one designated agency has responsibility for a complaint because it concerns more than one department or agency of a public entity? Complaints involving more than one area should be filed with the Department of Justice. If two or more agencies have apparent responsibility for a complaint, the Assistant Attorney General for Civil Rights of the Department of Justice shall determine which one of the agencies shall be the designated agency for purposes of that complaint. Complaints involving more than one area of a public entity should be sent to: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66738, Washington, D.C. 20035-6738.

How will complaints be resolved? The Federal agency processing the complaint will resolve the complaint through informal means or issue a detailed letter containing findings of fact and conclusions of law and, where appropriate, a description of the actions necessary to remedy each violation. Where voluntary compliance cannot be achieved, the complaint may be referred to the Department of Justice for enforcement. In cases where there is Federal funding, fund termination is also an enforcement option.

If a public entity has a grievance procedure, must an individual use that procedure before filing a complaint with a Federal agency or a court? No. Exhaustion of a public entity's grievance procedure is not a prerequisite to filing a complaint with either a Federal agency or a court.

Must the complainant file a complaint with a Federal agency prior to filing an action in court? No. The ADA does not require complainants to exhaust administrative remedies prior to instituting litigation.

Are attorney's fees available? Yes. The prevailing party (other than the United States) in any action or administrative proceeding under the Act may recover attorney's fees in addition to any other relief granted. The "prevailing party" is the party that is successful and may be either the complainant (plaintiff) or the covered entity against which the action is brought (defendant). The defendant, however, may not recover attorney's fees unless the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation, although it does not have to find that the action was brought in subjective bad faith. Attorney's fees include litigation expenses, such as expert witness fees, travel expenses, and costs. The United States is liable for attorney's fees in the same manner as any other party, but is not entitled to them when it is the prevailing party.

Is a State immune from suit under the ADA? No. A State is not immune from an action in Federal court for violations of the ADA.

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AMERICANS DISABILITIES ACT REFERENCE MATERIAL

Tab 3

ADA Title II Technical Assistance Manual 1994 Supplement

U.S. Department of Justice
Civil Rights Division
Public Access Section

Americans with Disabilities Act Title II Technical Assistance Manual 1994 Supplement

The following pages contain material to be added to the Americans with Disabilities Act Title II Technical Assistance Manual (Nov. 1993 edition). These supplements are to be inserted, as appropriate, at the end of each chapter of the Manual.

II-1.0000 COVERAGE.

II-1.3000 Relationship to title III.

[Insert the following text at the end of ILLUSTRATION 2, p. 2.]

Similarly, if an existing building is owned by a private entity covered by title III and rented to a public entity covered by title II, the private landlord does not become subject to the public entity's title II program access requirement by virtue of the leasing relationship. The private landlord only has title III obligations. These extend to the commercial facility as a whole and to any places of public accommodation contained in the facility. The governmental entity is responsible for ensuring that the programs offered in its rented space meet the requirements of title II.

II-3.0000 GENERAL REQUIREMENTS

II-3.3000 Equality in participation/benefits.

[Insert the following text after ILLUSTRATION 5, p. 11.]

Finally, the ADA permits a public entity to offer benefits to individuals with disabilities, or a particular class of individuals with disabilities, that it does not offer to individuals without disabilities. This allows State and local governments to provide special benefits, beyond those required by the ADA, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

> ILLUSTRATION 6: The ADA does not require a State government to continue providing medical support payments to dependent children with schizophrenia, if other dependent children without disabilities are also ineligible for continued coverage. This is true even if the State chooses to provide continued coverage to a particular class of children with disabilities (e.g., those with physical impairments, or those who have mental retardation).

II-3.5300 Unnecessary inquiries.

[Insert the following text at the end of this section, p. 14.]

> ILLUSTRATION 2: An essential eligibility requirement for obtaining a license to practice medicine is the ability to practice medicine safely and competently. State Agency X requires applicants for licenses to practice medicine to disclose whether they have ever had any physical and mental disabilities. A much more rigorous investigation is undertaken of applicants answering in the affirmative than of others. This process violates title II because of the additional burdens placed on individuals with disabilities, and because the disclosure requirement is not limited to conditions that *currently* impair one's ability to practice medicine.

II-3.6000 Reasonable modifications.

II-3.6100 General.

[Insert the following text after ILLUSTRATION 3, p. 15.]

> ILLUSTRATION 4: C, a person with a disability, stops at a rest area on the highway. C requires assistance in order to use the toilet facilities and his only companion is a person of the opposite sex. Permitting a person of the opposite sex to assist C in a toilet room designated for one sex may be a required reasonable modification of policy.

> ILLUSTRATION 5: S, an individual with an environmental illness, requests a public entity to adopt a policy prohibiting the use of perfume or other scented products by its employees who come into contact with the public. Such a requirement is not a "reasonable" modification of the public entity's personnel policy.

II-5.0000 PROGRAM ACCESSIBILITY

II-5.1000 General.

[Insert the following text before the question, "*Can back doors . . . ?*" p. 22.]

Does the program accessibility requirement prevent a public entity from renting existing inaccessible space to a private entity? Not necessarily. For example, if a State leases space to a public accommodation in a downtown office building in a purely commercial transaction, i.e., the private entity does not provide any services as part of a State program, the State may rent out inaccessible space without violating its program access requirement. The private entity, though, would be responsible for compliance with title III. On the other hand, if a State highway authority leases a facility in one of its highway rest areas to a privately owned restaurant, the public entity would be responsible for making the space accessible, because the restaurant is part of the State's program of providing services to the motoring public. The private entity operating the restaurant would have an independent obligation to meet the requirements of title III.

II-5.2000 Methods for providing program accessibility.

[Insert the following text after ILLUSTRATION 3, p. 23.]

> ILLUSTRATION 4: A municipal performing arts center provides seating at two prices -- inexpensive balcony seats and more expensive orchestra seats. All of the accessible seating is located on the higher priced orchestra level. In lieu of providing accessible seating on the balcony level, the city must make a reasonable number of accessible orchestra-level seats available at the lower price of balcony seats.

II-6.0000 NEW CONSTRUCTION AND ALTERATIONS

II-6.2000 Choice of design standard: UFAS or ADAAG.

II-6.2100 General.

[Insert the following text at the end of this section, p. 26]

What if neither ADAAG nor UFAS contain specific standards for a particular type of facility? In such cases the technical requirements of the chosen standard should be applied to the extent possible. If no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, including program accessibility (see II-5.0000).

ILLUSTRATION 1: A public entity is designing and constructing a playground. Because there are no UFAS or ADAAG standards for playground equipment, the equipment need not comply with any specific design standard. The title II requirements for equal opportunity and program accessibility, however, may obligate the public entity to provide an accessible route to the playground, some accessible equipment, and an accessible surface for the playground.

ILLUSTRATION 2: A public entity is designing and constructing a new baseball stadium that will feature a photographers' moat running around the perimeter of the playing field. While there are no specific standards in either ADAAG or UFAS for either dugouts or photographer's moats, the chosen standard should be applied to the extent that it contains appropriate technical standards. For example, an accessible route must be provided and any ramps or changes in level must meet the chosen standard. The public entity may have additional obligations under other title II requirements.

II-6.6000 Curb ramps.

[Insert the following text at the end of this section.]

Resurfacing beyond normal maintenance is an alteration. Merely filling potholes is considered to be normal maintenance.

II-7.0000 COMMUNICATIONS

II-7.1000 Equally effective communication.

A. [Insert the following text after ILLUSTRATION 2, p. 38.]

> ILLUSTRATION: S, who is blind, wants to use the laundry facilities in his State university dormitory. Displayed on the laundry machine controls are written instructions for operating the machines. The university could make the machines accessible to S by Brailling the instructions onto adhesive labels and placing the labels (or a Brailled template) on the machines. An alternative method of ensuring effective communication with S would be to arrange for a laundry room attendant to read the instructions printed on the machines to S. Any one particular method is not required, so long as effective communication is provided.

B. [Insert the following text after ILLUSTRATION 2, p. 39.]

> ILLUSTRATION 3: A municipal police department encounters many situations where effective communication with members of the public who are deaf or hard of hearing is critical. Such situations include interviewing suspects prior to arrest (when an officer is attempting to establish probable cause); interrogating arrestees; and interviewing victims or critical witnesses. In these situations, appropriate qualified interpreters must be provided when necessary to ensure effective communication.

The obligation of public entities to provide necessary auxiliary aids and services is not limited to individuals with a direct interest in the proceedings or outcome. Courtroom spectators with disabilities are also participants in the court program and are entitled to such aids or services as will afford them an equal opportunity to follow the court proceedings.

> ILLUSTRATION: B, an individual who is hard of hearing, wishes to observe proceedings in the county courthouse. Even though the county believes that B has no personal or direct involvement in the courtroom proceedings at issue, the county must provide effective communication, which in this case may involve the provision of an assistive listening device, unless it can demonstrate that undue financial and administrative burdens would result.

C. [Insert the following text at the end of the question, "*Must tax bills . . .* ?" p. 39.]

> Brailled documents are not required if effective communication is provided by other means.

II-7.1100 Primary consideration.

[Insert the following text after the first paragraph of this section, p. 39.]

> ILLUSTRATION: A county's Supervisor of Elections provides magnifying lenses and readers for individuals with vision impairments seeking to vote. The election procedures specify that an individual who requests assistance will be aided by two poll workers, or by one person

selected by the voter. C, a voter who is blind, protests that this method does not allow a blind voter to cast a secret ballot, and requests that the County provide him with a Brailled ballot. Brailled ballot, however, would have to be counted separately and would be readily identifiable, and thus would not resolve the problem of ballot secrecy. Because County X can demonstrate that its current system of providing assistance is an effective means of affording an individual with a disability an equal opportunity to vote, the County need not provide ballots in Braille.

II-7.3000 Emergency telephone services.

II-7.3300 Seven-digit lines.

[Insert the following text at the end of this section, p. 42.]

ILLUSTRATION: Some States may operate a statewide 911 system for both voice and nonvoice calls and, in addition, permit voice callers only to dial seven-digit numbers to obtain assistance from particular emergency service providers. Such an arrangement does not violate title II so long as nonvoice callers whose calls are directed through 911 receive emergency attention as quickly as voice callers who dial local emergency seven-digit numbers for assistance.

II-9.0000 INVESTIGATION OF COMPLAINTS AND ENFORCEMENT

II-9.2000 Complaints.

[Insert the following text at the end of this section, p. 51.]

Is a private plaintiff entitled to compensatory damages? A private plaintiff under title II is entitled to all of the remedies available under section 504 of the Rehabilitation Act of 1973, including compensatory damages.

ILLUSTRATION: A county court system is found by a Federal court to have violated title II of the ADA by excluding a blind individual from a jury because of his blindness. The individual is entitled to compensatory damages for any injuries suffered, including compensation, when appropriate, for any emotional distress caused by the discrimination.

AMERICANS DISABILITIES ACT REFERENCE MATERIAL

Tab 4

Enforcement Guidance

The U.S. Equal Employment Opportunity Commission

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

Table of Contents

Enforcement Guidance: Reasonable Accommodation And Undue Hardship Under The Americans With Disabilities Act

INTRODUCTION

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. This Guidance sets forth an employer's legal obligations regarding reasonable accommodation; however, employers may provide more than the law requires.

This Guidance examines what "reasonable accommodation" means and who is entitled to receive it. The Guidance addresses what constitutes a request for reasonable accommodation, the form and substance of the request, and an employer's ability to ask questions and seek documentation after a request has been made.

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and modified schedules. Reassignment issues addressed include who is entitled to reassignment and the extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

The final section of this Guidance discusses undue hardship, including when requests for schedule modifications and leave may be denied.

GENERAL PRINCIPLES

Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (the "ADA")[(1)] requires an employer[(2)] to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "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."(3) There are three categories of "reasonable accommodations":

> "(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."(4)

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities.(5) Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered "probationary." Generally, the individual with a disability must inform the employer that an accommodation is needed.(6)

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.(7)

There are several **modifications or adjustments that are not considered forms of reasonable accommodation**. An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation,(8) is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards -- whether qualitative or quantitative(9) -- that are applied

uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.(10)

A modification or adjustment satisfies the reasonable accommodation obligation if it is "effective."(11) In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, an effective accommodation will enable an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation will be effective if it allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

> Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY(12) to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is a reasonable accommodation because it is effective. It enables the employee to communicate with the public.
>
> Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This reasonable accommodation is effective because it removes a workplace barrier -- being required to stand -- and thus gives the employee the opportunity to perform as well as any other cashier.

The term "reasonable accommodation" is a term of art that Congress defined only through examples of changes or modifications to be made, or items to be provided, to a qualified individual with a disability. The statutory definition of "reasonable accommodation" does not include any quantitative, financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment.(13) **The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" on the employer.**(14) Undue hardship addresses quantitative, financial, or other limitations on an employer's ability to provide reasonable accommodation.

Undue Hardship

"Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a

specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.(15) An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.(16)

REQUESTING REASONABLE ACCOMMODATION

1. **How must an individual** request a reasonable accommodation?

   When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."(17)

   > Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.
   >
   > Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.
   >
   > Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.
   >
   > Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

   While an individual with a disability may request a change due to a medical condition, **this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step** in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of "disability,"**(18)** a prerequisite for the individual to be entitled to a reasonable accommodation.

2. May someone **other than the individual with a disability request a reasonable accommodation** on behalf of the individual?

   Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.(19) Of course, the

individual with a disability may refuse to accept an accommodation that is not needed.

> Example A: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. This discussion constitutes a request for reasonable accommodation.
>
> Example B: An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.

3. Do requests for reasonable accommodation need to be **in writing**?

   No. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication.[(20)] An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. (See Question 6).

4. When should an individual with a disability **request a reasonable accommodation**?

   An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer. Rather, an individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.[(21)] As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

5. What must an employer do **after receiving a request for reasonable accommodation?**

   The employer and the individual with a disability should **engage in an informal process** to clarify what the individual needs and identify the appropriate reasonable accommodation.[(22)] The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

   The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions

concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.(23)

6. May an employer ask an individual for **documentation** when the individual requests reasonable accommodation?

   Yes. When the **disability and/or the need for accommodation is not obvious**, the employer may ask the individual for **reasonable documentation** about his/her disability and functional limitations.(24) The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

   Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

   An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

   In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.(25)

   As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

   Example A: An employee says to an employer, "I'm having trouble reaching

tools because of my shoulder injury." The employer may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities (i.e., the employer is seeking information as to whether the employee has an ADA disability).

Example B: A marketing employee has a severe learning disability. He attends numerous meetings to plan marketing strategies. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his supervisor about his disability and requests a laptop computer to use in the meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. The employer also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.(26)

Example C: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. The supervisor can ask the spouse to send in documentation from the employee's treating physician that confirms that the hospitalization was related to the multiple sclerosis and provides information on how long an absence may be required from work.(27)

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation.(28) On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.(29)

7. May an employer require an individual to go to a health care professional of the **employer's (rather than the employee's) choice** for purposes of documenting need for accommodation and disability?

   The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an

ADA disability and explain the need for reasonable accommodation.[(30)]

Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.[(31)] If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

8. Are there situations in which an employer **cannot ask for documentation** in response to a request for reasonable accommodation?

   Yes. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

   Example A: An employee brings a note from her treating physician explaining that she has diabetes and that, as a result, she must test her blood sugar several times a day to ensure that her insulin level is safe in order to avoid a hyperglycemic reaction. The note explains that a hyperglycemic reaction can include extreme thirst, heavy breathing, drowsiness, and flushed skin, and eventually would result in unconsciousness. Depending on the results of the blood test, the employee might have to take insulin. The note requests that the employee be allowed three or four 10-minute breaks each day to test her blood, and if necessary, to take insulin. The doctor's note constitutes sufficient documentation that the person has an ADA disability because it describes a substantially limiting impairment and the reasonable accommodation needed as a result. The employer cannot ask for additional documentation.

   Example B: One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.

   Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts, the employer may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has an ADA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

   Example C: An employee gives her employer a letter from her doctor, stating

that the employee has asthma and needs the employer to provide her with an air filter. This letter contains insufficient information as to whether the asthma is an ADA disability because it does not provide any information as to its severity (i.e., whether it substantially limits a major life activity). Furthermore, the letter does not identify precisely what problem exists in the workplace that requires an air filter or any other reasonable accommodation. Therefore, the employer can request additional documentation.

9. Is an employer required to provide the reasonable accommodation **that the individual wants**?

   The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.(32) Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

   If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "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."(33)

   Example A: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

   Example B: An attorney with a severe vision disability requests that her employer provide someone to read printed materials that she needs to review daily. The attorney explains that a reader enables her to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly, the employer instead provides the attorney with a device that allows her to magnify print so that she can read it herself. The attorney can read print using this device, but with such great

difficulty it significantly slows down her ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the attorney with an equal opportunity to attain the same level of performance as her colleagues. Without an equal opportunity to attain the same level of performance, this attorney is denied an equal opportunity to compete for promotions. In this instance, failure to provide the reader, absent undue hardship, would violate the ADA.

10. **How quickly must an employer respond** to a request for reasonable accommodation?

An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible.(34) Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.(35)

Example A: An employer provides parking for all employees. An employee who uses a wheelchair requests from his supervisor an accessible parking space, explaining that the spaces are so narrow that there is insufficient room for his van to extend the ramp that allows him to get in and out. The supervisor does not act on the request and does not forward it to someone with authority to respond. The employee makes a second request to the supervisor. Yet, two months after the initial request, nothing has been done. Although the supervisor never definitively denies the request, the lack of action under these circumstances amounts to a denial, and thus violates the ADA.

Example B: An employee who is blind requests adaptive equipment for her computer as a reasonable accommodation. The employer must order this equipment and is informed that it will take three months to receive delivery. No other company sells the adaptive equipment the employee needs. The employer notifies the employee of the results of its investigation and that it has ordered the equipment. Although it will take three months to receive the equipment, the employer has moved as quickly as it can to obtain it and thus there is no ADA violation resulting from the delay. The employer and employee should determine what can be done so that the employee can perform his/her job as effectively as possible while waiting for the equipment.

11. May an employer **require an individual with a disability to accept a reasonable accommodation that s/he does not want**?

No. An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.(36)

REASONABLE ACCOMMODATION AND JOB APPLICANTS

12. **May** an employer ask whether a reasonable accommodation is needed when **an applicant has not asked for one**?

    An employer may tell applicants what the hiring process involves (e.g., an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

    During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will **need a reasonable accommodation to perform specific job functions**. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.(37)

    After a conditional offer of employment is extended, an employer may inquire whether applicants will **need reasonable accommodations related to anything connected with the job** (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.(38)

13. Does an employer have to provide a reasonable accommodation to an applicant with a disability even **if it believes that it will be unable to provide this individual with a reasonable accommodation on the job**?

    Yes. An employer must provide a reasonable accommodation to a **qualified applicant with a disability** that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that **may** be needed to perform the job.(39)

    > Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels

the interview and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

Example B: An individual who has paraplegia applies for a secretarial position. Because the office has two steps at the entrance, the employer arranges for the applicant to take a typing test, a requirement of the application process, at a different location. The applicant fails the test. The employer does not have to provide any further reasonable accommodations for this individual because she is no longer qualified to continue with the application process.

REASONABLE ACCOMMODATION RELATED TO THE BENEFITS AND PRIVILEGES OF EMPLOYMENT[(40)]

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).[(41)] If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

14. Does an employer have to provide reasonable accommodation **to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees**?

    Yes. Employers provide information to employees through different means, including computers, bulletin boards, mailboxes, posters, and public address systems. Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs.

    Example A: An employee who is blind has adaptive equipment for his computer that integrates him into the network with other employees, thus allowing communication via electronic mail and access to the computer bulletin board. When the employer installs upgraded computer equipment, it must provide new adaptive equipment in order for the employee to be integrated into the new networks, absent undue hardship. Alternative methods of communication (e.g., sending written or telephone messages to the employee instead of electronic mail) are likely to be ineffective substitutes since electronic mail is used by every employee and there is no effective way to ensure that each one will always use alternative measures to ensure that the

blind employee receives the same information that is being transmitted via computer.

Example B: An employer authorizes the Human Resources Director to use a public address system to remind employees about special meetings and to make certain announcements. In order to make this information accessible to a deaf employee, the Human Resources Director arranges to send in advance an electronic mail message to the deaf employee conveying the information that will be broadcast. The Human Resources Director is the only person who uses the public address system; therefore, the employer can ensure that all public address messages are sent, via electronic mail, to the deaf employee. Thus, the employer is providing this employee with equal access to office communications.

15. Must an employer provide reasonable accommodation so that **an employee may attend training programs**?

Yes. Employers must provide reasonable accommodation (e.g., sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio-cassette) that will provide employees with disabilities with an equal opportunity to participate in employer-sponsored training, absent undue hardship. This obligation extends to in-house training, as well as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

Example A: XYZ Corp. has signed a contract with Super Trainers, Inc., to provide mediation training at its facility to all of XYZ's Human Resources staff. One staff member is blind and requests that materials be provided in braille. Super Trainers refuses to provide the materials in braille. XYZ maintains that it is the responsibility of Super Trainers and sees no reason why it should have to arrange and pay for the braille copy.

Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA[(42)]) have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

Employers arranging with an outside entity to provide training may wish to avoid such problems by specifying in the contract who has the responsibility to provide appropriate reasonable accommodations. Similarly, employers should ensure that any offsite training will be held in an accessible facility if they have an employee who, because of a disability, requires such an accommodation.

Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take

the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

TYPES OF REASONABLE ACCOMMODATIONS RELATED TO JOB PERFORMANCE[(43)]

Below are discussed certain types of reasonable accommodations related to job performance.

Job Restructuring

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.[(44)]

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

16. If, as a reasonable accommodation, an employer restructures an employee's job to eliminate some marginal functions, **may the employer require the employee to take on other marginal functions** that s/he can perform?

    Yes. An employer may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.

    Example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability.[(45)] **An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.** Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.[(46)] For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons related to the disability,

including, but not limited to:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of braille or to learn sign language.

17. May an employer apply a **"no-fault" leave policy,** under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

    No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.(47)

18. Does an employer have to **hold open an employee's job** as a reasonable accommodation?

    Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.(48)

    If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.(49)

    > Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

19. Can an employer **penalize an employee for work missed during leave** taken as a reasonable accommodation?

No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law.(50) Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.(51)

Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is automatically terminated. The employer terminates the salesperson because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

Penalizing the salesperson in this manner constitutes retaliation and a denial of reasonable accommodation.

Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.(52)

20. When an employee requests leave as a reasonable accommodation, may an employer provide an accommodation that **requires him/her to remain on the job** instead?

Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave.(53) An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.(54) Accordingly, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

Example A: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the employer provides these accommodations, then it can require the employee to return to work after seven weeks.

Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the

employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

21. How should an employer handle leave for an employee covered by both the **ADA and the Family and Medical Leave Act (FMLA)**?(55)

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.(56)

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one.(57) An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.(58)

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment,(59) but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Modified or Part-Time Schedule

22. Must an employer allow an **employee with a disability to work a modified or part-time schedule** as a reasonable accommodation, absent undue hardship?

Yes.(60) A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.

Example A: An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, **the time during which an essential function is performed may be critical**. This could affect whether an employer can grant a request to modify an employee's schedule.(61) Employers should carefully assess whether modifying the hours could **significantly disrupt** their operations -- that is, cause undue hardship -- or whether the essential functions may be performed at different times with **little or no impact** on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours

requested.(62)

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

23. How should an employer handle requests for modified or part-time schedules for an **employee covered by both the ADA and the Family and Medical Leave Act (FMLA)**? (63)

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship).(64) An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non-disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12-month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours.(65) An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.(66)

Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the

employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA.

Modified Workplace Policies

24. Is it a reasonable accommodation to **modify a workplace policy**?

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations,(67) absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

> Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be taken during working hours.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship.(68) Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.(69)

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.(70)

Reassignment(71)

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.(72) This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would

be an undue hardship.(73)

An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.(74) The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.(75) The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

> Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.
>
> Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.(76) However, if both the employer and the employee **voluntarily** agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.(77) A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.(78)

> Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks.

The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc.(79) If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. **Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion**.

25. Is a **probationary employee** entitled to reassignment?

Employers cannot deny a reassignment to an employee solely because s/he is designated as "probationary."(80) An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has **never** adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

Example A: An employer designates all new employees as "probationary" for one year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

Example B: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The employer does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified -- i.e., the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hired.

26. Must an employer offer reassignment as a reasonable accommodation **if it does not allow any of its employees to transfer** from one position to another?

    Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.(81)

27. Is an employer's obligation to offer reassignment to a vacant position **limited to those vacancies within an employee's office, branch, agency, department, facility, personnel system** (if the employer has more than a single personnel system), **or geographical area**?

    No. This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc.(82) Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship.(83) If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

28. Does an employer have **to notify an employee with a disability about vacant positions**, or is it the employee's responsibility to learn what jobs are vacant?

    The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.(84) In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.(85)

An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks.(86) When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

29. Does **reassignment** mean that the employee **is permitted to compete** for a vacant position?

    No. Reassignment means that the employee gets the vacant position **if s/he is qualified for it**. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.(87)

30. If an employee is reassigned to a lower level position, **must an employer maintain his/her salary** from the higher level position?

    No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.(88)

OTHER REASONABLE ACCOMMODATION ISSUES(89)

31. If an employer has provided one reasonable accommodation, does it have to **provide additional reasonable accommodations** requested by an individual with a disability?

    The duty to provide reasonable accommodation is an ongoing one.(90) Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

    An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

32. Does an employer have to **change a person's supervisor** as a form of reasonable

accommodation?

No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation.(91) Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

> Example: A supervisor frequently schedules team meetings on a day's notice - often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings because they have conflicted with previously-scheduled physical therapy sessions. The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming no undue hardship would result, the supervisor must make this reasonable accommodation.

33. Does an employer have to allow an employee with a disability to **work at home** as a reasonable accommodation?

    An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but **only if this accommodation would be effective and would not cause an undue hardship**.(92) Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader).(93) For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

34. Must an employer **withhold discipline or termination of an employee who, because of a disability, violated a conduct rule** that is job-related for the position in question and consistent with business necessity?

    No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

35. Must an employer provide a **reasonable accommodation for an employee with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity**?

    An employer must make reasonable accommodation to enable **an otherwise qualified employee with a disability** to meet such a conduct standard **in the future**, barring undue hardship, except where the punishment for the violation is termination.(94) Since reasonable accommodation is always **prospective**, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.(95) Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.(96)

    > Example: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 a.m.

36. Is it a reasonable accommodation to **make sure that an employee takes medication** as prescribed?

    No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.(97)

    It may be a form of reasonable accommodation, however, to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment.

37. Is an employer **relieved of its obligation to provide reasonable accommodation** for an employee with a disability who **fails to take medication,** to obtain medical treatment, or to use an assistive device (such as a hearing aid)?

No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.(98)

However, if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified.

38. Must an employer provide a reasonable accommodation that is needed because of the **side effects of medication or treatment related to the disability**, or because of symptoms or other medical conditions resulting from the underlying disability?

Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

> Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule -- leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.(99)

> Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the text on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes but the employee does not have to show that the retinopathy is an independent disability under the ADA. Since the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown.

39. **Must** an employer ask whether a reasonable accommodation is needed when **an employee has not asked for one**?

Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.(100)

However, **an employer should initiate the reasonable accommodation interactive process(101) without being asked if** the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the

individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

> Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for "R. Miller" and "T. Miller." The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

40. **May** an employer ask whether a reasonable accommodation is needed when **an employee with a disability has not asked for one**?

An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.(102)

41. May an employer **tell other employees that an individual is receiving a reasonable accommodation** when employees ask questions about a coworker with a disability?

No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.(103)

An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of

employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute's confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA's confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

As long as there is no coercion by an employer, an employee with a disability may **voluntarily** choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

UNDUE HARDSHIP ISSUES(104)

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.(105) A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.(106)

The ADA's legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly.(107) Undue hardship is determined based on the **net cost** to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation.(108) Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation.

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability.(109) Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees's ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.(110)

Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

42. Must an employer modify the work hours of an employee with a disability if doing so **would prevent other employees from performing their jobs**?

No. If the result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

Example B: A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning.

The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.

43. Can an employer deny a request for leave when **an employee cannot provide a fixed date of return**?

Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

In certain situations, an employee may be able to provide only an **approximate date of return**. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return.(111) In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.(112)

Example A: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the

employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

44. Does a **cost-benefit analysis** determine whether a reasonable accommodation will cause undue hardship?

No. A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship.(113) Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).

45. Can an employer claim that a reasonable accommodation imposes an undue hardship simply because it **violates a collective bargaining agreement (CBA)**(114)?

No. First, an employer should determine if it could provide a reasonable accommodation that would remove the workplace barrier without violating the CBA. If no reasonable accommodation exists that avoids violating the CBA, then the ADA requires an employer and a union, as a collective bargaining representative, to negotiate in good faith a variance to the CBA so that the employer may provide a reasonable accommodation, except if the proposed accommodation unduly burdens the expectations of other workers (i.e., causes undue hardship). Undue hardship must be assessed on a case-by-case basis to determine the extent to which the proposed accommodation would affect the expectations of other employees. Among the relevant factors to assess would be the duration and severity of any adverse effects caused by granting a variance and the number of employees whose employment opportunities would be affected by the variance.(115)

46. Can an employer claim undue hardship **solely** because a reasonable accommodation would require it to make **changes to property owned by someone else**?

No, an employer cannot claim undue hardship **solely** because a reasonable accommodation would require it to make changes to property owned by someone else. In some situations, an employer will have the right under a lease or other contractual relationship with the property owner to make the type of changes that are needed. If this is the case, the employer should make the changes, assuming no other factors exist that would make the changes too difficult or costly. If the contractual relationship between the employer and property owner requires the owner's consent to the kinds of changes that are required, or prohibits them from being made, then the employer must make good faith efforts either to obtain the owner's permission or to negotiate an exception to the terms of the contract. If the owner refuses to allow the employer to make the modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a

wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his work space easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

Example B: Same as Example A, except that X Corp.'s lease requires it to seek Z Co.'s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must provide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location within the office that would be accessible to the employee.

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners.(116) Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability.(117) In addition, other ADA provisions may require the property owner to make the modifications.(118)

INSTRUCTIONS FOR INVESTIGATORS

When assessing whether a Respondent has violated the ADA by denying a reasonable accommodation to a Charging Party, investigators should consider the following:

- **Is the Charging Party "otherwise qualified"** (i.e., is the Charging Party qualified for the job except that, because of disability, s/he needs a reasonable accommodation to perform the position's essential functions)?
- **Did the Charging Party, or a representative, request a reasonable accommodation** (i.e., did the Charging Party let the employer know that s/he needed an adjustment or change at work for a reason related to a medical condition)? [see Questions 1-4]
  - Did the Respondent request **documentation** of the Charging Party's disability and/or functional limitations? If yes, was the documentation provided? Did the Respondent have a legitimate reason for requesting documentation? [see Questions 6-8]
  - What **specific type of reasonable accommodation**, if any, did the Charging Party request?
  - Was there a **nexus** between the reasonable accommodation requested and the functional limitations resulting from the Charging Party's disability? [see Question 6]
  - Was the need for reasonable accommodation related to the **use of medication, side effects from treatment, or symptoms related to a disability**? [see Questions 36-38]
- **For what purpose did the Charging Party request a reasonable accommodation:**
  - for the application process? [see Questions 12-13]
  - in connection with aspects of job performance? [see Questions 16-24, 32-33]

    - in order to enjoy the benefits and privileges of employment? [see Questions 14-15]
- Should the **Respondent have initiated the interactive process, or provided a reasonable accommodation, even if the Charging Party did not ask** for an accommodation? [see Questions 11, 39]
- What did the Respondent do in response to the Charging Party's request for reasonable accommodation (i.e., did the Respondent engage in an **interactive process** with the Charging Party and if so, describe both the Respondent's and the Charging Party's actions/statements during this process)? [see Questions 5-11]
- If the Charging Party asked the Respondent for a particular reasonable accommodation, and the Respondent provided a different accommodation, **why did the Respondent provide a different reasonable accommodation than the one requested by the Charging Party?** Why does the Respondent believe that the reasonable accommodation it provided was effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity? Why does the Charging Party believe that the reasonable accommodation provided by the Respondent was ineffective? [see Question 9]
- **What type of reasonable accommodation** could the Respondent have provided that would have been **effective** in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity?
- Does the charge involve allegations concerning reasonable accommodation and violations of any **conduct rules**? [see Questions 34-35]
- If the Charging Party alleges that the Respondent failed to provide a **reassignment** as a reasonable accommodation [see generally Questions 25-30 and accompanying text]:
    - did the Respondent and the Charging Party first discuss other forms of reasonable accommodation that would enable the Charging Party to remain in his/her current position before discussing reassignment?
    - did the Respondent have any vacant positions? [see Question 27]
    - did the Respondent notify the Charging Party about possible vacant positions? [see Question 28]
    - was the Charging Party qualified for a vacant position?
    - if there was more than one vacant position, did the Respondent place the Charging Party in the one that was most closely equivalent to the Charging Party's original position?
- If the Respondent is claiming **undue hardship** [see generally Questions 42-46 and accompanying text]:
    - what evidence has the Respondent produced showing that providing a specific reasonable accommodation would entail significant difficulty or expense?
    - if a modified schedule or leave is the reasonable accommodation, is undue hardship based on the impact on the ability of other employees to do their jobs? [see Question 42]
    - if leave is the reasonable accommodation, is undue hardship based on the amount of leave requested? [see Question 43]
    - is undue hardship based on a conflict between the reasonable accommodation and the provisions of a collective bargaining agreement? [see Question 45]
    - is undue hardship based on the fact that providing the reasonable accommodation requires changes to property owned by an entity other than the Respondent? [see Question 46]
    - if the Respondent claims that a particular reasonable accommodation would result in undue hardship, is there another reasonable accommodation that Respondent could

have provided that would not have resulted in undue hardship?

- Based on the evidence obtained in answers to the questions above, is the Charging Party a **qualified** individual with a disability (i.e., can the Charging Party perform the essential functions of the position with or without reasonable accommodation)?

APPENDIX

Resources For Locating Reasonable Accommodations

U.S. Equal Employment Opportunity Commission
1-800-669-3362 (Voice) 1-800-800-3302 (TT)

The EEOC's Publication Center has many free documents on the Title I employment provisions of the ADA, including both the statute, 42 U.S.C. 12101 et seq. (1994), and the regulations, 29 C.F.R. 1630 (1997). In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship. The two main sources of interpretive information are: (1) the Interpretive Guidance accompanying the Title I regulations (also known as the "Appendix" to the regulations), 29 C.F.R. pt. 1630 app. 1630.2(o), (p), 1630.9 (1997) , and (2) A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act III, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992). The Manual includes a 200-page Resource Directory, including federal and state agencies, and disability organizations that can provide assistance in identifying and locating reasonable accommodations.

The EEOC also has discussed issues involving reasonable accommodation in the following guidances and documents: (1) Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 5, 6-8, 20, 21-22, 8 FEP Manual (BNA) 405:7191, 7192-94, 7201 (1995); (2) Enforcement Guidance: Workers' Compensation and the ADA at 15-20, 8 FEP Manual (BNA) 405:7391, 7398-7401 (1996); (3) Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 19-28, 8 FEP Manual (BNA) 405:7461, 7470-76 (1997); and (4) Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 at 6-9, 8 FEP Manual (BNA) 405:7371, 7374-76 (1996).

Finally, the EEOC has a poster that employers and labor unions may use to fulfill the ADA's posting requirement.

All of the above-listed documents, with the exception of the ADA Technical Assistance Manual and Resource Directory and the poster, are also available through the Internet at http://www.eeoc.gov.

U.S. Department of Labor (To obtain information on the Family and Medical Leave Act)

To request written materials: 1-800-959-3652 (Voice) 1-800-326-2577 (TT)

To ask questions: (202) 219-8412 (Voice)

Internal Revenue Service (For information on tax credits and deductions for providing certain reasonable accommodations)

(202) 622-6060 (Voice)

Job Accommodation Network (JAN)
1-800-232-9675 (Voice/TT)
http://janweb.icdi.wvu.edu/

A service of the President's Committee on Employment of People with Disabilities. JAN can provide information, free-of-charge, about many types of reasonable accommodations.

ADA Disability and Business Technical Assistance Centers (DBTACs)
1-800-949-4232 (Voice/TT)

The DBTACs consist of 10 federally funded regional centers that provide information, training, and technical assistance on the ADA. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance, and places special emphasis on meeting the needs of small businesses. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

Registry of Interpreters for the Deaf
(301) 608-0050 (Voice/TT)

The Registry offers information on locating and using interpreters and transliteration services.

RESNA Technical Assistance Project
(703) 524-6686 (Voice) (703) 524-6639 (TT)
http://www.resna.org/hometa1.htm

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on technology-related services for individuals with disabilities. Services may include:

- information and referral centers to help determine what devices may assist a person with a disability (including access to large data bases containing information on thousands of commercially available assistive technology products),
- centers where individuals can try out devices and equipment,
- assistance in obtaining funding for and repairing devices, and
- equipment exchange and recycling programs.

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Note: Page numbering and references removed for on-line version.

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Footnotes

1. 42 U.S.C. 12101-12117, 12201-12213 (1994) (codified as amended).

The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the

Rehabilitation Act. 29 U.S.C. 793(d), 794(d) (1994).

The ADA's requirements regarding reasonable accommodation and undue hardship supercede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA. See 29 C.F.R. 1630.1(c)(2) (1997).

2. In addition to employers, the ADA requires employment agencies, labor organizations, and joint labor-management committees to provide reasonable accommodations. See 42 U.S.C. 12112(a), (b)(5)(A) (1994).

3. 29 C.F.R. pt. 1630 app. 1630.2(o) (1997).

4. 29 C.F.R. 1630.2(o)(1)(i-iii) (1997) (emphasis added). The notices that employers and labor unions must post informing applicants, employees, and members of labor organizations of their ADA rights must include a description of the reasonable accommodation requirement. These notices, which must be in an accessible format, are available from the EEOC. See the Appendix.

5. All examples used in this document assume that the applicant or employee has an ADA "disability."

Individuals with a relationship or association with a person with a disability are not entitled to receive reasonable accommodations. See Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1084, 7 AD Cas. (BNA) 764, 772 (10th Cir. 1997).

6. See 29 C.F.R. pt. 1630 app. 1630.9 (1997); see also H.R. Rep. No. 101-485, pt. 3, at 39 (1990) [hereinafter House Judiciary Report]; H.R. Rep. No. 101-485, pt. 2, at 65 (1990) [hereinafter House Education and Labor Report]; S. Rep. No. 101-116, at 34 (1989) [hereinafter Senate Report].

For more information concerning requests for a reasonable accommodation, see Questions 1-4, infra. For a discussion of the limited circumstance under which an employer would be required to ask an individual with a disability whether s/he needed a reasonable accommodation, see Question 39, infra.

7. 42 U.S.C. 12111(9) (1994); 29 C.F.R. 1630.2(o)(2)(i-ii) (1997).

8. "[W]ith or without reasonable accommodation" includes, if necessary, reassignment to a vacant position. Thus, if an employee is no longer qualified because of a disability to continue in his/her present position, an employer must reassign him/her as a reasonable accommodation. See the section on "Reassignment," infra pp. 37-38 and n.73.

9. 29 C.F.R. pt. 1630 app. 1630.2(n) (1997).

10. 29 C.F.R. pt. 1630 app. 1630.9 (1997).

11. See 29 C.F.R. pt. 1630 app. 1630.9 (1997); Senate Report, supra note 6, at 35 ("reasonableness" of an accommodation is assessed "in terms of effectiveness and equal opportunity"); House Education and Labor Report, supra note 6, at 66 ("[a] reasonable accommodation should be effective for the employee"); see also Bryant v. Better Business

Bureau of Greater Maryland, 923 F. Supp. 720, 736, 5 AD Cas. (BNA) 625, 634-35 (D. Md. 1996); Dutton v. Johnson County Bd. of Comm'rs, 859 F. Supp. 498, 507, 3 AD Cas. (BNA) 808, 815 (D. Kan. 1994); Davis v. York Int'l, Inc., 2 AD Cas. (BNA) 1810, 1816 (D. Md. 1993).

Some courts have said that in determining whether an accommodation is "reasonable," one must look at the costs of the accommodation in relation to its benefits. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995). This "cost/benefit" analysis has no foundation in the statute, regulations, or legislative history of the ADA. See 42 U.S.C. 12111(9), (10) (1994); 29 C.F.R. 1630.2(o), (p) (1997); see also Senate Report, supra, at 31-35; House Education and Labor Report, supra, at 57-58.

12. A TTY is a device that permits individuals with hearing and speech impairments to communicate by telephone.

13. 42 U.S.C. 12111(9) (1994) ("The term 'reasonable accommodation' may include -- (A) making existing facilities . . . readily accessible . . .; and (B) job restructuring; part-time or modified work schedules, reassignment to a vacant position; acquisition or modification of equipment or devices, . . .").

14. See 42 U.S.C. 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C. 12111(10) (1994) (defining "undue hardship" based on factors assessing cost and difficulty).

The legislative history discusses financial, administrative, and operational limitations on providing reasonable accommodations only in the context of defining "undue hardship." Compare Senate Report, supra note 6, at 31-34 with 35-36; House Education and Labor Report, supra note 6, at 57-58 with 67-70.

15. See 42 U.S.C. 12111(10) (1994); 29 C.F.R. 1630.2(p) (1997); 29 C.F.R. pt. 1630 app. 1630.2(p) (1997).

16. See 29 C.F.R. pt. 1630 app. 1630.15(d) (1997). See also Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048-49, 5 AD Cas. (BNA) 1367, 1372-73 (7th Cir. 1996); Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720, 740, 5 AD Cas. (BNA) 625, 638 (D. Md. 1996).

17. See, e.g., Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . . The employee need not mention the ADA or even the term 'accommodation.'"). See also Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694, 8 AD Cas. (BNA) 875, 882 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); Bultemeyer v. Ft. Wayne Community Schs., 100 F.3d 1281, 1285, 6 AD Cas. (BNA) 67, 71 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); McGinnis v. Wonder Chemical Co., 5 AD Cas. (BNA) 219 (E.D. Pa. 1995) (employer on notice that accommodation had been requested because: (1) employee told supervisor that his pain prevented him from working and (2) employee had requested leave under

the Family and Medical Leave Act).

Nothing in the ADA requires an individual to use legal terms or to anticipate all of the possible information an employer may need in order to provide a reasonable accommodation. The ADA avoids a formulistic approach in favor of an interactive discussion between the employer and the individual with a disability, after the individual has requested a change due to a medical condition. Nevertheless, some courts have required that individuals initially provide detailed information in order to trigger the employer's duty to investigate whether reasonable accommodation is required. See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1660 (5th Cir. 1996); Miller v. Nat'l Cas. Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090-91 (8th Cir. 1995).

18. See Questions 5 - 7, infra, for a further discussion on when an employer may request reasonable documentation about a person's "disability" and the need for reasonable accommodation.

19. Cf. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996); Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146 (D. Or. 1994). But see Miller v. Nat'l Casualty Co., 61 F.3d 627, 630, 4 AD Cas. (BNA) 1089, 1091 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

The employer should be receptive to any relevant information or requests it receives from a third party acting on the individual's behalf because the reasonable accommodation process presumes open communication in order to help the employer make an informed decision. See 29 C.F.R. 1630.2(o), 1630.9 (1997); 29 C.F.R. pt. 1630 app. 1630.2(o), 1630.9 (1997).

20. Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation. Employers, however, **must** keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. If a charge is filed, records must be preserved until the charge is resolved. 29 C.F.R. 1602.14 (1997).

21. Cf. Masterson v. Yellow Freight Sys., Inc., Nos. 98-6126, 98-6025, 1998 WL 856143 (10th Cir. Dec. 11, 1998) (fact that an employee with a disability does not need a reasonable accommodation all the time does not relieve employer from providing an accommodation for the period when he does need one).

22. See 29 C.F.R. 1630.2(o)(3) (1997); 29 C.F.R. pt. 1630 app. 1630.2(o), 1630.9 (1997); see also Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601, 8 AD Cas. (BNA) 692, 700 (7th Cir. 1998); Dalton v. Subaru-Isuzu, 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998). The appendix to the regulations at 1630.9 provides a detailed discussion of the reasonable accommodation process.

Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer

engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. 1981a (a)(3) (1994).

23. See 29 C.F.R. pt. 1630 app. 1630.9 (1997). The Appendix to this Guidance provides a list of resources to identify possible accommodations.

24. 29 C.F.R. pt. 1630 app. 1630.9 (1997); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [hereinafter Preemployment Questions and Medical Examinations]; EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [hereinafter ADA and Psychiatric Disabilities]. Although the latter Enforcement Guidance focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.

When an employee seeks leave as a reasonable accommodation, an employer's request for documentation about disability and the need for leave may overlap with the certification requirements of the Family and Medical Leave Act (FMLA), 29 C.F.R. 825.305-.306, 825.310-.311 (1997).

25. Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from. See Question 41 and note 103, infra.

26. See Question 9, infra, for information on choosing between two or more effective accommodations.

27. This employee also might be covered under the Family and Medical Leave Act, and if so, the employer would need to comply with the requirements of that statute.

28. See Templeton v. Neodata Servs., Inc., No. 98-1106, 1998 WL 852516 (10th Cir. Dec. 10, 1998); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134, 5 AD Cas. (BNA) 304, 307 (7th Cir. 1996); McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518, 1525, 5 AD Cas. (BNA) 1047, 1052 (N.D. Tex. 1996).

29. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 887 (7th Cir. 1998).

30. If an individual provides sufficient documentation to show the existence of an ADA disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual see the employer's health professional could be considered retaliation.

31. Employers also may consider alternatives like having their health professional consult with the individual's health professional, with the employee's consent.

32. See 29 C.F.R. pt. 1630 app. 1630.9 (1997); see also Stewart v. Happy Herman's Cheshire

Bridge, Inc., 117 F.3d 1278, 1285-86, 6 AD Cas. (BNA) 1834, 1839 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800, 5 AD Cas. (BNA) 924, 926-27 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

33. 29 C.F.R. pt. 1630 app. 1630.9 (1997).

34. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998).

35. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

36. See 29 C.F.R. pt. 1630 app. 1630.9 (1997); see also Hankins v. The Gap, Inc., 84 F.3d 797, 801, 5 AD Cas. (BNA) 924, 927 (6th Cir. 1996).

37. 42 U.S.C. 12112(d)(2)(A) (1994); 29 C.F.R. 1630.13(a) (1997). For a thorough discussion of these requirements, see Preemployment Questions and Medical Examinations, supra note 24, at 6-8, 8 FEP Manual (BNA) 405:7193-94.

38. 42 U.S.C. 12112(d)(3) (1994); 29 C.F.R. 1630.14(b) (1997); see also Preemployment Questions and Medical Examinations, supra note 24, at 20, 8 FEP Manual (BNA) 405:7201.

39. See Question 12, supra, for the circumstances under which an employer may ask an applicant whether s/he will need reasonable accommodation to perform specific job functions.

40. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

41. See 29 C.F.R. pt. 1630 app. 1630.9 (1997).

42. 42 U.S.C. 12181(7), 12182(1)(A), (2)(A)(iii) (1994).

43. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

The types of reasonable accommodations discussed in this section are not exhaustive. For example, employees with disabilities may request reasonable accommodations to modify the work environment, such as changes to the ventilation system or relocation of a work space.

See the Appendix for additional resources to identify other possible reasonable accommodations.

44. 42 U.S.C. 12111(9)(B) (1994); 29 C.F.R. pt. 1630 app. 1630.2(o), 1630.9 (1997); see Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13, 4 AD Cas. (BNA) 1234, 1236-37 (8th Cir. 1995).

45. 29 C.F.R. pt. 1630 app. 1630.2(o) (1997). See Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d

775, 782, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

An employee who needs leave, or a part-time or modified schedule, as a reasonable accommodation also may be entitled to leave under the Family and Medical Leave Act. See Questions 21 and 23, infra.

46. See A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at 3.10(4), 8 FEP Manual (BNA) 405:6981, 7011 (1992) [hereinafter TAM].

47. 42 U.S.C. 12111(9)(B) (1994); 29 C.F.R. 1630.2(o)(2)(ii) (1997). See also Question 24, infra. While undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).

48. See Schmidt v. Safeway Inc., 864 F. Supp. 991, 996-97, 3 AD Cas. (BNA) 1141, 1145-46 (D. Or. 1994); Corbett v. National Products Co., 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).

49. See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996) [hereinafter Workers' Compensation and the ADA]. See also pp. 37-45, infra, for information on reassignment as a reasonable accommodation.

50. Cf. Kiel v. Select Artificials, 142 F.3d 1077, 1080, 8 AD Cas. (BNA) 43, 44 (8th Cir. 1998).

51. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

52. But see Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1197-98, 7 AD Cas. (BNA) 1651, 1653-54 (7th Cir. 1997) (an employee who, because of a heart attack, missed several months of work and returned on a part-time basis until health permitted him to work full-time, could be terminated during a RIF based on his lower productivity). In reaching this decision, the Seventh Circuit failed to consider that the employee needed leave and a modified schedule as reasonable accommodations for his disability, and that the accommodations became meaningless when he was penalized for using them.

53. If an employee, however, qualifies for leave under the Family and Medical Leave Act, an employer **may not** require him/her to remain on the job with an adjustment in lieu of taking leave. See 29 C.F.R. 825.702(d)(1) (1997).

54. See Question 9, supra.

55. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

56. Employers should remember that many employees eligible for FMLA leave will not be entitled to leave as a reasonable accommodation under the ADA, either because they do not meet the ADA's definition of disability or, if they do have an ADA disability, the need for leave is unrelated to that disability.

57. 29 C.F.R. 825.214(a), 825.215 (1997).

58. For further information on the undue hardship factors, see infra p. 54.

59. 29 C.F.R. 825.702(c)(4) (1997).

60. See Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998) (a modified schedule is a form of reasonable accommodation).

61. Certain courts have characterized attendance as an "essential function." See, e.g., Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 438 (D.C. Cir. 1994); Jackson v. Department of Veterans Admin., 22 F.3d 277, 278-79, 3 AD Cas. (BNA) 483, 484 (11th Cir. 1994). Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental **job duties** of the employment position." 29 C.F.R. 1630.2(n)(1) (1997) (emphasis added). As the regulations make clear, essential functions are duties to be performed. 29 C.F.R. 1630.2(n)(2) (1997). See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 602, 8 AD Cas. (BNA) 692, 701 (7th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782-83, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

On the other hand, attendance is **relevant to job performance** and employers need not grant all requests for a modified schedule. To the contrary, if the time during which an essential function is performed is **integral to its successful completion**, then an employer may deny a request to modify an employee's schedule as an undue hardship.

62. Employers covered under the Family and Medical Leave Act (FMLA) should determine whether any denial of leave or a modified schedule is also permissible under that law. See 29 C.F.R. 825.203 (1997).

63. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

64. See infra pp. 37-45 for more information on reassignment, including under what circumstances an employer and employee may voluntarily agree that a transfer is preferable to having the employee remain in his/her current position.

65. 29 C.F.R. 825.204 (1997); see also special rules governing intermittent leave for instructional employees at 825.601, 825.602.

66. 29 C.F.R. 825.209, 825.210 (1997).

67. 42 U.S.C. 12111(9)(B) (1994); 29 C.F.R. 1630.2(o)(2)(ii) (1997).

68. See Dutton v. Johnson County Bd. of Comm'rs, 868 F. Supp. 1260, 1264-65, 3 AD Cas. (BNA) 1614, 1618 (D. Kan. 1994).

69. See 29 C.F.R. pt. 1630 app. 1630.15(b), (c) (1997). See also Question 17, supra.

70. But cf. Miller v. Nat'l Casualty Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090 (8th

Cir. 1995) (court refuses to find that employee's sister had requested reasonable accommodation despite the fact that the sister informed the employer that the employee was having a medical crisis necessitating emergency hospitalization).

71. Pursuant to the Rehabilitation Act Amendment of 1992, the ADA's employment standards apply to all non-affirmative action employment discrimination claims filed by federal applicants or employees with disabilities under section 501 of the Rehabilitation Act. Pub. L. No. 102-569, 503(b), 106 Stat. 4344 (1992) (codified as amended at 29 U.S.C. 791(g) (1994)). The Rehabilitation Act regulations governing reassignment of federal employees with disabilities, which were promulgated several months prior to the enactment of the Rehabilitation Act Amendment, differ in several respects from the ADA's requirements. See 29 C.F.R. 1614.203(g) (1997). For non-discrimination purposes, federal agencies must follow the ADA standards.

For information on how reassignment may apply to employers who provide light duty positions, see Workers' Compensation and the ADA, supra note 49, at 20-23, 8 FEP Manual (BNA) 405:7401-03.

72. 42 U.S.C. 12111(9)(B) (1994); 29 C.F.R. 1630.2(o)(2)(ii) (1997). See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114, 4 AD Cas. (BNA) 1234, 1238 (8th Cir. 1995); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1187, 5 AD Cas. (BNA) 1326, 1338 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 498, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

Reassignment is available only to employees, not to applicants. 29 C.F.R. pt. 1630 app. 1630.2 (o) (1997).

73. 29 C.F.R. pt. 1630 app. 1630.2(o) (1997); see Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104, 4 AD Cas. (BNA) 1297, 1305 (S.D. Ga. 1995).

Some courts have found that an employee who is unable to perform the essential functions of his/her **current position** is unqualified to receive a reassignment. See, e.g., Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 345, 5 AD Cas. (BNA) 1340, 1342 (7th Cir. 1996); Pangalos v. Prudential Ins. Co. of Am., 5 AD Cas. (BNA) 1825, 1826 (E.D. Pa. 1996). These decisions, however, nullify Congress' inclusion of reassignment in the ADA. An employee requires a reassignment **only if** s/he is unable to continue performing the essential functions of his/her current position, with or without reasonable accommodation. Thus, an employer must provide reassignment either when reasonable accommodation in an employee's current job would cause undue hardship or when it would not be possible. See Aka v. Washington Hosp. Ctr.,156 F.3d 1284, 1300-01, 8 AD Cas. (BNA) 1093, 1107-08 (D.C. Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 24, at 28, 8 FEP Manual (BNA) 405:7476; Workers' Compensation and the ADA, supra note 49, at 17-18, 8 FEP Manual (BNA) 405:7399-7400.

74. 29 C.F.R. 1630.2(m) (1997); 29 C.F.R. pt. 1630 app. 1630.2(m), 1630.2(o) (1997). See Stone v. Mount Vernon, 118 F.3d 92, 100-01, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997).

75. See Quintana v. Sound Distribution Corp., 6 AD Cas. (BNA) 842, 846 (S.D.N.Y. 1997).

76. See 29 C.F.R. pt. 1630 app. 1630.2(o) (1997); Senate Report, supra note 6, at 31; House

Education and Labor Report, supra note 6, at 63.

77. For suggestions on what the employee can do while waiting for a position to become vacant within a reasonable amount of time, see note 86, infra.

78. See 29 C.F.R. pt. 1630 app. 1630.2(o) (1997); see also White v. York Int'l Corp., 45 F.3d 357, 362, 3 AD Cas. (BNA) 1746, 1750 (10th Cir. 1995).

79. See 29 C.F.R. pt. 1630 app. 1630.2(o) (1997).

80. The current regulation governing reassignment of federal employees states that reassignment is available to "nonprobationary" employees. See 29 C.F.R. 1614.203(g) (1997). This regulation does not state the applicable ADA non-discrimination standard. See note 71, supra.

81. See Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998); United States v. Denver, 943 F. Supp. 1304, 1312, 6 AD Cas. (BNA) 245, 252 (D. Colo. 1996). See also Question 24, supra.

82. 42 U.S.C. 12111(9)(B) (1994); 29 C.F.R. 1630.2(o)(2)(ii) (1997); see Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695, 8 AD Cas. (BNA) 875, 883 (7th Cir. 1998); see generally Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677-78, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998).

83. See Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1472 (7th Cir. 1996); see generally United States v. Denver, 943 F. Supp. 1304, 1311-13, 6 AD Cas. (BNA) 245, 251-52 (D. Colo. 1996).

Some courts have limited the obligation to provide a reassignment to positions within the same department or facility in which the employee currently works, except when the employer's standard practice is to provide inter-department or inter-facility transfers for all employees. See, e.g., Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398, 4 AD Cas. (BNA) 1, 4-5 (E.D. Tex. 1995). However, the ADA requires modification of workplace policies, such as transfer policies, as a form of reasonable accommodation. See Question 24, supra. Therefore, policies limiting transfers cannot be a *per se* bar to reassigning someone outside his/her department or facility. Furthermore, the ADA requires employers to provide reasonable accommodations, including reassignment, regardless of whether such accommodations are routinely granted to non-disabled employees. See Question 26, supra.

84. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695-96, 697-98, 8 AD Cas. (BNA) 875, 883, 884 (7th Cir. 1998) (employer cannot mislead disabled employees who need reassignment about full range of vacant positions; nor can it post vacant positions for such a short period of time that disabled employees on medical leave have no realistic chance to learn about them); Mengine v. Runyon, 114 F.3d 415, 420, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (an employer has a duty to make reasonable efforts to assist an employee in identifying a vacancy because an employee will not have the ability or resources to identify a vacant position absent participation by the employer); Woodman v. Runyon, 132 F.3d 1330, 1344, 7 AD Cas. (BNA) 1189, 1199 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions).

85. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA) 1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive); Mengine v. Runyon, 114 F.3d 415, 419-20, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing).

86. If it will take several weeks to determine whether an appropriate vacant position exists, the employer and employee should discuss the employee's status during that period. There are different possibilities depending on the circumstances, but they may include: use of accumulated paid leave, use of unpaid leave, or a temporary assignment to a light duty position. Employers also may choose to take actions that go beyond the ADA's requirements, such as eliminating an essential function of the employee's current position, to enable an employee to continue working while a reassignment is sought.

87. 42 U.S.C. 12111(9)(b) (1994); 29 C.F.R. pt. 1630 app. 1630.2(o) (1997). See Senate Report, supra note 6, at 31 ("If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker."). See Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to "compete"); cf. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998) (the court, in interpreting a collective bargaining agreement provision authorizing reassignment of disabled employees, states that "[a]n employee who is allowed to compete for jobs precisely like any other applicant has not been "reassigned"); United States v. Denver, 943 F. Supp. 1304, 1310-11, 6 AD Cas. (BNA) 245, 250 (D. Colo. 1996) (the ADA requires employers to move beyond traditional analysis and consider reassignment as a method of enabling a disabled worker to do a job).

Some courts have suggested that reassignment means simply an opportunity to compete for a vacant position. See, e.g., Daugherty v. City of El Paso, 56 F.3d 695, 700, 4 AD Cas. (BNA) 993, 997 (5th Cir. 1995). Such an interpretation nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position.

88. 29 C.F.R. pt. 1630 app. 1630.2(o) (1997).

89. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause an undue hardship.

90. See Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998).

91. For a discussion on ways to modify supervisory methods, see ADA and Psychiatric

Disabilities, supra note 24, at 26-27, 8 FEP Manual (BNA) 405:7475.

92. See 29 C.F.R. 1630.2(o)(1)(ii), (2)(ii) (1997) (modifications or adjustments 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).

93. Courts have differed regarding whether "work-at-home" can be a reasonable accommodation. Compare Langon v. Department of Health and Human Servs., 959 F.2d 1053, 1060, 2 AD Cas. (BNA) 152, 159 (D.C. Cir. 1992); Anzalone v. Allstate Insurance Co., 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 437-38 (D.D.C. 1994), with Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 545, 3 AD Cas. (BNA) 1636, 1640 (7th Cir. 1995). Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position. See, e.g., Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), aff'd, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227-28, 3 AD Cas. (BNA) 449, 457-58 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

94. See 29 C.F.R. 1630.15(d) (1997).

95. See Siefken v. Arlington Heights, 65 F.3d 664, 666, 4 AD Cas. (BNA) 1441, 1442 (7th Cir. 1995). Therefore, it may be in the employee's interest to request a reasonable accommodation **before** performance suffers or conduct problems occur. For more information on conduct standards, including when they are job-related and consistent with business necessity, see ADA and Psychiatric Disabilities, supra note 24, at 29-32, 8 FEP Manual (BNA) 405:7476-78.

An employer does not have to offer a "firm choice" or a "last chance agreement" to an employee who performs poorly or who has engaged in misconduct because of alcoholism. "Firm choice" or "last chance agreements" involve excusing past performance or conduct problems resulting from alcoholism in exchange for an employee's receiving substance abuse treatment and refraining from further use of alcohol. Violation of such an agreement generally warrants termination. Since the ADA does not require employers to excuse poor performance or violation of conduct standards that are job-related and consistent with business necessity, an employer has no obligation to provide "firm choice" or a "last chance agreement" as a reasonable accommodation. See Johnson v. Babbitt, EEOC Docket No. 03940100 (March 28, 1996). However, an employer may choose to offer an employee a "firm choice" or a "last chance agreement."

96. See ADA and Psychiatric Disabilities, supra note 24, at 31-32, 8 FEP Manual (BNA) 405:7477-78.

97. See Robertson v. The Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 24, at 27-28, 8 FEP Manual (BNA) 405:7475.

98. While from an employer's perspective it may appear that an employee is "failing" to use medication or follow a certain treatment, such questions can be complex. There are many reasons why a person would choose to forgo treatment, including expense and serious side effects.

99. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544, 3 AD Cas. (BNA) 1636, 1639 (7th Cir. 1995).

100. See 29 C.F.R. pt. 1630 app. 1630.9 (1997); see also House Judiciary Report, supra note 6, at 39; House Education and Labor Report, supra note 6, at 65; Senate Report, supra note 6, at 34.

See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1659 (5th Cir. 1996); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538, 5 AD Cas. (BNA) 141, 147 (N.D. Ala. 1995); Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1080, 5 AD Cas. (BNA) 1295, 1300 (S.D. Ga. 1995), aff'd, 87 F.3d 1331, 6 AD Cas. (BNA) 1152 (11th Cir. 1996). But see Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) (employer had obligation to provide reasonable accommodation because it knew of the employee's alcohol problem and had reason to believe that an accommodation would permit the employee to perform the job).

An employer may not assert that it never received a request for reasonable accommodation, as a defense to a claim of failure to provide reasonable accommodation, if it actively discouraged an individual from making such a request.

For more information about an individual requesting reasonable accommodation, see Questions 1-4, supra.

101. See Question 5, supra, for information on the interactive process.

102. 29 C.F.R. pt. 1630 app. 1630.9 (1997).

103. 42 U.S.C. 12112(d)(3)(B), (d)(4)(C) (1994); 29 C.F.R. 1630.14(b)(1) (1997). The limited exceptions to the ADA confidentiality requirements are:

(1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; and

(3) government officials investigating compliance with the ADA must be given relevant information on request. In addition, the Commission has interpreted the ADA to allow employers to disclose medical information in the following circumstances: (1) in accordance with state workers' compensation laws, employers may disclose information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers; and (2) employers are permitted to use medical information for insurance purposes. See 29 C.F.R. pt. 1630 app. 1630.14(b) (1997); Preemployment Questions and Medical Examinations, supra note 24, at 23, 8 FEP Manual (BNA) 405:7201; Workers' Compensation and the ADA, supra note 49, at 7, 8 FEP Manual (BNA) 405:7394.

104. The discussions and examples in this section assume that there is only one effective accommodation.

105. See 29 C.F.R. pt. 1630 app. 1630.15(d) (1996); see also Stone v. Mount Vernon, 118 F.3d 92, 101, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997) (an employer who has not hired any persons with disabilities cannot claim undue hardship based on speculation that if it were to hire several people with disabilities it may not have sufficient staff to perform certain tasks); Bryant

v. Better Business Bureau of Greater Maryland, 923 F. Supp. 720, 735, 5 AD Cas. (BNA) 625, 634 (D. Md. 1996).

106. See 42 U.S.C. 12111(10)(B) (1994); 29 C.F.R. 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. 1630.2(p) (1997); TAM, supra note 46, at 3.9, 8 FEP Manual (BNA) 405:7005-07.

107. See Senate Report, supra note 6, at 36; House Education and Labor Report, supra note 6, at 69. See also 29 C.F.R. pt. 1630 app. 1630.2(p) (1997).

108. See the Appendix on how to obtain information about the tax credit and deductions.

109. See 29 C.F.R. pt. 1630 app. 1630.15(d) (1997).

110. Failure to transfer marginal functions because of its negative impact on the morale of other employees also could constitute disparate treatment when similar morale problems do not stop an employer from reassigning tasks in other situations.

111. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 600-02, 8 AD Cas. (BNA) 692, 699-701 (7th Cir. 1998).

112. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

113. The ADA's definition of undue hardship does not include any consideration of a cost-benefit analysis. See 42 U.S.C. 12111(10) (1994); see also House Education and Labor Report, supra note 6, at 69 ("[T]he committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship.").

Furthermore, the House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee's annual salary. See 136 Cong. Rec. h1475 (1990), see also House Judiciary Report, supra note 6, at 41; 29 C.F.R. pt. 1630 app. 1630.15(d) (1997).

Despite the statutory language and legislative history, some courts have applied a cost-benefit analysis. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995).

114. The current regulation governing reassignment of federal employees states that Postal Service workers with disabilities shall not be considered qualified for a reassignment to the extent that it would be inconsistent with the terms of a collective bargaining agreement. See 29 C.F.R. 1614.203(g) (1997). This regulation does not state the applicable ADA non-discrimination standard when there is a conflict between a collective bargaining agreement and the need to provide a reassignment to an employee with a disability.

115. See 42 U.S.C. 12111(10) (1994). Certain circuits have held that it is an undue hardship to provide a reasonable accommodation when doing so will violate the seniority provisions of a collective bargaining agreement. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048, 5 AD Cas. (BNA) 1367, 1372 (7th Cir. 1996); Kralik v. Durbin, 130 F.3d 76, 83, 7 AD Cas.

(BNA) 1040, 1045-46 (3d Cir. 1997). These decisions create a virtual *per se* rule that the ADA does not mandate as a reasonable accommodation an action that infringes on the seniority rights of another employee in a collective bargaining agreement. In the EEOC's view, such a *per se* rule nullifies Congress' intent that undue hardship always be determined on a case-by-case basis. See House Judiciary Report, supra note 6, at 42. Indeed, Congress believed employers could consider the terms of a collective bargaining agreement as one factor, but not the determining factor, in assessing undue hardship. See Senate Report, supra note 6, at 32; House Education and Labor Report, supra note 6, at 63. Finally, both Eckles and Kralik rely heavily upon pre-ADA Rehabilitation Act case law, despite the fact that Congress amended that statute by incorporating the ADA's employment discrimination provisions. See 29 U.S.C. 791(g), 793(d), 794(d) (1994).

116. See 42 U.S.C. 12112(b)(2) (1994); 29 C.F.R. 1630.6 (1997) (prohibiting an employer from participating in a contractual relationship that has the effect of subjecting qualified applicants or employees with disabilities to discrimination).

117. See 42 U.S.C. 12203(b) (1994); 29 C.F.R. 1630.12(b) (1997).

118. For example, under Title III of the ADA a private entity that owns a building in which goods and services are offered to the public has an obligation, subject to certain limitations, to remove architectural barriers so that people with disabilities have equal access to these goods and services. 42 U.S.C. 12182(b)(2)(A)(iv) (1994). Thus, the requested modification may be something that the property owner should have done to comply with Title III.

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