THE LOGISTICS OF ADA ACCOMMODATIONS

Marcel L. Debruge
Burr & Forman, LLP
Suite 3400
420 North 20th Street
Birmingham, AL 35203
205-458-5214
mdebruge@burr.com
www.burr.com

Margaret A. Harris
Butler & Harris
1007 Heights Blvd.
Houston, Texas 77008
713-526-5677
margie@butlerharris.com
www.butlerharris.com

AMERICANS WITH DISABILITIES ACT/REHABILITATION ACT[1]

The ADA prohibits discrimination against a "qualified individual with a disability because of the disability" with regard to terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). A "qualified individual with a disability" is one "...who, with or without reasonable accommodation, can perform the essential functions of the job that such individual holds or desires." 42 U.S.C. §12111(8). "Disability" means one with "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of impairment; or (C) being regarded as having an impairment." 42 U.S.C. §12102(2). The "record of" provision is aimed at persons with a history of a physical or mental impairment substantially limiting a major life activity. The "regarded as" provision covers those with physical or mental impairments that do not limit a major life activity, but are treated by an employer as having such a limitation. The term "disability" does not include an individual currently engaging in the illegal use of drugs where the employer acts on the basis of such use.

In determining whether a qualified individual with a disability can perform the "essential functions" of a job she holds or desires, essential function has been defined by applicable ADA regulations as being those that are essential, not marginal. A function will be considered essential if the position exists to perform the function (as in the case of reading for a proofreader position), the number of employees available to perform the function are limited, and/or the function involves a high degree of specialty that the

[1] The ADA and the Rehabilitation Act have the same anti-discrimination requirements, with the Rehabilitation Act imposing affirmative action obligations upon employers who are federal contractors. See, e.g., Branscomb v. Sec. of Navy, 2012 WL 833316 (11th Cir. Mar. 13, 2012).

incumbent is hired for his or her expertise. A job description completed by an employer prior to the challenged decision is *prima facie* evidence of what the essential functions actually are. Other evidence of what constitutes essential functions include the amount of time spent performing the function, the consequences of not requiring the incumbent employee to perform, the collective bargaining agreement, the work experience of past incumbents in the same job, and the work experience of current employees in similar jobs. Most caselaw takes the position that regular attendance is an essential function.

An employer may be required to provide reasonable accommodation to a qualified individual with a disability. "Reasonable accommodation" is defined as including "any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered for the position," "modifications or adjustments to the work environment, or, to the manner or circumstances under which the position...is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position," or "modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment" as others. An employer must provide accommodation when:

1. The employee or applicant has a disability;

2. The disability causes restrictions;

3. The employer knows or has reason to know that there is a disability causing restrictions;

4. The restrictions prevent the employee from performing the essential functions of the job;

5. The employee has not declined the accommodation;

6. The accommodation would enable the employee to perform the essential functions of the job that he or she cannot perform due to the restrictions caused by the disability; and

7. The accommodation does not cause the employer "undue hardship."

An employer need not reassign or eliminate essential functions to enable an employee with a disability to perform a job.

The Federal courts have consistently held that to establish a *prima facie* case of discrimination under the ADA, plaintiff must prove that (1) she had a disability; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability. Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002); Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 910 (11th Cir. 1996); Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996). The burden of establishing a *prima facie* case under the ADA remains at all times on the plaintiff. Gordon, 100 F.3d at 915 (reversing jury verdict on grounds that plaintiff presented insufficient evidence to support his *prima facie* case).

In addition to prohibiting discrimination against a qualified individual with a disability, the ADA prohibits unlawful medical inquiries. Prior to extending a

conditional offer of employment to an applicant, an employer may not ask questions concerning a disability or medical history, including the following:

- Do you require accommodation to perform the essential functions of the job?
- Have you ever been treated for the following conditions or diseases?
- Have you ever been hospitalized?
- Have you had a major illness in the past five years?
- Are you taking any prescribed drugs?
- Have you ever made a claim for workers' compensation?

At the preoffer stage, an employer may lawfully administer a test for illegal drugs and may inquire as to whether the employee needs reasonable accommodation in the hiring process. After a conditional offer of employment has been made, the employer may make any medical inquiry (including questions about workers' compensation) so long as the inquiry is made of all individuals receiving a conditional offer and the criteria used to evaluate the responses is job-related and consistent with business necessity. When an offerree becomes an employee, the employer may make only those medical inquiries that are job-related and consistent with business necessity, and medical records obtained must be segregated from the employee's personnel file.

RECENT AMENDMENTS

On March 24, 2011, the Equal Employment Opportunity Commission ("EEOC") released its final regulations to implement the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). Like the statute, the regulations' general purpose

is to simplify the determination of who has a "disability" under the ADA by mandating a broad interpretation in favor of coverage. Individuals seeking the ADA's protection will now find it easier to establish that they have a "disability" within the meaning of the ADA. Likewise, employers will now be faced with more situations in which reasonable accommodations must be evaluated before moving forward with certain employment actions.

The ADAAA and the final regulations do not change the definition of the term "disability," which is a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having a disability. Nevertheless, the statute and final regulations change the analysis as to who has a "disability" and, as a result, expand the ADA's coverage:

- While not all impairments are disabilities, impairments need not prevent performance, or even severely or significantly restrict performance, of a major life activity to be substantially limiting. Thus, "substantially limits" now requires a lower degree of limitation than has been previously applied by courts. In addition, the regulations make clear that "substantially limits" is to be construed broadly in favor of coverage.
- Other than corrective vision devices, including contacts or eyeglasses, the effects of mitigating measures, such as medication, are not to be considered in determining whether an individual has a disability. This is a substantial departure from previous caselaw. Conversely, the side effects of medication can be considered when determining if an individual's major life activity is substantially limited.

- Impairments that are substantially limiting when active remain so, even if they are only episodic in nature or in remission. Examples include epilepsy and cancer. An employer will need to look at the impairment, while active, in determining if it is substantially limiting, even if it is no longer active.
- Major life activities include "major bodily functions." These include functions of the brain, neurological system, endocrine system, respiratory system, circulatory system, digestive system, and the immune system. "Major bodily functions" also include sensory organs, skin, bowel, and bladder function, musculoskeletal function (which could implicate carpal tunnel syndrome), and reproductive functions.
- The EEOC also lists certain impairments, such as HIV/AIDS, diabetes, epilepsy, and bipolar disorder, which will almost always be considered disabilities.
- The regulations state that pregnancy, standing alone, is not an impairment and therefore not a disability subject to the ADA's protections. However, certain impairments resulting from or related to pregnancy--including gestational diabetes--may be considered disabilities if they substantially limit a major life activity.
- "Regarded as" claims (in which an applicant or employee alleges that he or she was treated as if there were a substantially limiting impairment, when there was not) will now focus upon how an applicant or employee has been treated because of a physical or mental impairment, instead of

what the employer believed about the impairment. Consequently, employers can expect to see more of these claims and more success on the claims brought.

- Employees who are only "regarded as" having a disability are not entitled to reasonable accommodation.
- Although the "regarded as" prong requires that the perceived impairment be neither transitory (lasting less than six months) nor minor, the exception does not apply to an actual disability. The regulations specifically state that the effects of an impairment lasting less than six months can be substantially limiting.
- The regulations no longer refer to a "qualified individual with a disability," but instead separately refer to an "individual with a disability" and "qualified individual." The regulations now prohibit discrimination "on the basis of a disability" rather than "against a qualified individual with a disability." The focus will now be on whether discrimination occurred, rather than whether the individual is, in fact, a qualified individual.

Notably, the final regulations do not alter the definitions of "qualified," "direct threat," "reasonable accommodation," or "undue hardship." The regulations also do not change the requirement that an individualized assessment be performed in order to determine whether the individual is disabled under the statute.

Importantly, the ADAAA does not apply retroactively. Therefore, any EEOC charges filed prior to January 1, 2009, are not subject to these regulations.

The EEOC's press release concerning the Final Regulations emphasized that the effect of the statute and the final regulations "is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA." Because of this new, lower burden, employers should:

- Evaluate any post-conditional offer medical examination and/or screening process. While this process is still permissible (so long as it takes place after a conditional offer is extended), more applicants will now qualify as "disabled" and may require reasonable accommodation.
- Review existing policies and practices to ensure that they take into the account the regulations' broadened definition of disability. These may include handbooks, medical leave policies, or restriction placement policies.
- Ensure that it is engaging in the interactive process when an employee presents with a medical condition rising to the level of a disability. Employers should consider use of limited HIPAA releases to obtain medical information and fitness for duty examinations, where necessary.
- Train managers, supervisors, and HR personnel on the new regulations, including the broadened definition of disability, what may constitute a request for a reasonable accommodation, and how such requests should be handled.

ADDENDUM 1

The U.S. Equal Employment Opportunity Commission

EEOC	NOTICE	Number 915.002
		October 17, 2002

1. SUBJECT: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
2. PURPOSE: This enforcement guidance supersedes the enforcement guidance issued by the Commission on 03/01/99. Most of the original guidance remains the same, but limited changes have been made as a result of: (1) the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), and (2) the Commission's issuance of new regulations under section 501 of the Rehabilitation Act. The major changes in response to the Barnett decision are found on pages 4-5, 44-45, and 61-62. In addition, minor changes were made to certain footnotes and the Instructions for Investigators as a result of the Barnett decision and the new section 501 regulations.
3. EFFECTIVE DATE: Upon receipt.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, . a (5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

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

Table of Contents

Notice Concerning The Americans With Disabilities Act Amendments Act Of 2008

The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be

evaluating the impact of these changes on this document and other publications. See the list of specific changes to the ADA made by the ADA Amendments 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)]

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;"[(8)] this means it is "reasonable" if it appears to be "feasible" or "plausible."[(9)] An accommodation also must be effective in meeting the needs of the individual.[(10)] In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables 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 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[(11)] to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

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 accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.

Example C: A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions to this employee's problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties.

There are several modifications or adjustments that are not considered forms of reasonable accommodation.[12] 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,[13] 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[14] -- 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.[15]

Undue Hardship

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" to the employer.[16] "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.[17] 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.[18]

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."[19]

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,"[(20)] 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.[(21)] 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.[(22)] 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.[(23)] 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.[24] 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.[25]

   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.[26]

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. [27] 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.[28]

   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.[29]

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.[30]

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.[31] 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.[32]

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.[33]

   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.[34] 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.[35] 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."[36]

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.[37] Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.[38]

    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.[39]

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. (40)

    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.(41)

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. (42)

    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 [(43)]

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).[(44)] 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)[45] 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[46]

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.[47]

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.[48] 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.[49] 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.[50]

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.[51]

    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.[52]

    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.[53] Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.[54]

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.[55]

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.[56] An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.[57] 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)?[58]

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.[59]

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.[60] 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.[61]

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,[62] 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.[63] 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.[64]

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. (65) 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. (66)

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)?(67)

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).(68)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.(69) 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.(70)

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,[71] 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.[72]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.[73]

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.[74]

Reassignment [75]

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.[76] 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.[77]

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.[78] 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.[79] 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.[(80)] 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.[(81)] 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.[(82)]

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.[(83)]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." 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. (84)

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.(85) Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship.(86)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.(87) 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.[88]

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.[89] 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.[90]

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.[91]

31. Must an employer provide a reassignment if it would violate a seniority system?

    Generally, it will be "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system.[92] This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment expectations that would be undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process.[93]

    However, if there are "special circumstances" that "undermine the employees' expectations of consistent, uniform treatment," it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, "special circumstances" may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system.[94] In this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference.[95] Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter.[96] Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

OTHER REASONABLE ACCOMMODATION ISSUES[97]

32. 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.[98] 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.

33. 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.[(99)] 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.

34. 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.[(100)] 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).[(101)] 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.

35. 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.

36. 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.[(102)] 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.[(103)] 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.[(104)]

    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.

37. 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.[(105)]

    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.

38. 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.[(106)]

    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.

39. 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.(107)

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.

40. 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.(108)

    However, an employer should initiate the reasonable accommodation interactive process(109) 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.

41. 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.(110)

42. 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.(111)

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(112)

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.(113) 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.(114)

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.(115) 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.[116] In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. 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.[117] 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.[118]

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.

43. 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.

44. 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.[(119)] 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. 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.[(120)]

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.

45. 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.[(121)] 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).

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.(122) 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.(123) In addition, other ADA provisions may require the property owner to make the modifications.(124)

BURDENS OF PROOF

In US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation. The "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."(125) Once the plaintiff has shown that the accommodation s/he needs is "reasonable," the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances.(126)

The Supreme Court's burden-shifting framework does not affect the interactive process triggered by an individual's request for accommodation.(127) An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.

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 accommodation could the Respondent have provided that would have been "reasonable" and 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 reassignment would conflict with a seniority system, are there "special circumstances" that would make it "reasonable" to reassign the Charging Party? [see Question 31]
- 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]
  - if there are "special circumstances" that would make it "reasonable" to reassign the Charging Party, despite the apparent conflict with a seniority system, would it nonetheless be an undue hardship to make the reassignment? [see Question 31]
  - 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.

INDEX

The index applies to the print version. Since page numbering does not exist in HTML files, page numbers have been removed.

Who is entitled to reassignment

Sign language interpreters

Supervisory methods (changing)

Working at home

Reasonable accommodation (who is entitled to receive)

Rehabilitation Act of 1973; Relationship with the ADA

Relationship and association with a person with a disability

Requests for reasonable accommodation

Choosing between two or more reasonable accommodations

Documentation on the need for reasonable accommodation

How to request reasonable accommodation

Interactive process between employer and individual with a disability

Timing of employer's response to a request for reasonable accommodation

When should individual with disability request reasonable accommodation

Who may request reasonable accommodation

Right of individual with a disability to refuse reasonable accommodation

Role of health care providers in reasonable accommodation process

Seniority systems and reassignment

State or local antidiscrimination laws; Relationship with the ADA

Supervisors and reasonable accommodation

Undue hardship

Cost

Cost-benefit analysis

Definition of

Disruption to operations

Factors to assess

Landlord/Tenant

Leave

Work environment and reasonable accommodation

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 40, infra.

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

8. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

9. Id.

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 note 6, at 31-35; House Education and Labor Report, supra note 6, at 57-58.

10. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1522 (2002). The Court explained that "in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." Id.

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

12. In US Airways, Inc. v. Barnett, the Supreme Court held that it was unreasonable, absent "special circumstances," for an employer to provide a reassignment that conflicts with the terms of a

seniority system. 535 U.S., 122 S. Ct. 1516, 1524-25 (2002). For a further discussion of this issue, see Question 31, infra.

13. "[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.77.

14. 29 C.F.R. pt. 1630 app. § 1630.2(n) (1997).

15. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

16. 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.

17. 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).

18. 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).

19. 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).

20. 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.

21. 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).

22. 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).

23. 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).

24. 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).

25. The burden-shifting framework outlined by the Supreme Court in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002), does not affect the interactive process between an employer and an individual seeking reasonable accommodation. See pages 61-62, infra, for a further discussion.

26. 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.

27. 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).

28. 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 42 and note 111, infra.

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

30. 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.

31. 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).

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

33. 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.

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

35. 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).

36. 29 C.F.R. pt. 1630 app. §1630.9 (1997).

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

38. 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.

39. 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).

40. 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 27, at 6-8, 8 FEP Manual (BNA) 405:7193-94.

41. 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 27, at 20, 8 FEP Manual (BNA) 405:7201.

42. 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.

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.

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

45. 42 U.S.C. §§ 12181(7), 12182(1)(A), (2)(A)(iii) (1994).

46. 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.

47. 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).

48. 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.

49. 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].

50. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002). 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?).

51. 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).

52. 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.

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

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

55. 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.

56. 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).

57. See Question 9, supra.

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

59. 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.

60. 29 C.F.R. §§ 825.214(a), 825.215 (1997).

61. For further information on the undue hardship factors, see infra pp. 55-56.

62. 29 C.F.R. § 825.702(c)(4) (1997).

63. 42 U.S.C. §12111 (9) (B) (1994); 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).

64. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

65. 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.

66. 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).

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

68. 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.

69. 29 C.F.R. § 825.204 (1997); see also special rules governing intermittent leave for instructional employees at §§ 825.601, 825.602.

70. 29 C.F.R. §§ 825.209, 825.210 (1997).

71. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

72. See Dutton v. Johnson County Bd. of Comm'rs, 868 F. Supp. 1260, 1264-65, 3 AD Cas. (BNA) 1614, 1618 (D. Kan. 1994).

73. See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1997). See also Question 17, supra.

74. 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).

75. For information on how reassignment may apply to employers who provide light duty positions, see Workers' Compensation and the ADA, supra note 52, at 20-23, 8 FEP Manual (BNA) 405:7401-03.

76. 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).

77. 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 27, at 28, 8 FEP Manual (BNA) 405:7476; Workers' Compensation and the ADA, supra note 52, at 17-18, 8 FEP Manual (BNA) 405:7399-7400.

78. 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).

79. See Quintana v. Sound Distribution Corp., 6 AD Cas. (BNA) 842, 846 (S.D.N.Y. 1997).

80. 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.

81. For suggestions on what the employee can do while waiting for a position to become vacant within a reasonable amount of time, see note 89, infra.

82. 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).

83. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

84. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521, 1524 (2002); see also 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.

85. 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).

86. 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.

87. 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).

88. 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).

89. 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.

90. 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.

91. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

92. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1524-25 (2002).

93. Id.

94. Id. at 1525. In a lawsuit, the plaintiff/employee bears the burden of proof to show the existence of "special circumstances" that warrant a jury's finding that a reassignment is "reasonable" despite the presence of a seniority system. If an employee can show "special circumstances," then the burden shifts to the employer to show why the reassignment would pose an undue hardship. See id.

95. Id.

96. Id. The Supreme Court made clear that these two were examples of "special circumstances" and that they did not constitute an exhaustive list of examples. Furthermore, Justice Stevens, in a concurring opinion, raised additional issues that could be relevant to show special circumstances that would make it reasonable for an employer to make an exception to its seniority system. See id. at 1526.

97. 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.

98. See Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998).

99. For a discussion on ways to modify supervisory methods, see ADA and Psychiatric Disabilities, supra note 27, at 26-27, 8 FEP Manual (BNA) 405:7475.

100. 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).

101. 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).

102. See 29 C.F.R. § 1630.15(d) (1997).

103. 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 27, 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."

104. See ADA and Psychiatric Disabilities, supra note 27, at 31-32, 8 FEP Manual (BNA) 405:7477-78.

105. See Robertson v. The Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 27-28, 8 FEP Manual (BNA) 405:7475.

106. 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.

107. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544, 3 AD Cas. (BNA) 1636, 1639 (7th Cir. 1995).

108. 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.

109. See Question 5, supra, for information on the interactive process.

110. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

111. 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 27, at 23, 8 FEP Manual (BNA) 405:7201; Workers' Compensation and the ADA, supra note 52, at 7, 8 FEP Manual (BNA) 405:7394.

112. The discussions and examples in this section assume that there is only one effective accommodation.

113. 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).

114. 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 49, at 3.9, 8 FEP Manual (BNA) 405:7005-07.

115. 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).

116. See the Appendix on how to obtain information about the tax credit and deductions.

117. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

118. 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.

119. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 600-02, 8 AD Cas. (BNA) 692, 699-701 (7th Cir. 1998).

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

121. 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. H2475 (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).

122. 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).

123. See 42 U.S.C. § 12203(b) (1994); 29 C.F.R. § 1630.12(b) (1997).

124. 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.

125. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

126. Id.

127. See Questions 5-10 for a discussion of the interactive process.

This page was last modified on October 22, 2002.

 Return to Home Page

ADDENDUM 2

Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008

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

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

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

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

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

2. What is the purpose of the ADAAA?

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

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

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

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

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

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

4. Who is required to comply with these regulations?

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

5. How does the ADAAA define "disability?"

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

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

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

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

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

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

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

8. What are "major life activities?"

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

the original ADA regulations and EEOC guidances, or from ADA and Rehabilitation Act case law.

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

As a result of the ADAAA's recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability. (For examples of impairments affecting major bodily functions that should easily be concluded to meet the first or second part of the definition of "disability," see Question 19.)

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

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

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

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

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

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

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

Yes. The ADAAA and the final regulations specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The Appendix provides examples of impairments that may be episodic, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the final regulations. [Section 1630.2(j)(1)(vii) and corresponding Appendix section]

12. What are mitigating measures?

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

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

No, except for ordinary eyeglasses or contact lenses (see Question 14). The ADAAA and the final regulations direct that the positive (or ameliorative) effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be

substantially limited in performing a major life activity without the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using a mitigating measure. [Section 1630.2(j)(1)(vi) and corresponding Appendix section]

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

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

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

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

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

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

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

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

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

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

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

Yes. The regulations identify examples of specific impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. [Section 1630.2(j)(3)]

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

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

Assessing the condition, manner, or duration under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity;

the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. [Section 1630.2(j)(4)(i) and (ii) and corresponding Appendix section]

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

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

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

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

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

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

23. Is pregnancy a disability under the ADAAA?

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

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

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

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

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

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

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

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

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

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

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

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

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

The ADAAA and the final regulations require that a covered entity show that a challenged qualification standard based on uncorrected vision is job-related and consistent with business necessity. An individual challenging the legality of an uncorrected vision standard need not be a person with a disability, but the individual must have been adversely affected by the standard. The Appendix notes that individuals who are screened out of a job because they cannot meet an uncorrected vision standard will usually meet the "regarded as" definition of disability. [Section 1630.10(b) and corresponding Appendix section]

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

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

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

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

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

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

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

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

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

Yes. When EEOC updates a particular document, we will note this on our website and explain what changes were made to the document. To avoid misunderstanding, all of these documents currently contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law. It should be noted that because the ADAAA focused almost exclusively on changing the definition of "disability," content in these documents unrelated to the definition of "disability" – including the meaning of qualified, essential functions, reasonable accommodation, and direct threat – remains unaffected by the ADAAA and the final regulations. Therefore, individuals can continue to rely on these parts of the documents as reflecting current law.

For more information about the ADA, please visit our website or call our toll-free number.

EEOC website: www.eeoc.gov
800-669-4000 (Voice) and 800-669-6820 (TTY)
All calls are confidential.

For more information about reasonable accommodations, contact the Job Accommodation Network. JAN provides free, expert, and confidential guidance on workplace accommodations.

JAN website: www.askjan.org
800-526-7234 (Voice) and 877-781-9403 (TTY)

ADDENDUM 3

Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)

INTRODUCTION

The Americans with Disabilities Act (ADA), which was amended by the ADA Amendments Act of 2008 ("Amendments Act" or "ADAAA"), is a federal law that prohibits discrimination against qualified individuals with disabilities. Individuals with disabilities include those who have impairments that substantially limit a major life activity, have a record (or history) of a substantially limiting impairment, or are regarded as having a disability.[1]

Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers. Section 501 of the Rehabilitation Act provides similar protections related to federal employment. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and may provide protections in addition to those available under the ADA.[2]

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This document, which is one of a series of question-and-answer documents addressing particular disabilities in the workplace,[3] explains how the ADA applies to job applicants and employees with intellectual disabilities. In particular, this document explains:

- when an employer may ask an applicant, employee, or third party (such as the family member of an applicant or employee) questions about an intellectual disability;
- what types of reasonable accommodations applicants and employees with intellectual disabilities may need;
- how an employer should handle safety concerns about applicants and employees with intellectual disabilities; and

- how an employer can ensure that no employee is harassed because of an intellectual disability or any other disability.

GENERAL INFORMATION ABOUT INTELLECTUAL DISABILITIES

An intellectual disability (formerly termed mental retardation) is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior that affect many everyday social and practical skills.[4] An individual is generally diagnosed as having an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical skills; and (3) the disability originated before the age of 18.[5] "Adaptive skill areas" refer to basic skills needed for everyday life. They include communication, self care, home living, social skills, leisure, health and safety, self direction, functional academics (reading, writing, basic math), and work. Individuals with severe intellectual disabilities are more likely to have additional limitations than persons with milder intellectual disabilities.[6]

An estimated 2.5 million Americans have an intellectual disability.[7] The majority of adults with an intellectual disability are either unemployed or underemployed, despite their ability, desire, and willingness to engage in meaningful work in the community.

As a result of changes made by the ADAAA, individuals who have an intellectual disability should easily be found to have a disability within the meaning of the first part of the ADA's definition of disability because they are substantially limited in brain function and other major life activities (for example, learning, reading, and thinking).[8] An individual who was misdiagnosed as having an intellectual disability in the past also has a disability within the meaning of the ADA.[9] Finally, an individual is covered under the third ("regarded as") prong of the definition of disability if an employer takes a prohibited action (for example, refuses to hire or terminates the individual) because of an intellectual disability or because the employer believes the individual has an intellectual disability.[10]

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

Title I of the ADA limits an employer's ability to ask questions related to an intellectual disability and other disabilities and to conduct medical examinations at three stages: pre-offer, post-offer, and during employment.

Job Applicants

Before an Offer of Employment Is Made

1. May an employer ask a job applicant whether she has an intellectual disability before making a job offer?

No. An employer may not ask questions about an applicant's medical condition[11] or require an applicant to have a medical examination before it makes a conditional job offer. This means that an employer cannot legally ask an applicant questions such as:

- whether she has taken any classes designated for "special education" or "special needs" students; or
- whether any of her school records indicate that she has mental retardation or an intellectual disability.

Of course, an employer may ask questions pertaining to the qualifications for, or performance of, the job, such as:

- whether the applicant can read;
- whether the applicant can put files in alphabetical order; or
- whether the applicant can place items in numerical order.

Additionally, where an employer reasonably believes that the applicant's known (that is, obvious or disclosed) intellectual disability may interfere with or prevent the performance of a job-related function, the employer may ask the applicant to describe or demonstrate how, with or without reasonable accommodation, she will be able to perform that function.[12]

2. May an employer ask any follow-up questions if it is obvious that an applicant has an intellectual disability or an applicant voluntarily reveals that she has an intellectual disability?

If it is obvious that an applicant has an intellectual disability or voluntarily tells an employer that she has an intellectual disability, and the employer reasonably believes that she will require an accommodation to perform the job, the employer may ask whether the applicant will need an accommodation and what type. The employer must keep any information an applicant discloses about her medical condition confidential. (See "Keeping Medical Information Confidential.")

Example 1: An applicant for a position as an office clerk voluntarily discloses to the employer that she has an intellectual disability and sometimes needs to be reminded of her duties. The employer may ask the applicant whether she needs a reasonable accommodation, such as a detailed checklist or the use of a computer with a touch screen that reads instructions out loud or has images to guide her through the steps in a task. However, the employer may not ask whether she will need to take frequent leave because of her intellectual disability or whether her condition is genetic.[13]

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

After an Offer of Employment Is Made

After making a job offer, an employer may ask questions about the applicant's health (including questions about the applicant's disability) and may require a medical examination, as long as all applicants for the same type of job are treated equally (that is, all applicants are asked the same questions and required to take the same examination). After an employer has obtained basic medical information from all individuals who have received job offers, it may ask specific individuals for more medical information if it is medically related to the previously obtained medical information.[14] For example, if an employer asks all applicants post-offer about their general physical and mental health, it can ask individuals who disclose a particular illness, disease, or impairment for more medical information or require them to have a medical examination related to the condition disclosed.

3. What may an employer do when it learns that an applicant has an intellectual disability after she has been offered a job but before she starts working?

When an applicant discloses after receiving a conditional job offer that she has an intellectual disability, an employer may ask the applicant questions about the extent of her disability. The employer also may ask the applicant to submit documentation from an appropriate professional answering questions specifically designed to assess her ability to perform the job's functions safely. Permissible follow-up questions at this stage differ from those at the pre-offer stage when an employer only may ask an applicant who voluntarily discloses a disability whether she needs an accommodation to perform the job and what type.

An employer may not withdraw an offer from an applicant with an intellectual disability if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation, without posing a direct threat (that is, a significant risk of substantial harm) to the health or safety of himself or others that cannot be eliminated or reduced through reasonable accommodation. ("Reasonable accommodation" is discussed at Questions 7 through 14. "Direct threat" is discussed at Question 15.)

> **Example 2:** A deli clerk who worked at a grocery chain for five years accepts an offer to be a deli clerk at a specialty market. In response to a question on a post-offer medical history questionnaire, she discloses that she was diagnosed with an intellectual disability in first grade. When the store manager tells the applicant that her disability makes him concerned about her ability to use a meat slicer and other sharp utensils, the applicant explains that she was supervised closely when she first started working as a deli clerk and that she has worked five years without injuring herself. Because there is no evidence that the applicant will pose a significant risk of substantial harm because of her intellectual disability, the employer may not withdraw the job offer.

Employees

The ADA strictly limits when an employer may ask questions about an employee's medical condition or require the employee to undergo a medical examination. Once an employee is on the job, his actual performance is the best measure of ability to do the job.

4. When may an employer ask an employee whether her intellectual disability, or some other medical condition, may be causing her performance problems?

Generally, an employer may ask disability-related questions or require an employee to have a medical examination when it knows about a particular employee's medical condition, has observed performance problems, and reasonably believes that the problems are related to a medical condition. At other times, an employer may ask for medical information when it has received reliable information from someone else (for example, a family member or co-worker) indicating that the employee may have a medical condition that is causing performance problems. Often, however, poor job performance is unrelated to a medical condition and generally should be handled in accordance with an employer's existing policies concerning performance.[15]

> **Example 3**: A mailroom clerk with an intellectual disability and attention deficit disorder who has performed his job successfully for five years starts to make mistakes in sorting and delivering letters and packages. He also appears anxious and emotional. The supervisor observed these changes soon after the employee moved into his brother's house. The supervisor can ask the employee why his performance has declined and may explore ways to ensure that mail is not misdirected, but may not ask him questions about his intellectual disability unless there is objective evidence that his poor performance is related to his disability.

5. Are there any other instances when an employer may ask an employee with an intellectual disability about his condition?

Yes. An employer also may ask an employee about an intellectual disability when it has a reasonable belief that the employee will be unable to safely perform the essential functions of his job because of his disability. In addition, an employer may ask an employee about his intellectual disability to the extent the information is necessary:

- to support the employee's request for a reasonable accommodation needed because of his intellectual disability;
- to verify the employee's use of sick leave related to his intellectual disability if the employer requires all employees to submit a doctor's note to justify their use of sick leave; [16] or
- to enable the employee to participate in a voluntary wellness program.[17]

Keeping Medical Information Confidential

With limited exceptions, an employer must keep all medical information it learns about an applicant or employee confidential and must keep this information separate from general personnel files. Under the following circumstances, however, an employer may disclose that an employee has an intellectual disability:

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

6. May an employer tell employees who ask why their co-worker is allowed to do something that generally is not permitted (such as additional time to finish training) that the employee is receiving a reasonable accommodation?

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure that the employee has a disability. Rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining employee privacy. Employers may be able to avoid many of these kinds of questions by giving all employees training on the requirements of equal employment opportunity laws, including the ADA.

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

ACCOMMODATING PERSONS WITH INTELLECTUAL DISABILITIES

The ADA requires employers to provide adjustments or modifications -- called reasonable accommodations -- to enable applicants and employees with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (that is, a significant difficulty or expense). Accommodations vary depending on the needs of the individual with a disability. Not all employees with intellectual disabilities will need an accommodation or require the same accommodations, and most of the accommodations a person with an intellectual disability might need will involve little or no cost.

7. What types of reasonable accommodations may persons with intellectual disabilities need for the application process?

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

- providing someone to read or interpret application materials for a person who has limited ability to read or to understand complex information;
- demonstrating, rather than describing, to the applicant what the job requires;

- modifying tests, training materials, and/or policy manuals; and
- replacing a written test with an "expanded" interview.[18]

Example 4: A person with an intellectual disability applies for a position as a baker and is scheduled for an interview with the employer. The applicant also has a speech and hearing impairment. The employer can accommodate the applicant by conducting an expanded interview to allow the applicant to demonstrate his ability to do the job.

8. What specific types of reasonable accommodations may employees with intellectual disabilities need to do their jobs or to enjoy the benefits and privileges of employment?

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

- reallocation of marginal tasks to another employee

Example 5: An individual with an intellectual disability is hired as part of a crew of three employees that works at the concession stand at a baseball stadium. He helps stock the counter with candy and snacks; at closing time, he cleans the counters and equipment and restocks the counters with supplies. However, he cannot perform the function of accurately counting money at closing time, which is usually done by the crew leader. Another concession stand employee, who is able to count money when the crew leader cannot, also sometimes performs the function of placing empty boxes and trash in designated bins at closing time. These are functions that the employee with an intellectual disability can perform. Allowing the employee with an intellectual disability to perform these functions instead of counting money, which is a marginal function for his position, is a reasonable accommodation.

- training or detailed instructions to do the job, including having the trainer or supervisor:
  - give instructions at a slower pace;
  - allow additional time to finish training;
  - break job tasks into sequential steps required to perform the task;
  - use charts, pictures, or colors;

Example 6: As part of his job, a restaurant worker with an intellectual disability refills condiment containers. The manager uses color-coding so the employee can identify the specific condiment that goes in each container.

Example 7: A retail store employee with an intellectual disability and attention deficit disorder loads customers' cars with purchased items. The store has a dress code that he often fails to follow. His supervisor

gives him a sheet with photographs illustrating both proper attire and items of clothing prohibited by the store's employee dress code.

- provide a tape recorder to record directions as a reminder of steps in a task;
- use detailed schedules for completing tasks; and
- provide additional training when necessary.

  Example 8: A hotel cleaning crew worker with an intellectual disability and autism has not performed his cleaning duties to company quality standards. His supervisor offers him additional training and allows him to bring a third party to the training sessions to assist him in learning proper cleaning techniques.

- a job coach, who can:
  - assist the employee in learning how to do the job;
  - provide intensive monitoring, training, assessment, and support;
  - help develop a healthy working relationship between management and the employee by encouraging appropriate social interaction and maintaining open communications; and
  - assist the parties in determining what reasonable accommodation is needed.
- modified work schedule or shift change

  Example 9: A grocery stock worker with an intellectual disability is scheduled to attend group counseling sessions on Tuesdays during working hours. Her employer has granted her request for a modified work schedule, allowing her to leave two hours early each Tuesday to attend the counseling sessions and to make up for the time by beginning work two hours early on Tuesdays.

- help in understanding job evaluations or disciplinary proceedings
  - An employer may allow the employee to bring someone to a job evaluation or disciplinary meeting to help him ask questions and to explain the job evaluation results or the purpose of the meeting.
- acquisition or modification of equipment or devices

  Example 10: A receptionist with an intellectual disability and fetal alcohol syndrome has difficulty remembering the telephone numbers of office workers when transferring calls. As a reasonable accommodation, the employer purchased a large-button telephone with a speed dial and clearly labeled buttons with the names of office staff.

- work station placement

Example 11: An employer relocates a data entry employee with an intellectual disability and attention deficit disorder from a large open area where employees work side-by-side to a quieter part of the office to accommodate limitations on the employee's ability to concentrate.

- reassignment to a vacant position when the employee is no longer able to perform current job

Example 12: For five years, a factory worker with an intellectual disability operated a cutting tool by hand until the plant replaced the tool with a more complex automated machine. Although the worker has received training, his functional limitations prevent him from learning how to operate the new equipment and there are no reasonable accommodations that will enable him to do his job. The worker asks his supervisor if there is some other job he can do at the plant. The employer should work with the employee to determine whether he can be reassigned to a vacant position for which he is qualified. The vacant position must be equivalent in terms of pay and status to the original job, or as close as possible if no equivalent position exists. The position need not be a promotion, although the employee should be able to compete for any promotion for which he is eligible.

Although these are some examples of the types of accommodations commonly requested by employees with intellectual disabilities, other employees may need different changes or adjustments. Employers should ask the particular employee, or person acting on the employee's behalf, what he needs that will help him do his job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the website for the Job Accommodation Network (JAN)(http://askjan.org/media/intcog.html) provides information about many types of accommodations for employees with intellectual disabilities.

9. How does a person with an intellectual disability request a reasonable accommodation?

There are no "magic words" that a person has to use when requesting a reasonable accommodation. An employee simply has to tell the employer that she needs an adjustment or change at work because of her intellectual disability. A request for a reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with an intellectual disability.

Example 13: A person with an obvious intellectual disability wants to apply for a job in a large retail store. The store manager gives him the application forms. The applicant tells the manager that he needs someone to assist him with the application. This is a request for a reasonable accommodation.

Example 14: A video store clerk with an intellectual disability and Prater-Willi Syndrome, who usually is scheduled to work when the

store opens at 10:00 a.m., tells his supervisor that he needs to change his work schedule because the medication he takes every night makes it difficult for him to wake up before noon. This is a request for a reasonable accommodation.

Example 15: The mother of a clerk with Down Syndrome calls the clerk's supervisor to tell him that she wants to schedule a meeting to discuss problems that her son is having with his job and some possible solutions. This is a request for a reasonable accommodation.

10. Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with an intellectual disability has not requested one?

Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[19]

Example 16: A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that the employee is unable to ask for a reasonable accommodation because of his intellectual disability. The employer asks the employee about the misplaced items and asks if it would be helpful to label the containers and refrigerator shelves. When the employee replies that it would, the employer, as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name or picture.

11. May an employer ask for documentation when a person with an intellectual disability requests a reasonable accommodation?

Yes. An employer may request reasonable documentation where a disability or the need reasonable accommodation is not known or obvious. An employer, however, is entitled only to documentation sufficient to establish that the employee has an intellectual disability and to explain why an accommodation is needed. A request for an employee's entire medical record, for example, would be inappropriate as it likely would include information about conditions other than the employee's intellectual disability.[20]

When a person's intellectual disability is obvious, the employer should focus on requesting documentation that describes the limitations stemming from the disability rather than on establishing that the person, in fact, has a disability. If a person has

more than one disability, an employer may only ask for information related to the disability that requires accommodation. The employer may request that a physician or an appropriate professional provide information or documentation of a person's impairment. Information about a person's functional limitations also can be obtained from non-professionals, such as the applicant, his family members, and friends.

> **Example 17**: A marketing office clerk with an intellectual disability has difficulty concentrating and meets with his supervisor every morning to discuss his tasks for the day. In order to remember his assigned tasks, the clerk needs his instructions in writing, but due to his disability, he has difficulty writing clearly. The clerk tells his supervisor about his disability and requests a personal digital assistant (PDA), where his supervisor can record and he can retrieve step-by-step audio and video instructions regarding his tasks. The employee's supervisor may ask him for reasonable documentation about his disability and why the disability requires the use of a PDA.

12. Does an employer have to grant every request for an accommodation?

No. An employer does not have to provide an accommodation if doing so will be an undue hardship. Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense. An employer also does not have to eliminate an essential function of a job as a reasonable accommodation, tolerate performance that does not meet its standards, or excuse violations of conduct rules that are job-related and consistent with business necessity and that the employer applies consistently to all employees (such as rules prohibiting violence, threatening behavior, theft, or destruction of property).

If more than one accommodation would be effective, the employee's preference should be given primary consideration, although the employer is not required to provide the employee's first choice of reasonable accommodation. If a requested accommodation is too difficult or expensive, an employer may choose to provide an easier or less costly accommodation as long as it is effective in meeting the employee's needs.

> **Example 18**: A photocopy clerk with an intellectual disability has great difficulty reading the many work-related memoranda that her supervisor sends to the office staff. The employee has no difficulty understanding oral communication. The clerk asks her supervisor to record all the memoranda that are distributed. The supervisor asks whether having someone read and explain the memoranda would work instead, and the employee agrees that it would. Since both accommodations are effective, the supervisor may decide to have someone read and explain the memoranda to the employee.

13. May an employer be required to provide more than one reasonable accommodation for the same person with a disability?

Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some employees with intellectual disabilities may require only one reasonable accommodation, others may need more than one. For example, an employee with an intellectual disability may require charts or pictures to learn how to do a job and later may require additional training. An employer must consider each request for a reasonable accommodation and determine whether it would be effective and whether providing it would pose an undue hardship.

14. Do persons with intellectual disabilities need more supervision than other employees?

Not necessarily. The type and amount of supervision required for an employee with an intellectual disability will depend on the type of job and the person's individual strengths. Although it may take longer for some individuals with intellectual disabilities to master the tasks associated with a job, with the proper training, many can perform as effectively as employees without intellectual disabilities in the same job. In other situations, supervisors may have to modify how they give instructions or communicate what needs to be done as a form of reasonable accommodation. For example, some employees with intellectual disabilities may benefit from additional day-to-day guidance or feedback, or from having a large task broken down into smaller parts that are easier to understand.

CONCERNS ABOUT SAFETY

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

15. When may an employer refuse to hire or terminate a person with an intellectual disability because of safety concerns?

An employer may refuse to hire or terminate a person with an intellectual disability for safety reasons when the individual poses a direct threat. A "direct threat" is a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation.[21] This determination must be based on objective, factual evidence.

In making a direct threat assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also must consider:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.[22]

The harm must be serious and likely to occur, not remote or speculative. Finally, the employer must determine whether any reasonable accommodation (for example,

temporarily limiting an employee's duties, temporarily reassigning an employee, or placing an employee on leave) would reduce or eliminate the risk.[23]

> **Example 19**: An employer cannot deny an applicant with an intellectual disability a job preparing food in a restaurant kitchen based on the assumption that people with intellectual disabilities are incapable of using sharp knives or working around hot ovens without injuring themselves. To assess whether the applicant would actually pose a direct threat, the employer must consider information from an appropriate professional and the applicant himself concerning the limitations imposed by the disability. The employer should also consider any training or prior work experience the applicant may have had, and whether he has had safety problems performing tasks similar to those required for the current position.

> **Example 20**: An employer may deny a factory job requiring work around dangerous machinery to someone whose intellectual disability makes it impossible for her to understand and follow safety procedures.

HARASSMENT

The ADA prohibits harassment, or offensive conduct, based on disability just as other federal laws prohibit harassment based on race, sex, color, national origin, religion, age, and genetic information. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

16. What should employers do to prevent and correct harassment?

Employers should make clear that they will not tolerate harassment based on disability or on any other basis. This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager. Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action. For more information on the standards governing harassment under all of the EEO laws, see www.eeoc.gov/policy/docs/harassment.html.

RETALIATION

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation related to a charge of employment discrimination. It is also unlawful for an employer to

retaliate against someone for requesting a reasonable accommodation. Persons who believe that they have experienced retaliation may file a charge of retaliation as described below.

HOW TO FILE A CHARGE OF EMPLOYMENT DISCRIMINATION

Against Private Employers and State/Local Governments

Any person who believes that his or her employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a charge of discrimination with the EEOC. A third party may also file a charge on behalf of another person who believes he or she experienced discrimination. For example, a family member, social worker, or other representative can file a charge on behalf of someone who is incapacitated because of diabetes. The charge must be filed by mail or in person with the local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination agency has the authority to grant or seek relief as to the challenged unlawful employment practice.

The EEOC will send the parties a copy of the charge and may ask for responses and supporting information. Before formal investigation, the EEOC may select the charge for EEOC's mediation program. Both parties have to agree to mediation, which may prevent a time consuming investigation of the charge. Participation in mediation is free, voluntary, and confidential.

If mediation is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination has occurred. If reasonable cause is found, the EEOC will then try to resolve the charge with the employer. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a court action. A charging party can also request a notice of a "right to sue" from the EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving the notice. For a detailed description of the process, you can visit our website at www.eeoc.gov/employees/howtofile.cfm.

Against the Federal Government

If you are a federal employee or job applicant and you believe that a federal agency has discriminated against you, you have a right to file a complaint. Each agency is required to post information about how to contact the agency's EEO Office. You can contact an EEO Counselor by calling the office responsible for the agency's EEO complaints program. Generally, you must contact the EEO Counselor within 45 days from the day the discrimination occurred. In most cases the EEO Counselor will give you the choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If you do not settle the dispute during counseling or through ADR, you can file a formal discrimination complaint against the agency with the agency's EEO Office. You

must file within 15 days from the day you receive notice from your EEO Counselor about how to file. Once you have filed a formal complaint, the agency will review the complaint and decide whether or not the case should be dismissed for a procedural reason (for example, your claim was filed too late). If the agency doesn't dismiss the complaint, it will conduct an investigation. The agency has 180 days from the day you filed your complaint to finish the investigation. When the investigation is finished, the agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred. For a detailed description of the process, you can visit our website at www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

Footnotes

[1] See U.S.C. §12102(2); 29 C.F.R. §1630.2(g).

[2] For example, disability laws in California, Pennsylvania, New Jersey, and New York apply to employers with fewer than 15 employees.

[3] See "The Question and Answer Series" under "Available Resources" on EEOC's website at www.eeoc.gov/laws/types/disability.cfm.

[4] Sometimes "intellectual disability" is also referred to as developmental disability, which is a broader term that includes ASD (autism spectrum disorders), epilepsy, cerebral palsy, developmental delay, fetal alcohol syndrome (or FASD) and other disorders that occur during the developmental period (birth to age 18). See Definition of Intellectual Disability, American Association of Intellectual and Developmental Disabilities (AAIDD), www.aaidd.org/content_100.cfm?navID=21; see also Intellectual Disability, The Arc, www.thearc.org/page.aspx?pid=2543.

[5] According to the AAIDD, the following five assumptions are essential to the application of this definition:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.

   (5)

6. With appropriate personalized supports over a sustained period, the life functioning of the person with an intellectual disability generally will improve. www.aaidd.org/content_104.cfm.

[6] Id.

[7] See Peter David Blanck, The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation, American Association on Mental Retardation (1998) at 17, citing Ability: The Bridge to the Future, President's Committee on Employment of Persons with Disabilities, Educational Kit (July 1997).

[8] 29 C.F.R. §1630.3(j)(3)(iii).

[9] Id. at §1630.2(k).

[10] Id. at §1630.2(g)(l)(iii).

[11] Federal contractors are required under 41 C.F.R. § 60-741.42, a regulation issued by the Office of Federal Contract Compliance Programs (OFCCP), to invite applicants to voluntarily self-identify as persons with disabilities for affirmative action purposes. The ADA prohibition on asking applicants about medical conditions at the pre-offer stage does not prevent federal contractors from complying with the OFCCP's regulation. See Letter from Peggy R. Mastroianni, EEOC Legal Counsel, to Patricia A. Shiu, Director of OFCCP, www.dol.gov/ofccp/regs/compliance/section503.htm#bottom.

[12] Id; see also EEOC Enforcement Guidance on Preemployment Disability-Related Questions & Medical Examinations (Oct. 10, 1995) (hereinafter EEOC Preemployment Guidance). This enforcement guidance is available at www.eeoc.gov/policy/docs/preemp.html.

[13] Some intellectual disabilities stem from genetic causes, such as Down or Fragile x syndromes. www.thearc.org/page.aspx?pid=2543. Asking applicants or employees about genetic conditions also violates Title II of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. 2000ff et seq., which prohibits employers from requesting, requiring, or purchasing genetic information (including family medical history) about applicants or employees. 29 C.F.R. §1635.8(a).

[14] See EEOC Preemployment Guidance supra note 13.

[15] An employer also may ask an employee about his epilepsy or send the employee for a medical examination when it reasonably believes the employee may pose a direct threat because of his diabetes. See "Concerns About Safety."

[16] An employer also may ask an employee for periodic updates on his condition if the employee has taken leave and has not provided an exact or fairly specific date of return or has requested leave in addition to that already granted. Of course, an employer may call employees on extended leave to check on their progress or to express concern for their health without violating the ADA.

[17] The ADA allows employers to conduct voluntary medical examinations and activities, including obtaining voluntary medical histories, which are part of an employee wellness program (such as a smoking cessation or diabetes detection screening and management program), as long as any medical records (including, for example, the results any diagnostic tests) acquired as part of the program are kept

confidential. See Q&A 22 in EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, http://www.eeoc.gov/policy/docs/guidance-inquiries.html

[18] An expanded interview allows applicants who have difficulty describing their abilities to demonstrate their skills at the employment office or work site.

[19] See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002) at Q&A 40. This enforcement guidance is available at www.eeoc.gov/policy/docs/accommodation.html.

[20] Requests for documentation to support a request for accommodation may violate Title II of GINA where they are likely to result in the acquisition of genetic information, including family medical history. 29 C.F.R. §1635.8(a). For this reason employers may want to include a warning in the request for documentation that the employee or the employee's doctor should not provide genetic information. Id. at §1635.8(b)(1)(i)(B).

[21] 29 C.F.R. §1630.2(r).

[22] Id.

[23] Id.