

# **AFGE's Guide to** **Defending the EEO** **Rights of** **Individuals with** **Disabilities**

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO. AFGE represents approximately 600,000 employees of the United States Federal Government and the government of the District of Columbia.

Under the leadership of the National Vice President for Women's and Fair Practices, the Women's and Fair Practices Departments are devoted to promoting the civil, human, women's and workers' rights of Federal and D.C. government workers.

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## Table of Contents

1. Introduction.....	2
2. Disability Discrimination.....	3
3. Governing Laws.....	4
a. Rehabilitation Act of 1973.....	4
b. Americans with Disabilities Act of 1990.....	5
c. Americans with Disabilities Amendments Act of 2008 .....	6
d. Executive Orders and EEOC Guidance .....	7
4. Who is Protected by the ADA and Rehabilitation Act? .....	10
5. What are Physical and Mental Impairments Under the ADA and Rehabilitation Act?.....	12
6. What is Substantially Limiting?.....	14
7. What are Major Life Activities and Major Bodily Functions? .....	15
8. What Does it Mean to be a Qualified Individual With a Disability?.....	16
9. What is an Essential Job Function? .....	17
10. Types of Disability Discrimination.....	18
11. Remedies for Disability Discrimination .....	19
12. Model Analysis for Disparate Treatment & Reasonable Accommodation .....	20
13. Reasonable Accommodation .....	22
14. Requesting a Reasonable Accommodation.....	23
15. Interactive Process .....	24
16. Undue Hardship .....	26
17. Possible Accommodations .....	28
a. Vision Impairment Accommodations .....	28
b. Hearing Impairment Accommodations.....	29
c. Psychological/Psychiatric Impairment Accommodations .....	30
d. Musculoskeletal/Mobility Impairment Accommodations .....	31
e. Learning Disability Accommodations .....	32
f. Past Drug Users and Alcoholism Accommodations.....	33
g. General Accommodations.....	34
h. Reassignment as an Accommodation .....	35
18. Medical Inquiries Related to Accommodations.....	36
19. Medical Inquiries For Other Reasons .....	38
20. Organize! Organize! Organize!.....	40
Appendix A: The Rehabilitation Act of 1973.....	41
Appendix B: Policy Guidance on Executive Order 13164 .....	63
Appendix C: Notice Concerning ADA Amendments Act of 2008.....	88
Appendix D: Fact Sheet on EEOC’s Regulations Implementing ADAAA.....	91

# **1. INTRODUCTION**

Nearly 1 in 5 people in the United States have a disability. The employment rate for individuals with disabilities aged 21-64 was 41% compared to a 79% employment rate of individuals without disabilities in the same age group. Among people age 15 to 64 with severe disabilities, 10.8% experienced persistent poverty; compared to 3.8% of individuals without disabilities living in poverty.<sup>1</sup>

This United States Census data demonstrates that the unemployment and poverty rates for individuals with disabilities far exceeds those of individuals without disabilities. There are numerous laws that provide individuals with disabilities various rights and protections in employment. Some of these laws include the Federal Employee Compensation Act, Social Security Act, Family Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and Rehabilitation Act.

This guide focuses on federal employees' equal employment opportunity rights to be free from discrimination under the Rehabilitation Act and the ADA. This guide should be used in conjunction with AFGE's Guide to Fighting Discrimination.

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<sup>1</sup> U.S. Census Bureau News Release, July 25, 2012 (available at: <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>) (last accessed May 29, 2015).

## **2. DISABILITY DISCRIMINATION**

Disability discrimination occurs when an employer treats a qualified individual with a disability who is an employee or applicant unfavorably because he/she has a disability, has a history of a disability, or because he/she is believed to have a disability. Disability discrimination can manifest in multiple ways:

### **a. Disability Discrimination & Adverse Actions**

The law forbids discrimination in employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

### **b. Disability Discrimination & Harassment**

It is illegal to harass an individual based on his/her disability. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so pervasive 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). The harasser can be the victim's supervisor, a supervisor in another area, or a co-worker.

### **c. Disability Discrimination & Reasonable Accommodation**

The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer. A reasonable accommodation is any change in the work environment to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

**Remember:** While federal anti-discrimination laws do not require an employer to accommodate an employee who must care for a family member with a disability, the Family and Medical Leave Act (FMLA) may require an employer to take such steps. For more information on FMLA, please refer to AFGE's Guide to Family Friendly and Family Medical Leave.

### **3. GOVERNING LAWS**

#### **a. The Rehabilitation Act of 1973<sup>2</sup>**

The Rehabilitation Act of 1973 (Act) is a federal civil rights law that prohibits the federal government from discriminating against applicants and employees with disabilities. Regulations interpreting the Act can be found at Title 29 of Code of Federal Regulations (CFR), sections 1614.203<sup>3</sup> and 1630<sup>4</sup>. Federal employees and applicants are covered by the Rehabilitation Act of 1973.

In short, the Rehabilitation Act requires that no agency discriminate against a “qualified individual” because of the individual’s actual or perceived disability. The agency shall not discriminate in regards to job application procedures, hiring, assignments, evaluations, leave, advancement, discipline, layoff/recall, discharge, compensation, job training, and other terms, conditions, and privileges of employment. Additionally, the Rehabilitation Act requires agencies to provide a “reasonable accommodation” that does not cause the agency “undue hardship” when requested by a qualified employee with a disability.

Relevant sections of the Act include:

**Section 501** of the Act prohibits discrimination on the basis of disability in federal employment and requires federal agencies to establish affirmative action plans for the hiring, placement, and advancement of people with disabilities in federal employment.

**Section 503** of the Act prohibits federal contractors and subcontractors from discriminating in employment against individuals with disabilities, and requires these employers to take affirmative action to recruit, hire, promote, and retain these individuals. It requires that contractors and subcontractors provide reasonable accommodations to the known physical or mental limitations of an

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<sup>2</sup> For relevant excerpts, please see Appendix A.

<sup>3</sup> Available at: <http://www.gpo.gov/fdsys/granule/CFR-2009-title29-vol4/CFR-2009-title29-vol4-sec1614-203> (last accessed May 29, 2015).

<sup>4</sup> Available at: <https://www.federalregister.gov/select-citation/2011/03/25/29-CFR-1630> (last accessed May 29, 2015).

otherwise qualified individual with a disability, unless it demonstrates that the accommodation would impose an undue hardship on business operations.

**Section 504** of the Act prohibits discrimination against persons with disabilities in any federally funded programs or activities and prohibits disability-based job discrimination of any kind and requires that employers make reasonable accommodations for employees with disabilities. Section 504 also requires that programs receiving federal funds to be accessible to individuals with disabilities.

**Section 508** of Act requires that when federal agencies develop, procure, maintain, or use electronic and information technology, federal employees and the general public with disabilities have access to and use of information that is comparable to access to and use of information by individuals without disabilities.

#### **b. Americans with Disabilities Act of 1990**

Seventeen years after the Rehabilitation Act of 1973 was passed, the Americans with Disabilities Act (“ADA”) was enacted. The ADA prohibits discrimination against individuals with disabilities in the private sector. The language of the ADA was based on the Rehabilitation Act. Therefore, the two Acts are very similar. As a result, case law that interprets the ADA often applies to the Rehabilitation Act.

On May 21, 2002, the EEOC published a final rule to implement the amendment of Section 501 of the Rehabilitation Act, under the Rehabilitation Act Amendments of 1992. The rule went into effect on June 20, 2002. This rule creates more uniformity between the ADA and the Rehabilitation Act because it changes the regulations interpreting the Rehabilitation Act at 29 CFR Section 1614.203.

The Rehabilitation Act has two subsections. The first subsection retains the language from the old regulation that states that the federal government is to be a model employer. The second subsection incorporates by reference the ADA regulations at 29 CFR Section 1630.

While the ADA and Rehabilitation Act were always similar, they were also slightly different. Those differences are eliminated now that the ADA regulations are incorporated in the Rehabilitation Act regulations.

### c. **The Americans With Disabilities Amendments Act of 2008**

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act (ADA Amendments Act or ADAAA). The ADAAA emphasizes that the definition of disability should be interpreted broadly and shall not require extensive analysis.

The ADAAA retains the basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the ADAAA:

- Directs Equal Employment Opportunity Commission (EEOC) to revise the portion of its regulations defining the term "**substantially limits**";
- Expands the definition of "**major life activities**" by including two non-exhaustive lists:
  - The first list includes many **activities** that the EEOC has recognized (e.g., walking, hearing, talking, seeing) as well as activities that EEOC has not specifically recognized (e.g., thinking, concentrating, and communicating);
  - The second list includes **major bodily functions** (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- States that **mitigating measures** other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- Clarifies that an impairment that is **episodic or in remission** is a disability if it would substantially limit a major life activity when active;
- Changes the definition of "**regarded as**" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an



action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;

- Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

The ADA Amendments Act was effective as of January 1, 2009. EEOC's regulations to implement the equal employment provisions of the ADA Amendments Act were effective as of March 25, 2011.<sup>5</sup>

#### **d. Executive Orders and EEOC Guidance**

- Executive Order 13163, Increasing the Opportunity for Individuals With Disabilities To Be Employed in the Federal Government<sup>6</sup>

Executive Order (E.O.) 13163 was signed on July 26, 2000 by President Clinton. E.O. 13163 is based on the premise that the federal government will hire 100,000 employees with disabilities over the next 5 years. In order to facilitate such representation, agencies are to (1) create a plan by which to increase representation, (2) expand outreach efforts, and (3) increase endeavors to accommodate.

- Executive Order 13548, Increasing Federal Employment of Individuals With Disabilities<sup>7</sup>

E.O. 13548 was signed July 26, 2010 by President Obama. The Order expresses the President's commitment to E.O. 13163 and requires the Director of OPM in consultation with the Secretary of Labor, the Chair of the EEOC, and the Director of the Office of Management and Budget to design model recruitment and hiring strategies for agencies seeking to increase their employment

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<sup>5</sup> Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA (available at: [http://www.eeoc.gov/laws/regulations/adaaa\\_fact\\_sheet.cfm](http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm)) (last accessed May 29, 2015).

<sup>6</sup> Executive Order 13163 (available at: <http://www.gpo.gov/fdsys/pkg/FR-2000-07-28/pdf/00-19322.pdf>) (last accessed May 29, 2015).

<sup>7</sup> Executive Order 13548 (available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-07-30/pdf/2010-18988.pdf>) (last accessed May 29, 2015).

of people with disabilities and develop mandatory training programs for both human resources personnel and hiring managers on the employment of individuals with disabilities.

- Executive Order 13164, Requiring Federal Agencies To Establish Procedures To Facilitate the Provision of Reasonable Accommodation<sup>8</sup>

E.O. 13164 was signed on July 26, 2000 by President Clinton. It requires agencies to create a procedure, subject to collective bargaining, that facilitates the reasonable accommodation request, the interactive process, and the granting or denial of the request. Agencies are also required to create an informal dispute resolution process – separate from the statutory EEO complaint process – for reconsideration of denials of reasonable accommodation requests.

- EEOC Guidance on E.O. 13164, Establishing Procedures to Facilitate the Provision of Reasonable Accommodation<sup>9</sup>

This policy guidance elaborates on the accommodation request, interactive process, undue hardship, and reasonable accommodation. The guidance does not provide model language for procedures. However the EEOC issued practical tips and enforcement guidance on drafting reasonable accommodation policies.<sup>10</sup>

**Remember:** The Rehabilitation Act, Americans with Disabilities Act, Americans with Disabilities Amendments Act, and Executive Orders all prohibit discrimination in employment against individuals with disabilities.

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<sup>8</sup> Executive Order 13164 (available at: <http://www.gpo.gov/fdsys/pkg/FR-2000-07-28/pdf/00-19323.pdf>) (last accessed May 29, 2015).

<sup>9</sup> Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation (available at: [http://www.eeoc.gov/policy/docs/accommodation\\_procedures.html](http://www.eeoc.gov/policy/docs/accommodation_procedures.html)) (last accessed May 29, 2015).

<sup>10</sup> For more information, see *Practical Advice For Drafting And Implementing Reasonable Accommodation Procedures Under Executive Order 13164* (available at: [http://www.eeoc.gov/policy/docs/implementing\\_accommodation.html](http://www.eeoc.gov/policy/docs/implementing_accommodation.html)) and *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (available at: <http://www.eeoc.gov/policy/docs/accommodation.html>) (last accessed May 29, 2015).

**Remember:** While Executive Orders are binding on federal agencies, the EEOC does not have jurisdiction to review violations of these Executive Orders. Violations of Executive Orders must be appealed within the offending Agency, therefore it is recommended that an employee consult the Agency's Executive Order complaint process to learn more about alleging violations of Executive Orders.

**Remember:** Violations of the Rehabilitation Act, ADA, and ADAAA are subject to EEOC review and can be pursued through a number of forums such as the negotiated grievance procedure subject to a collective bargaining agreement (CBA), an EEO complaint, or a Merit Systems Protection Board (MSPB) Appeal.

## **4. WHO IS PROTECTED BY THE ADA AND REHABILITATION ACT?**

Not everyone with a medical condition is protected by the ADA or Rehabilitation Act. In order to be protected, a person must be an individual with a disability, as defined by these Acts. A person can show that he/she meets the definition in one of three ways:

1. A person **has** a physical or mental impairment that substantially limits a major life activity or major bodily function (such as walking, talking, seeing, hearing, or learning).

### **Examples:**

- An individual with **diabetes** has a **physical impairment** that substantially limits a major bodily function of **metabolism**.
- An individual with **ADHD** has a **mental impairment** that substantially limits a major life activity of **concentrating**.
- An individual with a **partial hearing loss** in one ear has a **physical impairment** that substantially limits a major life activity of **hearing**.

2. A person **has a history/record** of a physical or mental impairment.

### **Examples:**

- An individual who had a **history of clinical depression** has a **record** of a **mental impairment** that substantially limits a major life activity of **thinking**.
- An individual with a **history of a pinched nerve** has a **record** of a **physical impairment** that substantially limits a major life activity of **standing**.
- An individual with a **history of clinical anxiety** has a **record** of a **mental impairment** that substantially limits a major life activity of **concentrating**.

3. A person **is regarded as** having a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he/she does not have such an impairment).

**Examples:**

- An individual who walks with a distinct gait is **regarded** by his employer as having a **physical impairment** that substantially limits a major life activity of **walking**, however the individual does not have any physical impairment in reality.
- An individual whose mother had **breast cancer** may be **regarded** as having a **physical impairment** that substantially limits a major bodily function of **normal cell growth**.
- An individual who **volunteers with a mental health clinic** may be **regarded** as having a **mental impairment** that substantially limits a major life activity of **thinking**.

**Remember:** A person may be considered an individual with a disability for the purpose of receiving Social Security or Social Security Disability Benefits (SSI/SSDI), worker's compensation, or a disability parking permit from the Department of Motor Vehicles (DMV), but that person **does not automatically meet the definition** of disability under the ADA

**Remember:** The EEOC does not have jurisdiction over worker's compensation disputes, social security disputes, or any other disputes concerning disability-related benefits that are defined by statutes other than the ADA or Rehabilitation Act.

**Remember:** An individual receiving SSDI or worker's compensation may qualify for a reasonable accommodation. The key is to show that the individual is disabled under the ADA (regardless of their disability status under another statute), and that they are qualified for their position with a reasonable accommodation.

## **5. WHAT ARE PHYSICAL OR MENTAL IMPAIRMENTS UNDER THE ADA AND REHABILITATION ACT?**

As discussed in Chapter 4, qualified applicants and federal employees are protected against discrimination under the ADA and Rehabilitation Act if they meet one of the three definitions of disability:

- (1) possessing a **physical** or **mental impairment** that substantially limits one or more major life activities;
- (2) possessing a record of such an impairment; or
- (3) being regarded as having such an impairment.

**Physical impairments** are defined 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...”<sup>11</sup> Examples of physical impairments may include:

- Epilepsy
- Amputation
- HIV+
- Diabetes
- Hypertension
- Asthma
- Cancer
- Arthritis
- Multiple sclerosis

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<sup>11</sup> 29 C.F.R. Section 1630.2(h).

**Mental impairments** are defined as “any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>12</sup> Examples of mental impairments may include:

- Clinical Depression
- Post-Traumatic Stress Disorder (PTSD)
- Bipolar Disorder
- Schizophrenia
- Attention Deficit Hyperactivity Disorder (ADHD)

Many conditions are considered **neither physical nor mental impairments**, therefore they are not considered disabling conditions under the ADA or Rehabilitation Act. Some examples are:

- Pregnancy (note: a condition such as diabetes caused by pregnancy may be a physical impairment but the act of being pregnant itself is not an impairment)
- Personality traits such as being loud or enthusiastic
- Lack of education
- Pyromania
- Left-handedness
- Stress due to general work pressures
- Temporary sprain (note: a temporary injury that continues can become a physical impairment)
- Current use of illegal drugs
- Multiple sclerosis

**Remember:** Past drug addiction and alcoholism are impairments which are protected under the Rehabilitation Act if an individual completed or recently participated in a rehabilitation program. Current drug users are not protected under the Rehabilitation Act.

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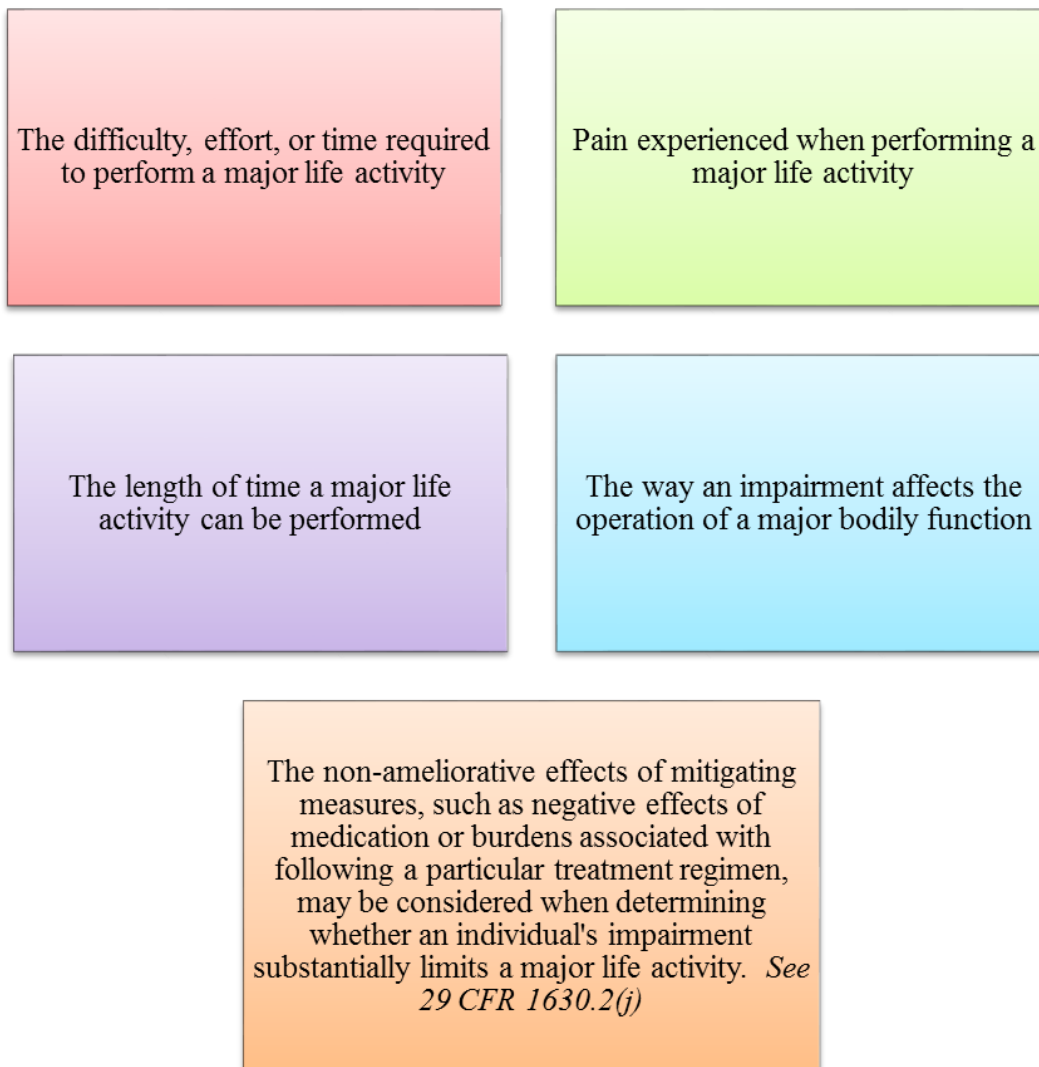
<sup>12</sup> 29 C.F.R. Section 1630.2(h).

## 6. WHAT IS SUBSTANTIALLY LIMITING?

To meet the definition of disability under the ADA and Rehabilitation Act, an individual's physical or mental impairment must "**substantially limit**" a **major life activity** or **major bodily function** as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict the individual to be considered "substantially limiting."

The determination of whether an individual is experiencing a substantial limitation in a major life activity is an assessment based on comparing an individual's ability to perform a major life activity or major bodily function with that of most people in the general population.

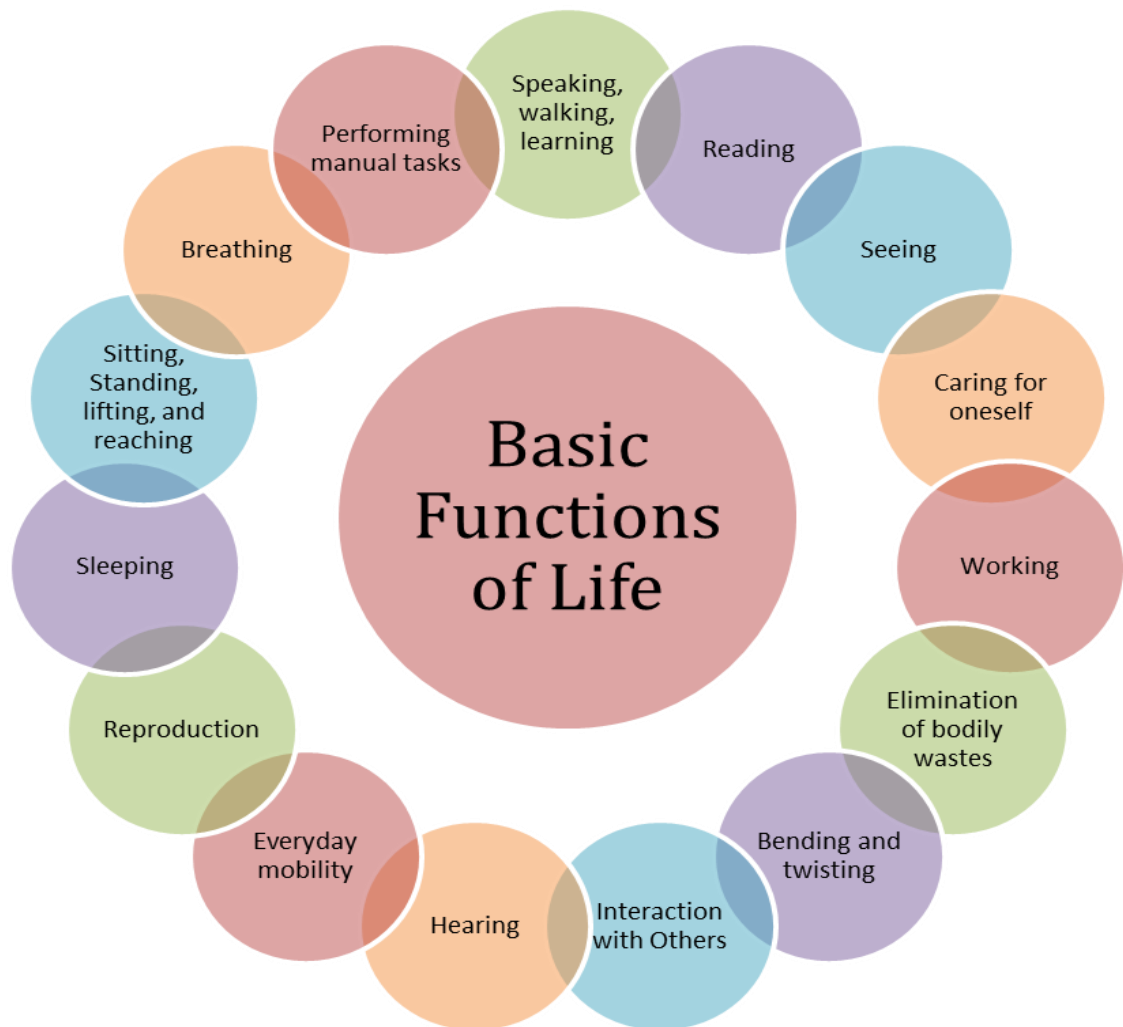
### Factors to determine "substantially limits":





## **7. WHAT ARE MAJOR LIFE ACTIVITIES AND MAJOR BODILY FUNCTIONS?**

# **Major Life Activities**



Major bodily functions include functions of the immune system; special sense organs and skin; normal cell growth; digestive system; genitourinary systems; bowel; bladder; neurological systems; brain; respiratory system; circulatory system; cardiovascular system; endocrine system; hemic system; lymphatic system; musculoskeletal system; and reproductive system.<sup>13</sup>

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<sup>13</sup> 29 C.F.R. Section 1630.2(i).

## **8. WHAT DOES IT MEAN TO BE A QUALIFIED INDIVIDUAL WITH A DISABILITY?**

In addition to being considered an individual with a disability, a person must be a **qualified** individual in order to receive the protection of the ADA and Rehabilitation Act.

A person is **qualified** if:

- He/she has the required education, with or without reasonable accommodation;
- He/she has the required work experience, with or without reasonable accommodation; and
- He/she can perform the **essential functions** of the position without endangering the health and safety of the individual or others, with or without reasonable accommodation

A person is **not qualified** if:

- He/she does not have the required license or certificate for the position;
- He/she does not have the required education or experience because of his/her disability;
- He/she requires an accommodation in order to perform the position's essential functions, but is not willing to accept a reasonable accommodation offered by the employer;
- He/she cannot identify a reasonable accommodation that would enable the person to overcome workplace barriers to meet his/her essential functions; and/or
- He/she can only be accommodated by creating an undue hardship on the employer.

## **9. WHAT IS AN ESSENTIAL JOB FUNCTION?**

Every job has aspects to it that are essential and those that are collateral. An **essential job function** is a job duty or skill that is vital to the performance of the job, or one without which the position could not be performed. Essential job functions vary for each position.

In order to determine whether a job function is essential, ask whether it is:

- Listed in the job description or CBA as an essential job function or as a critical element of a rating scheme, typically before the position is advertised;
- A duty that the individual actually performs as part of the position;
- A duty that other individuals in the workplace could perform without disturbing the flow of work in the office;
- A duty that, if removed, would fundamentally change the position;
- A duty that would be problematic to the office flow or office productivity if not performed; and
- The most time consuming function of the job.

**Remember:** In general, job attendance is considered an essential job function.

**Remember:** A receptionist's main responsibility might be to answer the phones at the main switchboard. However, once in a while the receptionist is asked to sort mail. As a result, answering the phone would be an essential function and sorting mail may be collateral.

## 10. TYPES OF DISABILITY DISCRIMINATION

### Disparate Treatment

Disparate means different or unequal. **Disparate treatment** occurs when an employer **intentionally treats** an individual **with a disability** differently than individuals who are **not disabled**, individuals with **different disabilities**, or individuals who are **not associated with someone** who has a disability.

An example may be a supervisor who denies leave for an employee to take his/her child to a behavioral pathologist but grants leave for other employees to take their children to soccer practice.

### Disparate Impact

**Disparate impact** occurs when a **facially neutral rule or policy** has an **adverse impact** against disabled employees and is not job related. For disparate impact, one need not prove that the employer knows about the disability or that the discrimination was intentional.

An example of a facially neutral rule that may have a disparate impact against individuals with learning disabilities is a policy that requires all grounds keepers to take written tests, even though the job responsibilities do not include writing.

### Harassment/Hostile-Work Environment

**Harassment** is **unwelcome conduct** based on a protected class (e.g. disability). Harassment becomes unlawful when 1) the offensive conduct affects a **term or condition of employment**, or 2) the conduct is **severe or pervasive** enough to create a work environment that a **reasonable person** would consider **intimidating, hostile, offensive or abusive**.

An example may be a coworker's repeated and intentional use of the word "retard" in reference to an employee with developmental disabilities.

### Reasonable Accommodation

An employer must provide **reasonable accommodations** to **qualified individuals with disabilities** absent an **undue hardship**. After the employer discovers the need for an accommodation, it has a **duty to engage in an interactive process** to determine what reasonable accommodation can be offered.

An example may be an employee who suffers migraines in brightly-lit areas and cannot concentrate. Upon request for reasonable accommodation, the employer must engage in the interactive process to determine if dimming the lights, offering telework, or other accommodations are available without undue hardship.

## **11. REMEDIES FOR DISABILITY DISCRIMINATION**

There are many forms discrimination can take. Sometimes it is difficult to acknowledge or believe that discrimination is occurring. Therefore, the first step to asserting one's rights is to recognize the type of discrimination that may have occurred and determine what harm resulted from the discrimination.

In general, almost all of the **remedies** available for other forms of discrimination are available for discrimination on the basis of disability. Some of the available damages may include:



More information on the types of discrimination, including how to prove discrimination and how to file a discrimination complaint, can be found in “AFGE’s Guide to Fighting Discrimination.”

**12. MODEL ANALYSIS FOR DISPARATE TREATMENT AND REASONABLE ACCOMMODATION DISCRIMINATION<sup>14</sup>**

DISPARATE TREATMENT	REASONABLE ACCOMODATION
<p>1. Establish Protected Status</p> <ul style="list-style-type: none"> <li>a. Identify the physical or mental impairment,</li> <li>b. Identify the substantial limitation to a major life activity, or identify the record of impairment, or identify the behavior that shows complainant is regarded as disabled</li> </ul>	<p>1. Establish Disability</p> <ul style="list-style-type: none"> <li>a. Identify the physical or mental impairment, and</li> <li>b. Identify the substantial limitation to a major life activity</li> </ul>
<p>2. Establish the agency knows of the complainant’s disability, record of impairment, or regards the complainant as disabled</p>	<p>2. Establish that the agency knows of the complainant’s disability</p>
<p>3. Establish the complainant is qualified</p>	<p>3. Establish the complainant is qualified</p>
<p>4. Establish that complainant is able to perform the essential job functions with or without reasonable accommodation</p> <ul style="list-style-type: none"> <li>a. Identify essential job functions</li> <li>b. Identify reasonable accommodations needed to perform job functions</li> </ul>	<p>4. Establish that complainant is able to perform the essential job functions with or without reasonable accommodation</p> <ul style="list-style-type: none"> <li>a. Identify essential job functions</li> <li>b. Identify reasonable accommodations needed to perform job functions</li> </ul>

<sup>14</sup> For more detailed information on proving cases of disability discrimination, please see AFGE’s “How to Prove” booklet and “AFGE’s Guide to Fighting Discrimination”.

DISPARATE TREATMENT	REASONABLE ACCOMODATION
<p>5. Establish that complainant was treated differently from an individual in the same work unit/chain of command who is not disabled, does not have a record impairment, is not regarded as disabled, or who has a different disability</p>	<p>5. Establish that the complainant asked for an accommodation and when the accommodation was requested.</p>
<p>6. Present evidence of discriminatory intent through actions, behavior, and/or comments made by the agency.</p>	<p>6. Establish interactive process or lack thereof</p> <ul style="list-style-type: none"> <li>a. What accommodations did complainant propose and did the agency considered them?</li> <li>b. Did the agency identify other accommodations and do they enable the complainant to perform the essential functions of the job?</li> </ul>
<p>7. Rebut the agency’s reason for treating complainant differently than other similarly-situated employees</p>	<p>7. Establish whether the agency actually provided an accommodation</p>
<p>8. Present evidence that the agency’s reason for its treatment of the complainant is pretext.</p>	<p>8. Identify a reason, if any, that the agency gave for its refusal to engage in the interactive process and/or accommodate</p>
	<p>9. Establish that the proposed accommodation would not have caused undue hardship due to size of agency, type of operation and/or cost of accommodation.</p>

## **13. REASONABLE ACCOMMODATION**

The Rehabilitation Act requires federal agencies to provide reasonable accommodation to qualified employees or applicants with disabilities, unless doing so would cause undue hardship.

An accommodation is a change in the work environment or in the way things are customarily done to enable an individual with a disability to enjoy equal employment opportunities.

There are three broad categories<sup>15</sup> of reasonable accommodations:

1. Modifications or adjustments to a job application process to permit an individual with a disability to be considered for a job (such as providing application forms in alternative formats like large print or Braille);
2. Modifications or adjustments necessary to enable a qualified individual with a disability to perform the essential functions of the job (such as providing sign language interpreters); and
3. Modifications or adjustments that enable employees with disabilities to enjoy equal benefits and privileges of employment (such as removing physical barriers in an office cafeteria).

Agency procedures must address how to handle requests for each of these categories of accommodation. The procedures should be designed to expand employment opportunities for people with disabilities, not to create new bureaucratic requirements. Additionally, agency procedures must permit flexibility in the processing of requests and assure that agency officials act expeditiously in providing reasonable accommodations.

**Remember:** An agency may permit different components of the agency to adopt their own procedures, as necessary, to expedite the processing of reasonable accommodation requests.

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<sup>15</sup> 29 C.F.R. Section 1630.2(o).



## **14. REQUESTING A REASONABLE ACCOMMODATION**

The Rehabilitation Act requires an agency to provide a reasonable accommodation to an employee when the agency is made aware of a workplace barrier between an employee's physical or mental impairment and the requirements of that employee's position.

A request can be a statement in "plain English" that an individual needs an adjustment or change in the application process or at work for a reason related to a medical condition. The request does not have to include the term "reasonable accommodation," or be in writing, although an employer may ask for something in writing to document the request. A family member, friend, health professional, rehabilitation counselor, or other representative also may request a reasonable accommodation on behalf of an individual with a disability. There are no set of special words an employee must use in order to request a reasonable accommodation.

Generally speaking, an employer can be obligated to provide a reasonable accommodation to an employee without the employee requesting the accommodation if management had knowledge of the need for an accommodation. For example, an individual with learning disabilities may not need to request a reasonable accommodation if management is aware that the individual has a mental impairment that substantially limits a major life activity that is exacerbated by a workplace requirement.

However, it is recommended that employees be proactive and direct about their needs for accommodation. An employee requesting an accommodation should be aware of the local procedures for requesting reasonable accommodation, including what forms to provide and the individuals to whom requests can be made.

**Remember:** Employees should be prepared to identify (1) physical or mental impairments they have, (2) requirements of their positions or workplaces that present obstacles to their impairments, (3) reasonable accommodation requested, and (4) how the requested accommodation would allow them to meet the essential functions of their positions.

## **15. INTERACTIVE PROCESS**

In order to determine what accommodation is reasonable, the agency and individual with disability need to engage in an **interactive process**. During that process, the parties should make an individualized assessment of the accommodation that will best fit that particular individual's needs. Information provided by the individual with a disability, medical health professionals, and/or an accommodation specialist can be used to make an individualized assessment.

Below are tips to achieving a successful interactive process<sup>16</sup>:

- The decision maker should communicate with the individual where the specific limitation, problem, or barrier is unclear; where the effective accommodation is not obvious; or when choosing among different possible accommodations.
- Where an individual requesting reasonable accommodation can identify the problem, but not a solution, the agency should consult in-house experts such as an agency disability program manager or reasonable accommodation coordinator, or outside resources if necessary (e.g., the Job Accommodation Network, [www.askjan.org](http://www.askjan.org)).
- The employee shares responsibility for making the interactive process work by providing information that the agency reasonably needs to evaluate the accommodation request. For example, the agency may ask the employee for suggested accommodation solutions and preferences, or for supporting medical information where the disability or need for accommodation is not obvious or already known.
- Where a requested accommodation is not effective or would pose an undue hardship, or is otherwise not legally required (e.g., removing an essential job function), the agency should continue the interactive process, exploring alternatives until either a reasonable accommodation is found or the agency determines no accommodation is available.

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<sup>16</sup> Adapted from the EEOC's "Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce" (available at: <http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm>) (last accessed May 29, 2015).

- The accommodation preference of the individual with a disability should be given primary consideration. However, the agency may provide a different accommodation as long as it is effective.
- If an accommodation is provided but it is ineffective, the employee should promptly notify the agency, and the agency should continue to engage in the interactive process.

**Remember:** During the interactive process, you may be asked to provide additional medical documentation to clarify the nature of your disability and whether it presents any conflicts with accommodations proposed by your employer.

**Remember:** You should not provide your medical records to your direct supervisor, but your supervisor is entitled to know that you have a disability and that you require an accommodation.

**Remember:** When asking your doctor to describe the workplace limitations caused by your disability, take a copy of your position description to the appointment and show your doctor the essential functions that you are required to perform so that your doctor can explain which essential functions you can perform with an accommodation.

**Remember:** In general, a reasonable accommodation is one that is effective. A reasonable accommodation need not be the best accommodation available as long as it is effective.

## 16. UNDUE HARDSHIP

An agency does not have to provide an accommodation that would pose an **undue hardship**. 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.<sup>17</sup>

A determination of undue hardship should be based on several factors:<sup>18</sup>

- The **nature** and **cost** of the accommodation needed;
- The overall **financial resources of the facility** making the reasonable accommodation (e.g., the number of persons employed at the facility and 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; and/or
- The **impact** of the accommodation on the operation of the facility.

Undue hardship is determined based on the net cost to the agency. Thus, an agency should determine whether funding is available from an outside source or whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Technological advances continue to reduce the cost of many accommodations.

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<sup>17</sup> 29 C.F.R. Section 1630.15(d) (1996); *see also Stone v. Mount Vernon*, 118 F.3d 92 (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).

<sup>18</sup> Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (available at: <http://www.eeoc.gov/policy/docs/accommodation.html#general>) (last accessed May 29, 2015).

Most federal agencies have an agreement with the Department of Defense's Computer Electronic Accommodations Program (CAP)<sup>19</sup>, to receive assistive technology and services for employees with disabilities at no cost, although agencies incur costs for those accommodations not covered by CAP such as language interpreters. Agencies should encourage decision makers to consult with the Job Accommodation Network (JAN)<sup>20</sup> regarding possible no-cost or low-cost options.

If an agency 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 agency must provide the second accommodation.

Before denying an accommodation request based on cost or operational difficulty, an agency should have the decision reviewed by a higher-level official with broader authority and access to the agency's resource information than the official authorized to grant an accommodation request. The reasonable accommodation procedures mandated by E.O. 13164 provide that all denials of accommodation requests be in writing and provide a specific explanation of the grounds for denial.

**Remember:** It is NOT an undue hardship if the agency is concerned about other employees' fears or prejudices towards the disabled individual's physical or mental impairment.

**Remember:** It is NOT an undue hardship if the agency has only offered a conclusory statement that an accommodation would impact the agency's operations or its other employees.

**Remember:** It is NOT an undue hardship if the agency claims that providing a reasonable accommodation may have a negative impact on the morale of other employees.

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<sup>19</sup>CAP website (available at: <http://www.cap.mil/Default.aspx>) (last accessed May 29, 2015).

<sup>20</sup> JAN website (available at: [www.askjan.org](http://www.askjan.org)) (last accessed May 29, 2015).

## 17. POSSIBLE ACCOMMODATIONS

**Remember:** The degree and type impairment may vary from person to person.

### A. VISION IMPAIRMENT ACCOMMODATIONS<sup>21</sup>:

- Modify policies to allow a service animal in the workplace, with appropriate breaks in the day to allow the service animal opportunities for relief and feeding.
- Place dots of silicon on a knob, switch, or button to enable touch sensitivity.
- Use larger font to aid visibility of written materials.
- Place Braille labels on file cabinets, door plates, and vending machines.
- Modify computers to provide enlarged screens, synthesized voice, or Braille output.
- Install optical scanners to scan printed material and “read” it into a voice synthesizer.
- Provide machines that magnify printed materials.
- Review adaptive equipment regularly to ensure that it is still working well.
- Ensure adequate lighting in offices, meeting spaces, and hallways.

### ETIQUETTE TIPS:

- Offer assistance with sensitivity and respect. Be prepared to have the offer declined. If your offer is accepted, listen to and accept instructions. Example: “May I help you with your packages?” or “Would you like to take my arm?”
- Do not be embarrassed if you happen to use common expressions such as “See you later” or “Would you like to take a look at the work area?”
- When conversing in a group, give a vocal cue by announcing the name of the person to whom you are speaking. Speak in a normal tone of voice, indicate in advance when you will be moving from one place to another and make it known when the conversation is at an end. Speak to the person with the visual impairment, not to their companion.
- Do not pet or distract a service animal.

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<sup>21</sup> For more information, please see *Questions & Answers about Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act (ADA)* (available at: [http://www.eeoc.gov/eeoc/publications/qa\\_vision.cfm](http://www.eeoc.gov/eeoc/publications/qa_vision.cfm)) (last accessed May 29, 2015)

## **B. HEARING IMPAIRMENT ACCOMMODATIONS<sup>22</sup>:**

- Assign note-takers for meetings.
- Provide amplification or assisted listening devices.
- Provide sign classes for hearing workers.
- Provide professional interpreters for meetings, trainings, etc. Make sure interpreters sign the language of the hearing impaired individual (ASL, SignEnglish).
- Rearrange rooms to facilitate visual communication.
- Allow employees to sit a short distance from a speaker.
- Arrange workspaces in a way to allow an employee to easily see when someone enters or exits.
- Utilize e-mail and/or fax machines for intra- and interoffice communication.
- Provide visual or tactile pagers for communication, instructions, and as an alerting system.
- Provide visual and auditory alerting devices on telephones and fire alarm systems.

### **ETIQUETTE TIPS:**

- If an interpreter is present, speak to the hearing impaired individual, not the interpreter. Make sure the interpreter is seated in a place which facilitates conversation, such as next to an interviewer and opposite the interviewee with hearing impairment.
- Establish whether the person can read lips. Not all persons with hearing impairments can lip-read. Those who can will rely on facial expression and other body language to help in understanding.
- Do not shout at a hearing impaired person. Shouting distorts sounds accepted through hearing aids and inhibits lip reading.
- Look directly at the person and speak clearly, naturally, and slowly. Do not over pronounce or exaggerate your words.
- Show consideration by placing yourself facing the light source. Avoid sitting in front of bright lights or windows that make it difficult to lip-read.
- Be prepared to repeat yourself if requested.

<sup>22</sup> For more information, please see *Questions and Answers about Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act* (available at: [http://www.eeoc.gov/eeoc/publications/qa\\_deafness.cfm](http://www.eeoc.gov/eeoc/publications/qa_deafness.cfm)) (last accessed May 29, 2015)

### **C. PSYCHOLOGICAL/PSYCHIATRIC IMPAIRMENT ACCOMMODATIONS<sup>23</sup>:**

- Allow time off for the employee to attend support groups.
- Permit the use of break time according to the individual's needs, rather than on a fixed schedule.
- Make physical arrangements (such as room partitions or an enclosed office space) that reduce triggers, stressors, or other environmental factors that may affect the individual's psychological condition.
- Provide private space for employees to phone supportive friends, family members, or professionals during the work day.

### **ETIQUETTE TIPS:**

- Avoid discussing an individual's psychiatric or psychological condition without the individual's express consent.
- Refrain from using labels such as "crazy," "insane," "cuckoo," or other words that make fun of a person's mental health.
- Respect an individual's need for privacy, space, or other behavioral needs.
- Do not assume that a mental health condition or psychiatric impairment renders a person unable to interact professionally with others, fulfill the obligations of their position, or move forward in one's career.
- Be sensitive to an individual's condition without assuming that the individual is hypersensitive or paranoid.

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<sup>23</sup> For more information, please see *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (available at: <http://www.eeoc.gov/policy/docs/psych.html>) (last accessed May 29, 2015)



#### **D. MUSCULOSKELETAL/ MOBILITY IMPAIRMENT ACCOMMODATIONS:**

- Provide necessary equipment or tools (e.g., lifting aids or ergonomic equipment).
- Ensure easy access to the building in which employees work.
- Reassign disabled employees to alternate vacant positions.
- Reserve designated parking spaces closer to building entrances.
- Relocate office spaces closer to elevators, entryways and exits, and restrooms.
- Redesign hallways, ramps, or pathways to ensure smooth grading and surfaces.
- Ensure that all of the offices that employees need to access (including the personnel office) are in accessible locations.
- Place a reachable cup dispenser near the water fountain to make the fountain accessible.

#### **ETIQUETTE TIPS:**

- Do not lean on a person's wheelchair. The chair is part of the space that belongs to the person using it.
- Do not patronize people using wheelchairs by patting them on the head or shoulder.
- Do not assume that people in wheelchairs or other mobile-assistive devices want to discuss the history of their impairment or how they are able to perform simple functions such as using the restroom, dressing/undressing, etc.
- Don't be embarrassed if you happen to use accepted common expressions that seem to relate to the person's disability, such as "got to be running along."
- When talking with a person in a wheelchair for more than a few minutes, sit in a chair in order to place yourself at the person's eye level to facilitate conversation.
- Enable people who use crutches, canes, or wheelchairs to keep them within reach.
- Know where accessible restrooms, drinking fountains, and telephones are located. If such facilities are not available, be ready to offer alternatives, such as the private or employee restroom, a glass of water, or your desk phone.

## **E. LEARNING DISABILITY ACCOMMODATIONS<sup>24</sup>:**

- Allow employees to work briefer intervals, and to shift to a new task when an employee finds his/her attention wandering.
- Allow for an employee to check his/her schedule and list of previous commitments before additional commitments/responsibilities are accepted.
- Assign tasks that include productive movement, such as picking up the mail, talking to a colleague, or walking to a meeting the long way.
- Provide effective supervision and/or structure deadlines to assist with time-management.
- Adjust method of communication (e.g.: written, spoken, visual) based on individual needs.
- Color code files to help distinguish similar objects from each other.
- Change icons on computers so that they do not look similar.
- Provide extra time reading emails or assignments.

### **ETIQUETTE TIPS:**

- Do not assume that a person with a learning disability cannot perform their job.
- Speak in a normal tone of voice, be patient, and be understanding of an employee who has a learning disability. Unless the employee asks coworkers to speak slowly, maintain a typical conversational pace.
- Do not patronize or condescend a person with a learning disability. Be aware that your tone can convey bias or judgment.
- Keep your manner encouraging rather than correcting or impatient.
- Offer to help persons with learning disabilities, but be willing to accept the method or manner in which they require your assistance.
- Do not feel slighted or offended if a person declines your offer of assistance.
- Remember that persons with learning disabilities have the same desire as everyone else to be respected at work with dignity.

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<sup>24</sup> For more information, please see *Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)* ([http://www.eeoc.gov/laws/types/intellectual\\_disabilities.cfm#fn1](http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm#fn1)) (last accessed May 29, 2015)

## F. PAST DRUG USERS AND ALCOHOLISM ACCOMMODATIONS<sup>25</sup>:

- Modify the work schedule to permit an employee to undergo treatment or counseling.
- Allow an employee to skip parties or functions where alcohol may be served.
- Allow employees to take breaks on a flexible schedule, versus a set schedule, in order for them to contact support groups or sponsors during the day.
- Provide space enclosures or a private office.
- Plan for uninterrupted work time.
- Allow for frequent breaks.
- Divide large assignments into smaller tasks and steps.
- Provide a self-paced workload or the ability to modify daily schedule

### ETIQUETTE TIPS:

- Avoid serving alcohol at work functions or celebrations.
- Avoid discussing how much fun a party, event, or function was because of alcohol.
- Do not judge an employee who is recovering from a drug addiction or alcoholism by making them feel as though they are no longer the life of the party or fun to be around.
- Try to find “dry” or “sober” events that you can attend with a person recovering from addiction.
- Be supportive if the person has relapsed and is struggling to overcome addiction.

### Remember it is NOT a reasonable accommodation to:

- Fail to comply with laws and regulations that relate to drug and alcohol use, such as the Drug Free Workplace Act, and standards relating to testing safety-sensitive employees for drug/alcohol use that were established by the Departments of Transportation, Defense, and the Nuclear Regulatory Commission.
- Waive laws or regulations that require employees holding safety-sensitive jobs to comply with restrictions on off-duty drug and alcohol use.
- Waive regulations that give employers the right to determine when individuals who have tested positive for drugs or alcohol may return to work.

<sup>25</sup> For more information, please see *Accommodation and Compliance Series: Employees with Alcoholism* (available at: <https://askjan.org/media/alcohol.html>) (last accessed May 29, 2015).

## G. GENERAL ACCOMMODATIONS FOR IMPAIRMENTS:

- Make facilities accessible by installing ramps and widening hallways.
- Restructure job duties to allow employees to perform only the essential functions or to switch collateral duties with other employees.
- Modify schedule by allowing changes to the tour of duty or allowing part-time work.
- Allow employees to telework by restructuring their responsibilities to enable telework compatible assignments and equipment.
- Grant additional leave for medical appointments.
- Buy equipment such as electronic readers, ergonomic desks, and teleconferencing technology.
- Relocate the employee to an office, floor, or building that is more accessible or better suited to the employee’s needs (i.e.: enclosed for more privacy).
- Reassign the employee if the employee prefers reassignment over other possible accommodations or if no other accommodation can be provided that would allow the employee to complete the essential functions of his/her current position.

### GENERAL ETIQUETTE TIPS:

What NOT to Say	What to Say
➤ Handicap	➤ Individual with disability
➤ Victim	➤ Person who has...
➤ Suffers from	➤ Person with...
➤ The blind, the deaf, the disabled	➤ People who are blind, People who...
➤ Wheelchair bound, confined to a...	➤ Uses a wheelchair
➤ Psycho, crazy, maniac, loony	➤ Person with mental illness
➤ Gimp, cripple, crippled, the crippled,	➤ Person with physical disability
➤ Mongoloid	➤ Person with Down Syndrome
➤ Invalid, patient (connotes sickness)	➤ Disability caused by... ➤ Disability resulting from...
➤ Unfortunate, pitiful, deformed ➤ Challenged, special, courageous	➤ “In order to comply with federal law, employer has made a modification for the particular employee, but federal law prohibits the employer from further disclosure.”

## H. REASSIGNMENT AS AN ACCOMMODATION:

- Reassignment can be an accommodation for both probationary and non-probationary employees.
- Reassignments, as accommodations, are to be noncompetitive. The employee must only qualify for the position and need not be the best qualified.
- The reassignment must be for a position in which the employee can meet the essential functions of the position with or without another accommodation.
- Reassignments only need to be made into a position that is:
  - Vacant;
  - Funded;
  - In the same commuting area;
  - Under the same appointing authority/agency;
  - At the same grade/level if possible, or at the highest grade/level below the employee's current grade/level.
- An agency has the burden to identify an appropriate position unless it is an undue hardship for the agency to do so.
- If an agency alleges that identifying appropriate positions is an undue hardship, it must prove that an undue hardship exists.

**Remember:** An employee may always request reassignment, even if there are other possible accommodations that may exist.

**Remember:** When an employee has asked for an accommodation, engaged in the interactive process with the Agency, and learns that there is no other accommodation that could be provided, reassignment may be the accommodation of last resort.

**Remember:** The employee's preferences should try to be met, however it may not always be possible to grant the accommodation of choice.

## **18. MEDICAL INQUIRIES RELATED TO ACCOMMODATIONS**

An agency is entitled only to information sufficient to show that the applicant or employee has a disability and needs a reasonable accommodation. It may not ask for information unrelated to the condition for which the accommodation has been requested or an individual's entire medical record.

The type of medical information an agency most often will need is:

- The past, present, and expected future nature, severity and duration of the impairment (e.g., functional limitations, symptoms, side effects of any treatments, etc.);
- The activities the impairment limits;
- The extent of the limitations; and
- Why the individual requires reasonable accommodation or the particular reasonable accommodation requested, and how the reasonable accommodation will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace.

When an individual requesting a reasonable accommodation provides insufficient documentation for the agency to process the request, the agency may ask for additional information. The agency may explain to the requesting individual why the documentation is insufficient and what information is needed.

The agency should allow the individual an opportunity to provide the information. If this does not result in sufficient information, the agency may require the individual to go to a health care provider of the agency's choice at the agency's expense.

The agency may also inquire about an employee’s medical condition, if the agency has a reasonable belief based on objective evidence that an employee’s ability to perform essential job functions has become impaired by a medical condition or that the employee poses a risk to him/herself, or other employees. An example of objective evidence would be if an employee confided in a co-worker that he/she was considering committing suicide. The agency may need to analyze whether the employee poses a direct, significant risk of substantial harm to him/herself or to others.

An agency may consider the following factors:

- Specific Risk (contagion, injury, etc.)
- Specific Harm
- Duration of Risk
- Nature and severity
- Likelihood that potential harm will occur
- Immediacy of the harm
- Evidence of the harm
- Individualized consideration
- Is an accommodation available? Has one been tried?
- Has the agency engaged in an interactive process?

The agency may allege that public health and safety is threatened, and therefore, no accommodation is reasonable, especially for those in the field of medicine, law enforcement, and other safety-related fields.

## **19. MEDICAL INQUIRIES FOR OTHER REASONS**

An agency may ask for an employee to explain his/her performance problems and excessive absences, even if the answer elicits information about the employee's disability.

Furthermore, an agency may inquire about or test for medication (or controlled substances) or alcohol only:

- If there is a reasonable suspicion that medication affects job performance, or
- After an incident involving the employee while he/she was on duty.

An agency can inquire about an individual's ability to perform a job-based on disability once a job offer has been extended, as long as it also inquires of all incumbents who currently hold that position. Similarly, the agency can condition a job offer on a health examination that is given in an effort to determine if the incumbent has the current capacity to accomplish the specific duties of the job, with or without reasonable accommodation, as long as it does so for all incumbents as well.

The agency may also make inquiries related to safety evacuation needs of employees in order to develop a comprehensive and inclusive safety policy. The agency may ask employees whether they require assistance during an evacuation due to a disability or medical condition, as long as the agency makes it clear that self-identification is voluntary and explains its purpose in requesting the information. The agency may also ask what type of assistance the employee may need.

Medical information must be kept confidential. However, there is an exception for first aid and safety personnel. Therefore, an employer may share information about the type of assistance an individual will need in the event of an evacuation with medical professionals, emergency coordinators, floor captains, colleagues who have volunteered to act as "buddies," building security officers who need to confirm that everyone has been evacuated, and other non-medical personnel who are responsible for ensuring a safe evacuation.



Any medical information or history obtained by the agency must be maintained on separate forms and separate files and must be treated as confidential. An employee's medical information or records should not be stored in his/her personnel file.

The Rehabilitation Act provides that information obtained regarding the medical condition or history of any employee shall be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). Further, medical information obtained from disability-related inquiries or medical examinations, or voluntarily disclosed by employees, must be treated as confidential and may only be shared in limited circumstances with supervisors and managers on a need to know basis. All staff who review and evaluate medical documentation should receive training on how to comply with the Rehabilitation Act rules concerning the use and confidentiality of applicant and employee medical information.

It is inappropriate for the agency to disclose to other employees that an employee with a disability has asked or received an accommodation. However, a supervisor may explain to another employee that in order to comply with federal law, a modification has been made for another employee, but any further disclosure is prohibited by law.

Genetic Information Non-Discrimination Act (GINA) places additional constraints on an employer's ability to obtain personal health information. With limited exceptions, GINA prohibits employers from requesting, requiring, or purchasing genetic information (e.g., information about an individual's genetic tests, genetic tests of a family member, or family medical history) about job applicants and employees or their family members at any time, including during the post-offer stage of employment. 29 C.F.R. §1635.8(a)-(b).

## **20. ORGANIZE! ORGANIZE! ORGANIZE!**

“The concept of work as opportunity lies at the very heart of trade union principles. It is what unions have worked for and fought for over decades. The extension of job opportunity to people with disabilities has long been a goal of labor unions. The ADA will serve only to strengthen the bond that already exists.” Lenore Miller, AFL-CIO Civil Rights Committee.

Current laws do not always provide sufficient protections and rights for individuals with disabilities.

A few organizational methods that locals may use to further the needs of individuals with disabilities are:

- Providing training, lectures, films, and/or roundtables about the disability discrimination.
- Providing employee assistance programs and safeguards for individuals who use the programs.
- Posting fliers, posters, and/or newsletters that contain information about the Rehabilitation Act and disability awareness issues.
- Collectively bargaining over provisions that strengthen the Rehabilitation Act, such as:
  - A clause that prohibits disability discrimination, which defines disability in terms of a worker’s ability to perform bargaining unit work.
  - A process by which negotiation commences if a requested accommodation would affect the terms of the collectively bargained agreement (CBA).
  - A clause allowing parties to extend, by mutual agreement, any contractual limits on the amount of leave an employee may take or the amount of time that an employee may be away from work before losing seniority.
  - Special transportation provisions.
  - A clause including individuals with disabilities in negotiations that focus on disability issues

# Appendix A



## The Rehabilitation Act of 1973

### Sections 501 and 505

*The following is the text of Sections 501 and 505 of the Rehabilitation Act of 1973 (Pub. L. 93-112) (Rehab. Act), as amended, as these sections will appear in volume 29 of the United States Code, beginning at section 791. Section 501 prohibits employment discrimination against individuals with disabilities in the federal sector. Section 505 contains provisions governing remedies and attorney's fees under Section 501. Relevant definitions that apply to sections 501 and 505 follow these sections.*

*Section 512 of the Americans with Disabilities Act of 1990 (Pub. L. 101-336) (ADA) and the Rehabilitation Act Amendments of 1992 (Pub. L. 102-569) amended definitions applicable to the Rehab. Act. In addition, section 102 of the Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) amended the statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the ADA, and section 501 of the Rehab Act. The Americans with Disabilities Act Amendments Act of 2008 (Pub. L. 110-325) (ADAAA) further amended the definition of “individual with a disability.”*

*Most recently, the Lilly Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amended Title VII, the Age Discrimination in Employment Act of 1967, the ADA and the Rehab Act to clarify the time frame in which victims of discrimination may challenge and recover for discriminatory compensation decisions or other discriminatory practices affecting compensation.*

*ADAAA amendments and Lilly Ledbetter Fair Pay Act amendments appear in boldface type. Cross references to the Rehabilitation Act as enacted appear in italics following each section heading. Editor's notes also appear in italics.*

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#### DEFINITIONS

##### **SEC. 705** [Section 7]

For the purposes of this chapter:

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##### (10) Drug and illegal use of drugs

###### (A) Drug

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

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

\* \* \*

(20) Individual with a disability

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), (E), and (F), the term “individual with a disability” means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], **any person who has a disability as defined in section 12102 of Title 42.**

(C) Rights and advocacy provisions

(i) In general; exclusion of individuals engaging in drug use

For purposes of subchapter V of this chapter [29 U.S.C. § 790 et seq.], the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Exception for individuals no longer engaging in drug use

Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who--

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

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

(III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter [29 U.S.C. § 701 et seq.] for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

\* \* \*

(E) Rights provisions; exclusion of individuals on basis of homosexuality or bisexuality For the purposes of sections 791, 793, and 794 of this title--

(i) for purposes of the application of subparagraph (B) to such sections, the term “impairment” does not include homosexuality or bisexuality; and

(ii) therefore the term “individual with a disability” does not include an individual on the basis of homosexuality or bisexuality.

(F) Rights provisions; exclusion of individuals on basis of certain disorders

For the purposes of sections 791, 793, and 794 of this title, the term “individual with a disability” does not include an individual on the basis of--

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

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES  
SEC. 791. [Section 501]

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions  
There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans  
Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.



[42 U.S.C. § 2000e-5 note]

(b) **REHABILITATION ACT OF 1973.**— The amendments made by section 3 [*Lilly Ledbetter Fair Pay Act of 2009, PL 111-2, 123 Stat. 5*] shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 *et seq.*] for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

## REMEDIES AND ATTORNEYS' FEES

### SEC. 794a. [Section 505]

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) **(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3) to claims of discrimination in compensation)**, shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 **(42 U.S.C. 2000d *et seq.*) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)** shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

### **29 C.F.R. 1614.203**

#### 1614.203 Rehabilitation Act.

(a) Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities,

(b) ADA standards. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging non-affirmative action employment discrimination under this part shall be the standards applied under

Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.

### **29 C.F.R. 1630**

## REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

### Sec. 1630.1 Purpose, applicability, and construction.

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

**(b) Applicability.** This part applies to “covered entities” as defined at Sec. 1630.2(b).**(c)**

#### **Construction—**

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

**(2) Relationship to other laws.** This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part.

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

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

### **Sec. 1630.2 Definitions.**

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

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

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

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

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

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

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

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

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

(g) *Definition of “disability.”*

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

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

of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (1) of this section.

This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”

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

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

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

(h) Physical or mental impairment means: [[Page 342]]

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

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

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

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

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

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

(j) Substantially limits-

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

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

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

Nonetheless, not every impairment will constitute a disability within the meaning of this section.

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

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

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

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

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

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

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

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

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

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

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

**(4) Condition, manner, or duration—**

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

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

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

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

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

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

**(ii)** Use of assistive technology;

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

**(iv)** Learned behavioral or adaptive neurological modifications; or

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

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

**(k) Has a record of such an impairment—**

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

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

**(3) Reasonable accommodation.** An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.

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

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

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

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

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

**(n) Essential functions—**

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

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

- (i)** The function may be essential because the reason the position exists is to perform that function;
  - (ii)** The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
  - (iii)** The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
- (3)** Evidence of whether a particular function is essential includes, but is not limited to:
- (i)** The employer's judgment as to which functions are essential;
  - (ii)** Written job descriptions prepared before advertising or interviewing applicants for the job;
  - (iii)** The amount of time spent on the job performing the function;
  - (iv)** The consequences of not requiring the incumbent to perform the function;
  - (v)** The terms of a collective bargaining agreement;
  - (vi)** The work experience of past incumbents in the job; and/or
  - (vii)** The current work experience of incumbents in similar jobs.

**(o) Reasonable accommodation.**

**(1)** The term *reasonable accommodation* means:

- (i)** Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii)** Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii)** Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

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

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

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

**(4)** A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual



disability” prong (paragraph (g)(1)(i) of this section), or “record of” prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (paragraph (g)(1)(iii) of this section).

**(p) Undue hardship—**

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

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

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

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

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

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

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

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

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

**(1)** The duration of the risk;

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

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

**(4)** The imminence of the potential harm.

**Sec. 1630.3 Exceptions to the definitions of “Disability” and “Qualified Individual with a Disability.”**

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

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

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

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

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

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

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

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

(d) *Disability* does not include:

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

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

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

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

#### **§ 1630.4 Discrimination prohibited.**

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

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

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

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

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

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

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

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

(viii) Activities sponsored by a covered entity, including social and recreational programs; and  
(ix) Any other term, condition, or privilege of employment.

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

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

Sec. 1630.5 Limiting, segregating, and classifying.

Limiting, segregating, and classifying.

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

### **Sec. 1630.6 Contractual or other arrangements.**

Contractual or other arrangements.

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

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

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

### **Sec. 1630.7 Standards, criteria, or methods of administration.**

Standards, criteria, or methods of administration.

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

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

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

### **Sec. 1630.8 Relationship or association with an individual with a disability.**

Relationship or association with an individual with a disability.

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

### **Sec. 1630.9 Not making reasonable accommodation.**

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

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

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

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

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

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

(a) **In general.** It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

(b) **Qualification standards and tests related to uncorrected vision.** Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

Sec. 1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).Sec. 1630.12 Retaliation and coercion.

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

**(b) Coercion, interference or intimidation.** It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part. Sec. 1630.13 Prohibited medical examinations and inquiries.

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

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

Sec. 1630.14 Medical examinations and inquiries specifically permitted.

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

**(b) Employment entrance examination.** A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

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

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

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

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

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

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

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

- (i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) Government officials investigating compliance with this part shall be provided relevant information on request.

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

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

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

- (i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) Government officials investigating compliance with this part shall be provided relevant information on request.

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

## **Sec. 1630.15 Defenses.**

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

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

**(b) Charges of discriminatory application of selection criteria— (1) In general.** It may be a defense to a charge of discrimination, as described in § 1630.10, that an alleged application of

qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

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

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

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

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

**(f) Claims based on transitory and minor impairments under the “regarded as” prong.** It may be a defense to a charge of discrimination by an individual claiming coverage under the “regarded as” prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) “transitory and minor.” To establish this defense, a covered entity must demonstrate that the impairment is both “transitory” and “minor.” Whether the impairment at issue is or would be “transitory and minor” is to be determined objectively. A covered entity may not defeat “regarded as” coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. For purposes of this section, “transitory” is defined as lasting or expected to last six months or less.

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

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

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

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

- (2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
- (3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq. );
- (4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;
- (5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and
- (6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.
- (c) Drug testing— (1) General policy.** For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its job applicants or employees is not a violation of § 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.
- (2) Transportation employees.** This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:
- (i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and
- (ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.
- (3) Confidentiality.** Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of § 1630.14(b) (2) and (3) of this part.
- (d) Regulation of smoking.** A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.
- (e) Infectious and communicable diseases; food handling jobs— (1) In general.** Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.



- (2) Effect on State or other laws.** This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:
- (i)** Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and
  - (ii)** Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.
- (f) Health insurance, life insurance, and other benefit plans—**
- (1)** An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.
  - (2)** A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.
  - (3)** A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
  - (4)** The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.



# Appendix B



## **Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation<sup>26</sup>**

### Introduction

On July 26, 2000, President Clinton signed Executive Order 13164 (Order),<sup>(1)</sup> which requires each federal agency to establish effective written procedures for processing requests for reasonable accommodation. The Order helps to implement the requirement of the Rehabilitation Act of 1973<sup>(2)</sup> that agencies provide reasonable accommodation to qualified employees and applicants with disabilities. It is an important part of the government's national policy to create additional employment opportunities for people with disabilities.

An accommodation is a change involving the workplace that enables a person with a disability to enjoy equal employment opportunities. Many individuals with disabilities can apply for and perform jobs without the need for an accommodation. However, where workplace barriers exist, such as physical obstacles or rules about how a job is to be performed, reasonable accommodation serves two fundamental purposes. First, reasonable accommodations remove barriers that prevent people with disabilities from applying for, or performing, jobs for which they are qualified. Second, reasonable accommodations enable agencies to expand the pool of qualified workers, thus allowing the agencies to benefit from the talents of people who might otherwise be arbitrarily barred from employment.

Effective procedures for processing reasonable accommodation requests will advance both these goals. They will enable agencies to handle requests in a prompt, fair, and efficient manner; they will assure that individuals with disabilities understand how to approach the system and know what to expect; and they will be a resource both for individuals with disabilities and for agency employees, so that all parties can understand the legal requirements of the Rehabilitation Act.

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) is responsible for issuing guidance to implement the Order. This Guidance first sets forth some background information on the obligation to provide reasonable accommodation and the standards of the Rehabilitation Act. It then addresses each of the requirements of the Order. This Guidance is to be read in conjunction with relevant EEOC regulations, *see* 29 C.F.R. part 1630, and the EEOC's "*Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*," available on the web at [www.eeoc.gov](http://www.eeoc.gov).

### I. Background

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<sup>26</sup> Available at: [http://www.eeoc.gov/policy/docs/accommodation\\_procedures.html](http://www.eeoc.gov/policy/docs/accommodation_procedures.html) (last accessed: May 29, 2015).

## A. Key Terms

**Reasonable accommodation.** The Rehabilitation Act of 1973 requires federal agencies to provide reasonable accommodation to qualified employees or applicants with disabilities, unless to do so would cause undue hardship. In general, an accommodation is a change in the work environment or in the way things are customarily done that would enable an individual with a disability to enjoy equal employment opportunities.<sup>(3)</sup> There are three categories of reasonable accommodations:

- **modifications or adjustments to a job application process to permit an individual with a disability to be considered for a job (such as providing application forms in alternative formats like large print or Braille);**
- **modifications or adjustments necessary to enable a qualified individual with a disability to perform the essential functions of the job (such as providing sign language interpreters); and**
- **modifications or adjustments that enable employees with disabilities to enjoy equal benefits and privileges of employment (such as removing physical barriers in an office cafeteria).**

Agency procedures must address how to handle requests for each of these categories of accommodation.

**Undue hardship.** Agencies do not have to provide reasonable accommodations that would impose an undue hardship on the operation of the agency. An undue hardship means that a specific accommodation would require significant difficulty or expense. This determination, which must be made on a case-by-case basis, considers factors such as the nature and cost of the accommodation needed and the impact of the accommodation on the operations of the agency.

**Essential functions.** The essential functions of a job are those job duties that are so fundamental to the position that the individual cannot do the job without being able to perform them. A function can be "essential" if, among other things, the position exists specifically to perform that function, there are a limited number of other employees who could perform the function if it were assigned to them, or the function is specialized and the incumbent is hired based on his/her ability to perform it.

For further guidance on their obligation to provide reasonable accommodation, agencies should consult the EEOC's "*Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*" (*EEOC Reasonable Accommodation Guidance*).<sup>(4)</sup> The *EEOC Reasonable Accommodation Guidance* discusses the types of accommodations that employers may be required to make; the ways in which individuals may request reasonable accommodation; the "interactive process" between the agency and the

individual following a request for reasonable accommodation; and factors to consider in evaluating undue hardship. All agency reasonable accommodation procedures must, at a minimum, conform to the standards set forth in the *EEOC Reasonable Accommodation Guidance*.

#### B. General Guidelines for Agency Reasonable Accommodation Procedures

Reasonable accommodation procedures should be designed to expand employment opportunities for people with disabilities, not to create new bureaucratic requirements. The Rehabilitation Act requires that individuals be given substantial leeway in the ways in which they can make requests for reasonable accommodation. **Additionally, agency procedures must permit flexibility in the processing of requests and assure that agency officials act expeditiously in providing reasonable accommodations.**

Agency procedures must also inform individuals with disabilities and agency employees about their rights and responsibilities under the Rehabilitation Act. The procedures must be written in plain language so that they can be understood by those not familiar with the law. They must also explain relevant terms (*e.g.*, essential functions, undue hardship, etc.).

An agency may permit different components of the agency to adopt their own procedures as necessary to expedite the processing of reasonable accommodation requests. However, all procedures must comply with the requirements of the Order and the standards set forth in this Guidance.

Agencies are also required to notify their collective bargaining representatives, and to bargain over their reasonable accommodation procedures, to the extent required by law. Order, Section 3.

#### C. Dissemination of Agency Reasonable Accommodation Procedures

Each agency must make copies of its reasonable accommodation procedures readily available to all agency employees. The procedures can, among other things, be posted on the agency's website or intranet service and included in employee handbooks. They should also be available in designated locations such as agency libraries, EEO offices, and/or personnel offices.

Each agency's procedures must be accessible to individuals with disabilities. Where agencies post their procedures on their websites, those websites must be accessible. Agencies should also make their procedures available in alternative formats, such as large print or Braille, on request. Moreover, agencies should provide other reasonable accommodations where necessary to make the procedures accessible for particular individuals with disabilities.

**EXAMPLE** - Matthew, who is mentally retarded, cannot understand the agency's reasonable accommodation procedures as written. The agency must provide the information contained in the procedures in a manner accessible to him.

Each agency must also educate its employees about its procedures. Agencies may tailor training to suit the needs of their workforces, but must ensure that all agency employees have sufficient information to understand their roles and obligations in the reasonable accommodation process.

#### D. Relationship of the Order and the Rehabilitation Act

This Order does not create any new rights for Executive branch applicants or employees; nor does it limit an individual's rights under the Rehabilitation Act. As a result, an individual who believes that a violation of this Order also constitutes a violation of the Rehabilitation Act may pursue his/her remedies under the Act without limitation.

### II. Components Of Agency Reasonable Accommodation Procedures

#### A. Initiating the Reasonable Accommodation Process

As the Executive Order states, each agency's procedures must:

**"Explain that an employee or job applicant may initiate a request for reasonable accommodation orally or in writing. If the agency requires an applicant or employee to complete a reasonable accommodation request form for recordkeeping purposes, the form must be provided as an attachment to the agency's written procedures."** (Order, Section 1(b)(1))

*1. May an agency require that individuals with disabilities use particular words to request a reasonable accommodation?*

**No.** A request for accommodation is a statement that an individual needs an adjustment or a change at work or in the application process for a reason related to a medical condition. Agencies may not require, for example, that individuals mention the Rehabilitation Act or use the phrase "reasonable accommodation." The agency's procedures should make this point clear.<sup>(5)</sup>

**EXAMPLE** - Michelle tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of the anti-depressants I take." This is a request for reasonable accommodation. Whether or not Michelle is ultimately entitled to an accommodation, the agency must start to consider the request.

**EXAMPLE** - An applicant who is vision-impaired asks for assistance with the agency's application materials. This is a request for reasonable accommodation and triggers the agency's obligation to engage in its reasonable accommodation process.

*2. May an agency wait to begin processing a request for reasonable accommodation until after an individual has submitted a written request?*



**No.** Although an agency can, for recordkeeping purposes, ask an applicant or employee to fill out a form, an individual's oral request will start the reasonable accommodation process.

Accordingly, the time limits set by the agency's procedures (*see* Section C below) must also run from the date of the oral request. Of course, a request can be initiated in writing if the individual prefers.

**EXAMPLE** - Elizabeth, whose left leg is amputated, orally requests that her office be moved closer to the ladies' restroom because of the fatigue and pain caused by using crutches. Agency Z's reasonable accommodation procedures provide that all individuals requesting accommodation should complete a written form for agency records. Elizabeth submits the form to the head of her office one week following her oral request.

Agency Z's procedures properly require the head of Elizabeth's office to begin processing her request for reasonable accommodation **on the date of her oral request**.

Where an agency requires those requesting reasonable accommodation to complete a written form, the form must be attached to the agency's procedures. Like the procedures, the form must be written in plain language and must conform to Rehabilitation Act limits on requests for medical or disability-related information. (*See* Section D below.) Where an individual with a disability requires assistance to complete a written request, an agency must provide that assistance.

*3. When someone requires a reasonable accommodation on a repeated basis, may an agency require the individual to submit a written request for recordkeeping purposes each time the accommodation is needed?*

**No.** Where an employee has requested a type of reasonable accommodation that s/he is likely to need on a repeated basis - for example, the assistance of sign language interpreters or readers - an agency may not require that the individual submit a written request for recordkeeping purposes each time the accommodation is needed. Agency procedures should provide that once the reasonable accommodation is approved the first time, the employee may obtain the accommodation by notice to an appropriate individual or office (*e.g.*, his/her supervisor or a centralized accommodation office).

*4. May an agency require that a request for reasonable accommodation be made at a certain time?*

**No.** Under the Rehabilitation Act, the duty to provide reasonable accommodation is an ongoing one. Thus, an individual with a disability must be permitted to request a reasonable accommodation whenever s/he chooses. That request will then trigger the agency's obligation to start the process laid out in its procedures.

**EXAMPLE** - Agency R's reasonable accommodation procedures require that all requests for reasonable accommodation be made within ten days of the date that an applicant is offered a job or that a current employee is offered a different position within the agency. This is impermissible.

**EXAMPLE** - Randy, who has multiple sclerosis, requests that his desk be raised to accommodate his wheelchair. The agency promptly processes and approves his request. Six months later, Randy requests an additional accommodation to further assist him in the workplace in light of complications that have arisen from his disability. The agency must promptly process Randy's second request, and should anticipate that other requests may be made if his condition worsens.

*5. May an agency require that a request for reasonable accommodation be made to a certain agency official?*

**No.** An agency's obligation to consider an individual's request begins when the individual makes that request to any of the following: his/her supervisor; a supervisor or manager in his/her immediate chain of command; the EEO office<sup>(6)</sup>; any other office designated by the agency to oversee the reasonable accommodation process; or, in connection with the application process, any agency employee with whom the applicant has contact. Agencies may also designate others, in addition to those identified above, to whom requests may be made.

Agency procedures should advise the employees who are designated to receive reasonable accommodation requests to then notify, if necessary, any other agency personnel who will be involved in the decisionmaking.

*6. Must an agency consider requests made by others on behalf of an individual with a disability?*

**Yes.** A family member, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Where possible, the agency should then confirm with the person with a disability that s/he in fact wants a reasonable accommodation.

**EXAMPLE** - An employee has been out of work for six months with a serious injury. The employee's doctor sends the agency a letter, stating that the employee is released to return to work, but with certain work restrictions. The letter is a request for reasonable accommodation. The agency should first confirm with the employee that the doctor's note was sent with the employee's consent.

## B. Processing Requests for Reasonable Accommodation

As the Executive Order states, each agency's procedures must:

**"Explain how the agency will process a request for reasonable accommodation, and from whom the individual will receive a final decision."** (Order, Section 1(b)(2))

*7. Should agency procedures be flexible?*

**Yes.** Agencies should **not** adopt a "one size fits all" approach to processing requests for reasonable accommodation. Instead, agency procedures should direct decision makers to process requests in a manner that imposes the fewest burdens on individuals with disabilities and permits the most expeditious consideration and delivery of the reasonable accommodation.

*8. May first-line supervisors be authorized to approve requests for reasonable accommodations?*

**Yes. To eliminate unnecessary levels of review, agencies should authorize first-line supervisors to approve requests for reasonable accommodation wherever possible.**

**EXAMPLE** - David has a disability that causes extreme fatigue at the end of each day. David is an accountant, and is expected to attend budget planning meetings with his supervisor and another colleague every Wednesday afternoon. David asks his supervisor whether the meetings can be changed to the morning so that he can attend them when he does not feel tired. The agency's procedures should authorize David's supervisor to evaluate and approve this type of request, absent undue hardship to the operation of the office.

*9. May an agency designate a particular office, or offices, to be involved in processing a request?*

**Yes.** An agency may choose to establish or designate an office to oversee the agency's reasonable accommodation process. Such an office would develop expertise in the requirements of the Rehabilitation Act, potential accommodations, and available resources, and be a resource for individuals with disabilities and agency decision makers. Additionally, agencies may designate a particular office to handle specialized requests, such as those involving computer technology.

Agency procedures should identify offices that supervisors or other decision makers can consult for assistance in considering and implementing different types of reasonable accommodation requests.

**EXAMPLE** - Melissa, who is blind, requests that her supervisor provide equipment that will read information on her computer screen to her. Because the requested accommodation involves the purchase of equipment, Melissa's supervisor may not be able to approve and implement the request on her own. The agency's procedures should identify the office that is to consider requests for computer equipment, and should provide for prompt processing by that office.

*10. Should agency procedures encourage a discussion between the individual requesting the accommodation and the agency decision maker?*

**Yes. To ensure that all effective accommodations have been considered, agency procedures should require that decision makers talk to the individual requesting the accommodation** where the specific limitation, problem, or barrier is unclear; where an effective accommodation is not obvious; or where the parties are choosing between different possible reasonable accommodations.

**EXAMPLE** - Roger has a disability that prevents him from working in the early mornings. He asks for a reasonable accommodation that would permit him to work part-time and to come in every day at 11:00 a.m. The agency decision maker discusses Roger's request with him and proposes that Roger simply shift his schedule to work two hours longer in the evenings. Roger agrees to this alternative reasonable accommodation.

Such discussions may not be necessary where the existence of the disability, the need for accommodation, and the nature of the effective accommodation are clear.

*11. Should agency procedures specify resources that individuals with disabilities and agency decision makers could consult to identify and evaluate possible accommodations?*

**Yes.** The Appendix to this Guidance provides a non-exhaustive list of relevant resources. This list, as well as any other sources that agencies can identify, should be attached to each agency's procedures.

Agencies should also develop internal resources to provide technical assistance to agency personnel. These internal resources could, for example, demonstrate and evaluate equipment and assistive devices; expeditiously purchase or lease equipment needed for reasonable accommodation; provide referrals for additional information; and promptly prepare agency printed and audiovisual materials in alternative formats on request.<sup>(7)</sup>

*12. How should agencies fund requested reasonable accommodations?*

Under the Rehabilitation Act, the resources of the agency as a whole -- and not just those of an individual office -- will be factors in determining whether a requested reasonable accommodation poses an undue hardship. As a result, agencies should anticipate the expenses of reasonable accommodation and should include those expenses in their agency-wide budget planning and requests for each fiscal year. In addition, each agency is strongly encouraged to implement practices that will reduce bureaucratic barriers that could make it difficult for individual offices to provide effective accommodations. Possible practices include:

- **establishing a central pool of staff assistant slots, that would not be included in a requesting office's personnel ceiling, to provide readers, interpreters, and other assistants throughout the agency; and**

- **implementing funding mechanisms that will avoid charging individual offices for the cost of accommodations.**

### C. Time Limits

As the Executive Order states, each agency's procedures must:

**"Designate a time period during which reasonable accommodation requests will be granted or denied, absent extenuating circumstances. Time limits for decision making should be as short as reasonably possible."** (Order, Section 1(b)(3))

#### *13. How should agencies set applicable time limits?*

Time limits for processing requests for and providing reasonable accommodations should be as short as reasonably possible. The time necessary to respond to any particular request for accommodation will depend largely on the nature of that accommodation. A reassignment is likely, for example, to take longer to review and implement than a request that a desk be put on blocks. Where the requested accommodation is simple and straightforward, the agency should provide it immediately, absent undue hardship. Furthermore, the time frame should be cut down considerably where a supervisor is authorized to grant an accommodation.

Agencies may wish to identify the *maximum* amount of time that the process can take. But agency procedures should make clear that where a particular reasonable accommodation can be provided in less time than is authorized under those procedures, the failure to respond promptly to the request may result in a violation of the Rehabilitation Act.

**EXAMPLE** - Ruth's agency prohibits employees from eating or drinking at their workstations. Ruth has insulin-dependent diabetes, and asks her supervisor to permit her to eat a candy bar or drink fruit juice at her desk if necessary to avoid going into insulin shock. The agency's reasonable accommodation procedures state that decisions about whether to grant or deny requests for reasonable accommodation should be made within 15 days of the date of the request. In this case, however, the agency should be able to provide the reasonable accommodation in no more than a day or two, and hopefully sooner. The agency should not wait the full 15 days before responding to Ruth's request.

**EXAMPLE** - Marcus works for the same agency as Ruth. He has a psychiatric disability that causes him to be easily distracted, and requests that he be given a private office on a quiet corridor. Because the agency must investigate the availability of office space and is entitled to consider other effective accommodations, the agency may need to take the full 15 days allotted by its procedures to make a decision on his request.

Of course, special circumstances may influence the timing of the reasonable accommodation process. For example, agency procedures should require that processing of reasonable

accommodation requests be expedited in appropriate cases. Expedited processing might be necessary where, for instance:

- **the reasonable accommodation is needed to enable an individual to apply for a job; or**
- **the reasonable accommodation is needed for a specific agency activity that is scheduled to occur shortly.**

**EXAMPLE** - James, who uses a wheelchair, is chosen to attend a computer training class that will be held in the agency's computer lab starting the following day. James requests that the computer desk be raised in time for him to participate in the class. The agency's procedures should provide for expedited processing of James' request in circumstances like these.

*14. What are "extenuating circumstances" that would justify an agency not processing a request for reasonable accommodation during the designated time period?*

"Extenuating circumstances" are factors that could not reasonably have been anticipated or avoided in advance of the request for the accommodation. These can include situations in which equipment must be back-ordered or the vendor typically used by an agency has unexpectedly gone out of business. In addition, an agency will not be expected to adhere to its usual time frames if an individual's health professional fails to provide needed documentation, *see* Section D below, in a timely manner.

Where there is a delay in either processing a request for, or delivering, a reasonable accommodation, the agency must notify the individual of the reason for the delay. To the extent possible, the agency must also keep the individual informed of the date on which the agency expects to complete the process.

If there is a delay, the agency must investigate whether there are temporary measures that could be taken to assist the individual with a disability. An agency could consider, for example, a temporary job restructuring or the use of equipment that might permit the individual to perform *some* of the functions of his/her job.

**EXAMPLE** - To perform the essential functions of her job, Maria, who has a vision-related disability, needs a sophisticated piece of equipment that is not readily available from the agency's suppliers. The agency has asked its suppliers to check further, and is also independently pursuing other avenues to obtain the necessary equipment. Because of this delay, the agency is not able to meet the time limit set in its procedures for a response to Maria's request.

The agency should notify Maria about the delay and tell her when it expects to be able to respond to her request. Whether or not it ultimately grants Maria's request, the agency should also

investigate alternative accommodations, such as a qualified reader, that it could provide on an interim basis to remove at least some of the barriers that limit Maria's use of her computer.

*15. Are there steps an agency can take prior to receiving a request for reasonable accommodation that will avoid unnecessary delays in responding if a request is made?*

**Yes.** To anticipate and limit impediments that may cause unnecessary delay in providing reasonable accommodation, agencies should review and modify, in advance of a specific request, policies that might affect the agency's ability to respond promptly to requests for reasonable accommodation. Among the policies that agencies should review are those that affect:

- **the purchasing or leasing of equipment;**
- **the hiring of, or contracting for, readers, interpreters, or other assistants; and**
- **the flexibility to approve leave or to restructure work schedules.**

Agencies must also ensure that all contracts for the use of external facilities -- such as contracts to use hotels for conferences or training programs -- reflect the obligation that such facilities be accessible to people with disabilities. Of course, an agency's own facilities must also conform to the laws on accessibility of federal buildings.<sup>(8)</sup>

#### D. Medical Information

As the Executive Order states, each agency's procedures must:

- **"Explain the responsibility of the employee or applicant to provide appropriate medical information related to the functional impairment at issue and the requested accommodation where the disability and/or need for accommodation is not obvious;**
- **Explain the agency's right to request relevant supplemental medical information if the information submitted does not clearly explain the nature of the disability, or the need for the reasonable accommodation, or does not otherwise clarify how the requested accommodation will assist the employee to perform the essential functions of the job or to enjoy the benefits and privileges of the workplace; and**
- **Explain the agency's right to have medical information reviewed by a medical expert of the agency's choosing at the agency's expense."** (Order, Section 1(b)(4-6))

*16. When may an agency request medical information in connection with a request for reasonable accommodation?*

An agency is entitled to know that an employee or applicant has a covered disability that requires a reasonable accommodation. Thus, when a disability and/or need for accommodation is not obvious, the agency may, if it chooses, require that the individual provide reasonable

documentation about the disability and his/her functional limitations. Additionally, the agency may request supplemental documentation when the information already submitted is insufficient to document the disability and/or the functional limitations it causes. The agency is *not required* to request documentation in such cases; the agency's procedures should, however, explain that failure to provide necessary documentation where it has been properly requested could result in a denial of reasonable accommodation.

If it chooses to seek medical information, an agency must, of course, conform to the requirements of the Rehabilitation Act.<sup>(9)</sup> Under the Act, **an agency may not request medical information where (a) both the disability and the need for reasonable accommodation are obvious; or (b) the individual has already provided the agency with sufficient information to document the existence of the disability and his/her functional limitations.**

*17. What types of medical information or documentation may an agency request in connection with a request for reasonable accommodation?*

When the standards set forth in Question 16 are met, an agency may request information or documentation regarding:

- **the nature, severity, and duration of the individual's impairment;**
- **the activity or activities that the impairment limits;**
- **the extent to which the impairment limits the individual's ability to perform the activity or activities; and/or**
- **why the individual requires reasonable accommodation or the particular reasonable accommodation requested, as well as how the reasonable accommodation will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace.<sup>(10)</sup>**

An agency may require that documentation about the disability or functional limitations come from an appropriate professional, such as a doctor, social worker, or rehabilitation counselor. However, the agency may request only the information that is relevant to making a decision about reasonable accommodation. In most situations, this means that the agency may **not** request access to a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

Where necessary to enable an individual's health professional to provide information regarding that individual's ability to perform a job, the agency should provide information to the health professional that describes the nature of the job, the essential functions the individual will be expected to perform, and any other information that is relevant to evaluating the request.



Consistent with the principle that information requested in connection with an employment decision may be disclosed to those making the decision, the agency may share the medical information it obtains, as necessary, with the individuals involved in determining whether to grant a reasonable accommodation. Those individuals must be informed of the limits on further disclosure of the information. (*See Question 20 below.*)

**EXAMPLE** - Richard, who has a severe learning disability, attends numerous meetings. Due to his disability, he finds it extremely difficult to write notes during these meetings, yet his work depends on remembering the details discussed. Richard asks his supervisor for a laptop computer to use in these meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask Richard for reasonable documentation about the nature, severity, and duration of his impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits his ability to perform the activity or activities. The supervisor 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 Richard retain the information from the meetings.

Documentation may contain sensitive information about a person's medical condition, which may make some employees uncomfortable about sharing it with supervisors. In order to avoid this problem, agencies should consider designating an individual, such as a disability or reasonable accommodation coordinator or a medical officer, to receive and review the documentation. This individual then may tell those making a decision on the reasonable accommodation request that the employee has a disability rather than sharing all of the details about the medical condition.

*18. May an agency have medical information reviewed by its own medical expert?*

**Yes.** Where an agency is entitled to request medical information under the standards set forth above, the agency may have that information reviewed by its own medical expert at its own expense.

*19. May an agency request that an individual who has asked for reasonable accommodation be examined by its own physician?*

**Yes, but only in certain circumstances.** An agency may request that an individual be examined by its own physician **only** if the individual has provided insufficient documentation from his/her own health care or other appropriate professional to substantiate the existence of a disability and the need for reasonable accommodation. If, in response to an agency's initial request, an individual submits insufficient documentation to demonstrate that s/he has a disability and needs accommodation, the agency should explain to that person why the submitted documentation is insufficient; identify the information that is needed; and allow the individual an opportunity to provide the information *before* requesting a medical examination. In such circumstances, the

agency may ask the individual to sign a limited release and then either submit a list of specific questions to the individual's health care professional or simply have its own physician contact the individual's doctor.

If the individual requesting an accommodation is still unable to provide sufficient information in support of the request, the agency may request that the individual be examined by a health care professional of the agency's choice at the agency's expense. Any such medical examination must be limited to determining the existence of a disability and/or the functional limitations that require a reasonable accommodation. Where a medical examination is warranted, the agency must explain to the individual with a disability that failure to agree to it could result in a denial of reasonable accommodation.

*20. Are there restrictions on handling medical information after it is obtained by the agency?*

**Yes.** The Rehabilitation Act requires that all medical information be kept **confidential**. This means that all medical information that an agency obtains in connection with a request for reasonable accommodation must be kept in files separate from the individual's personnel file. In addition, individuals who have access to information necessary to make a decision about whether to grant a requested accommodation **may not disclose this information except as follows:**

- **supervisors and managers who need to know may be told about necessary restrictions on the work or duties of the employee and about the necessary accommodation(s);**
- **first aid and safety personnel may be told *if* the disability might require emergency treatment;**
- **government officials may be given information necessary to investigate the agency's compliance with the Rehabilitation Act;**
- **the information may in certain circumstances be disclosed to workers' compensation offices or insurance carriers;<sup>(11)</sup> and**
- **agency EEO officials may be given the information to maintain records and evaluate and report on the agency's performance in processing reasonable accommodation requests. (See Section G below on information tracking.)**

Where medical information is disclosed to any of the foregoing officials, the agency must inform those individuals about the confidentiality requirements that attach to the information.

E. Reassignment<sup>(12)</sup>

As the Executive Order states, each agency's procedures must:

**"Provide that reassignment will be considered as a reasonable accommodation if the agency determines that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position."** (Order, Section 1(b)(7))

*21. When is reassignment required under the Rehabilitation Act?*

Reassignment is a form of reasonable accommodation that must be provided, absent undue hardship, to an employee who, because of a disability, can no longer perform the essential functions of the position s/he holds, with or without reasonable accommodation. Reassignment is a "last resort" accommodation that must be considered if there are no effective accommodations that would enable the employee to perform the essential functions of his/her current job, or if all other possible accommodations would impose undue hardship.

Reassignment is available only to employees, not to applicants. In addition, reassignment may be made only to a vacant position. The law does not require that agencies create new positions or move employees from their jobs in order to create a vacancy.

*22. Must the employee with a disability be qualified for the new position?*

**Yes.** An employee will be qualified 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 position with or without reasonable accommodation. If the employee is qualified for the position, s/he should be reassigned to the job as a reasonable accommodation and should not have to compete for it.

*23. What should an agency's reasonable accommodation procedures provide with regard to reassignment?*

Agency procedures must explain the circumstances in which reassignment is required. They must also clearly notify supervisors and other relevant agency employees about how and where they are required to conduct a search for available vacancies. Agency procedures should identify the agency personnel who are responsible for conducting the search and require these individuals to consult with the affected employee as necessary to determine whether there are limits on the search the employee would like the agency to conduct; whether the employee is qualified for a particular job; or whether the employee would need a reasonable accommodation to perform the essential functions of a new position.

#### F. Denials of Reasonable Accommodation

As the Executive Order states, an agency's procedures must:

**"Provide that reasonable accommodation denials be in writing and specify the reasons for denial."** (Order, Section 1(b)(8))

Where an agency denies an individual's request for a reasonable accommodation, it must notify the individual in writing of the denial and the reasons for it. The denial should be written in plain language with as much specificity as possible, and should identify the employee or office that made the decision.

**EXAMPLE** - Steven, who has HIV infection, requests that he be allowed to work at home three days a week due to the serious side effects he experiences from his medications. The agency denies the request with a one line statement noting that the "reasonable accommodation requested would pose an undue hardship for the agency."

This is an inadequate explanation. The agency must identify the basis for its finding of undue hardship - that is, it must explain how allowing Steven to work at home three days a week would create significant difficulty or expense for the agency. The explanation should also identify the decision maker.

Where an agency has denied a specific requested reasonable accommodation but offered to make a different one in its place, the agency's notice should explain both the reasons for the denial of the requested accommodation and the reasons that it believes that the chosen accommodation will be effective.

All agency denials must notify the individual that s/he has a right to file an EEO complaint. The agency must also identify and explain any agency procedures that are available for informal dispute resolution. *See* Section H below.

Where the agency grants an individual's request for reasonable accommodation, there is no requirement that the decision be in writing or that reasons for the decision be provided to the individual. Because the agency is required to track its processing of reasonable accommodation requests, *see* Section G, however, the agency should monitor its disposition of each request.

## G. Information Tracking

As the Executive Order states, an agency's procedures must:

**"Ensure that agencies' systems of recordkeeping track the processing of requests for reasonable accommodation and maintain the confidentiality of medical information received in accordance with applicable law and regulations."** (Order, Section 1(b)(9))

### 24. *What information must an agency be able to track?*

The Order does not require that agencies maintain particular recordkeeping systems, documents, or databases. Nonetheless, all agencies must be able to identify at least the following information:

- **the number and types of reasonable accommodations that have been requested in the application process and whether those requests have been granted or denied;**
- **the jobs (occupational series, grade level, and agency component) for which reasonable accommodations have been requested;**
- **the types of reasonable accommodations that have been requested for each of those jobs;**
- **the number and types of reasonable accommodations for each job, by agency component, that have been approved, and the number and types that have been denied;**
- **the number and types of requests for reasonable accommodations that relate to the benefits or privileges of employment, and whether those requests have been granted or denied;**
- **the reasons for denial of requests for reasonable accommodation;**
- **the amount of time taken to process each request for reasonable accommodation; and**
- **the sources of technical assistance that have been consulted in trying to identify possible reasonable accommodations.**

25. *How long must agencies maintain tracking information?*

Agencies should maintain tracking information for as long as is necessary to serve the purposes of their reasonable accommodation programs. In general, agencies may divide any records they keep into two categories for this purpose.

- **Agencies should keep records related to a particular individual who has requested a reasonable accommodation for the duration of that individual's employment.** These records would include any documentation of the individual's disability or need for reasonable accommodation, as well as information about the disposition of that individual's accommodation request.
- **Agencies should keep any cumulative records used to track the agency's performance with regard to reasonable accommodation for at least three years.** Tracking performance over a three year period is critical to enable an agency to assess whether it has adequately processed and provided reasonable accommodations. Agencies can use this tracking information to evaluate whether and where they need to improve their handling of reasonable accommodation requests.

*26. Are individual medical records subject to the confidentiality restrictions of the Rehabilitation Act?*

**Yes.** Records that contain medical information about a particular individual with a disability are fully subject to the confidentiality restrictions discussed above in Section D. Thus, the agency's recordkeeping systems must contain safeguards to ensure that those restrictions are fully observed. The agency's procedures should detail how the agency will ensure that medical records are segregated from official personnel files, and to whom and under what circumstances medical information may be disclosed. Agency procedures should make clear that the EEOC has the right to review all relevant records upon request to evaluate the efficacy of the agency's reasonable accommodation procedures.

If an agency creates tracking records that contain merely aggregate information - information that does not, and cannot be used to, identify any particular individual with a disability -- the records will not be subject to the confidentiality restrictions of the Rehabilitation Act. Records that identify, for example, the number and types of requests for reasonable accommodation made by job category, will likely not contain medical information about specific employees or applicants with disabilities.

*27. How should agencies use their tracking information?*

Each agency should regularly use its tracking information to evaluate the agency's performance in responding to requests for reasonable accommodation. Among other things, the agency should assess how long it takes its employees to respond to requests for different types of reasonable accommodations; whether there are particular types of reasonable accommodations that the agency has been unable to provide; whether there are agency components that have not granted requests for reasonable accommodations; and what the reasons for denial have been. Where, for example, there have been repeated delays in the processing of reasonable accommodation requests, the agency should investigate the reasons for the problem and take the steps that are necessary to correct it.

*28. Are there any reporting requirements under the Order?*

**Yes.** The Order requires that each agency and agency component that adopts reasonable accommodation procedures submit those procedures to the EEOC no later than July 26, 2001. Each agency or agency component must also submit to the EEOC any modifications to its reasonable accommodation procedures at the time they are adopted. The Order imposes no other formal reporting requirements.

Procedures and modifications to procedures should be submitted to:

Director, Federal Sector Programs  
Equal Employment Opportunity Commission

Office of Federal Operations  
1801 L Street, N.W.  
Washington, D.C. 20507

## H. Informal Dispute Resolution and EEO Complaints

As the Executive Order states, each agency's procedures must:

**"Encourage the use of informal dispute resolution processes to allow individuals with disabilities to obtain prompt reconsideration of denials of reasonable accommodation. Agencies must also inform individuals with disabilities that they have the right to file complaints in the Equal Employment Opportunity process and other statutory processes, as appropriate, if their requests for reasonable accommodation are denied."** (Order, Section 1(b)(10))

### *29. What is an informal dispute resolution process for purposes of the Order?*

An informal dispute resolution process is any voluntary mechanism through which an individual can request reconsideration of an agency denial of reasonable accommodation, regardless of whether the person has started the EEO complaint process. Any informal dispute resolution process should begin by encouraging individuals to ask the decision maker to reconsider his/her decision. Procedures also could allow individuals to appeal the denial to others in the decision maker's chain of command.

While the Order encourages the use of informal processes for resolution of reasonable accommodation disputes, it does not require them. Furthermore, agencies are free to tailor any procedures they use to the needs of their own workplaces. Thus, agencies may, if they choose, create programs devoted exclusively to resolving reasonable accommodation disputes. Agencies could alternatively consider making existing mechanisms already set up to address workplace disputes (such as alternative dispute resolution (ADR) programs) available for this purpose. The objective is to permit quick and thoughtful reconsideration of a denial, not to establish cumbersome new procedures.

### *30. What is the relationship between an informal dispute resolution process and the EEO or other federal sector complaint processes?*

Three basic principles govern the relationship between an informal process for addressing reasonable accommodation disputes and the EEO and other federal sector complaint processes:

- An agency's informal process must be **in addition to - and may not modify or replace** - the EEO complaint process governed by EEOC regulations, *see* 29 C.F.R. part 1614, and Merit Systems Protection Board (MSPB) and union grievance procedures available to federal sector applicants or employees. While the agency's informal mechanism for

resolving reasonable accommodation disputes may rely on the same ADR procedures that the agency uses in its EEO processes, the individual challenging the denial of a reasonable accommodation request must be able to gain access to those procedures without having to contact an EEO counselor or file an EEO complaint.

- **The informal process must be voluntary and may not be used to limit an individual's rights.** An agency may not require that an individual challenging the denial of a reasonable accommodation request use its informal dispute resolution process. Nor may an agency prevent such an individual from filing an EEO complaint, an MSPB claim, or a union grievance, even if s/he is also pursuing the agency's informal process. The agency's informal process is not an administrative remedy that must be exhausted before a complaint may be filed.
- **The informal process does not affect the time limits governing the EEO complaint process.** An individual's participation in the informal process does not satisfy the requirements for bringing a claim under the EEO, MSPB, or union grievance procedures. When an agency denies a request for reasonable accommodation, it must notify the individual **in writing** that if s/he wishes to pursue the EEO complaint process, s/he must do so within 45 days of the denial, even if s/he is also participating in the agency's informal dispute resolution process.

*31. What is the procedure for alleging a violation of Section 501 of the Rehabilitation Act?*

The procedure for alleging a violation of Section 501 of the Rehabilitation Act is set forth in the Commission's federal sector EEO process regulations.<sup>(13)</sup> Briefly stated, the federal sector process requires the following:

- the individual alleging discrimination must contact an EEO Counselor within 45 days of the date of the discriminatory act or within 45 days of when the individual became aware or should have become aware of the allegedly illegal conduct;
- the agency must conduct EEO counseling or offer mediation or other form of alternative dispute resolution;
- if the matter is not resolved informally, the agency will give the individual a notice of final interview, and the individual will have 15 days from the date of the notice to file a formal complaint;
- once a formal complaint is filed, the matter will either be dismissed or investigated, and may proceed either to an agency decision or a hearing before a Commission Administrative Judge; and



- after either the agency or the Administrative Judge issues a decision, the matter may be appealed to the EEOC's Office of Federal Operations, which will then render a decision.

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## Appendix

### Selected Reasonable Accommodation Resources

U.S. Equal Employment Opportunity Commission

1-800-669-3362 (Voice) 1-800-800-3302 (TT)

<http://www.eeoc.gov/>

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., and the regulations, 29 C.F.R. § 1630. In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship. The three 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; (2) *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 8 FEP Manual 405:7601 (1999); and (3) *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992) (*Technical Assistance Manual*). The *Technical Assistance 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); (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); and (5) *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* at 20, 22, 23, 24-5, 8 FEP Manual (BNA) 405:7701, 7711, 7712-14, 7715-16 (2000).

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 *Technical Assistance Manual* and the poster, are also available through the Internet at [www.eeoc.gov](http://www.eeoc.gov). All of these documents provide guidance that applies to federal agencies through the Rehabilitation Act of 1973, 29 U.S.C. § 791.

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)

<http://www.rid.org/>

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/>

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

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

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#### Footnotes

1. 65 Fed. Reg. 46565, 2000 WL 1114943 (2000).
2. 29 U.S.C. § 791.
3. 29 C.F.R. pt. 1630 app. § 1630.2(o).
4. 8 FEP Manual (BNA) 405:7601 (1999). The *EEOC Reasonable Accommodation Guidance* is also available on the EEOC's website at <http://www.eeoc.gov/>. The reasonable accommodation standards of the Americans with Disabilities Act apply to the Rehabilitation Act as well. 29 U.S.C. § 791(g).
5. Agencies should also bear in mind the limited circumstances in which an employer should initiate the reasonable accommodation process without being asked. See *EEOC Reasonable Accommodation Guidance*, Question 39.
6. Of course, to the extent that an EEO official is involved in the handling of a reasonable accommodation request, s/he should not be involved in the processing of any EEO complaint that is made regarding disposition of the request.
7. Agencies may wish to seek advice from other agencies - such as the Department of Defense's "Computer/Electronic Accommodations Program" (CAP) or the Department of Agriculture's "Technology Accessible Resources Gives Employment Today" (TARGET) Center - that have established programs to provide these types of assistance. Information about the CAP program can be found at <http://www.tricare.osd.mil/cap/>; information about the TARGET Center is posted at <http://www.usda.gov/oo/target.htm>.
8. Architectural Barriers Act of 1968, 42 U.S.C. § 4151 *et seq.*; Rehabilitation Act Section 504, 29 U.S.C. § 794; *see also* Americans with Disabilities Act, 42 U.S.C. § 12131.
9. The EEOC has issued detailed guidance that applies to the provisions of the Rehabilitation Act that address permissible medical inquiries. See *EEOC Reasonable Accommodation Guidance*;

"Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," 8 FEP Manual (BNA) 405:7191 (1995); and "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act," 8 FEP Manual (BNA) 405:7701 (2000). These documents can be found on the EEOC's website at <http://www.eeoc.gov/>.

The Office of Personnel Management (OPM) also regulates when an agency may request medical examinations of applicants and employees. *See* 5 U.S.C. § 3301 & 3302; 5 C.F.R. Part 339 (Medical Qualification Determination). In making these requests, agencies must comply with Rehabilitation Act requirements.

10. *See EEOC Reasonable Accommodation Guidance*, Question 6; "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act," Question 10.

11. For further guidance on the circumstances in which it is permissible to disclose confidential medical information to workers' compensation offices or insurance carriers, *see* 29 C.F.R. pt. 1630 app. §§ 1630.14(b), 1630.16(f).

12. For further information on reassignment, *see EEOC Reasonable Accommodation Guidance*, Questions. 25-30.

In March 2000, the Commission also issued a Notice of Proposed Rulemaking regarding proposed revisions to 29 C.F.R. § 1614.203, addressing, among other things, requirements related to reassignment and the obligations of agencies and their unions to bargain over modifications to collective bargaining agreements. *See* 65 Fed. Reg. 11019, 2000 WL 226980 (3/1/00). As of the date of issuance of this Guidance, the Commission is considering the comments received on the proposed rule and is proceeding with the rulemaking process.

13. 29 C.F.R. pt. 1614.

# Appendix C



## **Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008<sup>27</sup>**

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act" or "Act"). The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.

The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes 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.

The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- directs EEOC to revise that portion of its regulations defining the term "substantially limits";
- expands the definition of "major life activities" by including two non-exhaustive lists:
  - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
  - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;

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<sup>27</sup> Available at: [http://www.eeoc.gov/laws/statutes/adaaa\\_notice.cfm](http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm) (last accessed: May 29, 2015)

- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

EEOC will be evaluating the impact of these changes on its enforcement guidances and other publications addressing the ADA.

Effective Date: The ADA Amendments Act is effective as of January 1, 2009. EEOC's regulations to implement the equal employment provisions of the ADA Amendments Act are effective as of March 25, 2011.



# Appendix D



## **Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA<sup>28</sup>**

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

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

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

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

- The term “substantially limits” requires a lower degree of functional limitation than the standard previously applied by the courts . An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability.
- The term “substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADAAA.

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<sup>28</sup> Available at: [http://www.eeoc.gov/laws/regulations/adaaa\\_fact\\_sheet.cfm](http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm) (last accessed: May 29, 2015).

- With one exception (“ordinary eyeglasses or contact lenses”), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- In keeping with Congress’s direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.

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

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

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

- Instead of providing a list of impairments that would “consistently,” “sometimes,” or “usually not” be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying those principles, there will be some impairments that virtually always constitute a disability. The regulations also provide examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.
- Language in the NPRM describing how to demonstrate that an individual is substantially limited in “working” has been deleted from the final regulations and moved to the appendix (consistent with how other major life activities are addressed). The final regulations also retain the existing familiar language of “class or broad range of jobs”

rather than introducing a new term, and they provide examples of individuals who could be considered substantially limited in working.

- The final regulations retain the concepts of “condition, manner, or duration” that the NPRM had proposed to delete and explain that while consideration of these factors may be unnecessary to determine whether an impairment substantially limits a major life activity, they may be relevant in certain cases.

The Commission has released two Question-and-Answer documents about the regulations to aid the public and employers – including small business – in understanding the law and new regulations. The ADAAA regulations and accompanying Question and Answer documents are available on the EEOC website at [www.eeoc.gov](http://www.eeoc.gov).