

MODEL POLICIES - EMPLOYMENT



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END SEXUAL VIOLENCE IN OUR COMMUNITIES
WASHINGTON COALITION OF SEXUAL ASSAULT PROGRAMS

ACCOLUS SERRILLIS

INTRODUCTION

Most employment discrimination against people with disabilities is not intentional. Discrimination most frequently occurs because interviewers and others involved in hiring or promotion are uninformed about the differing capabilities of individuals with disabilities and make decisions based on misconceptions, speculations, stereotypes, or even unfounded fears.

MATTER OF JUSTICE

The continuing existence of unfair and unnecessary discrimination denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities which we all value, and costs untold billions of dollars in expenses resulting from dependency and nonproductivity. ¹

Assuring your employment practices are free from discrimination is a matter of justice. It is also a matter of law.

The Americans with Disabilities Act (ADA) was enacted to support equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. ²

Most programs serving sexual assault survivors are covered under portions of the Americans with Disabilities Act and the Washington Law Against Discrimination, Chapter 49.60. ³

If you receive federal funds, your program is also covered by Section 504 of the Rehabilitation Act of 1973; if you are a federal contractor or subcontractor, then you will also be covered under Section 503 of the Rehabilitation Act of 1973. ⁴

You are covered under Washington's law if you are an employer, which includes any person acting in the interest of an employer, directly or indirectly, who employs **eight** or more persons. Here, the definition of employer *does not* include any religious or sectarian organization not organized for private profit

Compliance is but the first step..... We can reach beyond to ensure equal opportunity

Fortunately, the employment requirements discussed below will provide guidance for meeting the standards expressed in the above laws. However, it is our goal to reach beyond the law, to be flexible and imaginative in creating solutions that ensure equal opportunity and fair treatment for people with disabilities.

TRAINING IS THE KEY

To avoid discrimination in the hiring process, agency directors must provide awareness training for interviewers and others involved in the hiring process, and for supervisors and managers that make decisions regarding promotion and advancement. Such training provides:

- Factual information about disability and the qualifications of people with disabilities,
- Emphasizes the importance of individualized assessments, and
- Helps interviewers feel more at ease in talking with people who have different disabilities. ⁵

AN OVERVIEW OF THE LAW

WHAT IS TITLE 1?

Title I contains the employment provisions of the Americans with Disabilities Act.

Title I applies to private employers, state and local governments, employment agencies, labor unions, and joint labor-management committees with 15 or more employees, including part-time employees.⁶

Title I Employers cannot discriminate against people with disabilities in regard to any employment practices, terms, conditions, and privileges of employment.

HOW IS DISABILITY DEFINED UNDER THE ADA?

The ADA prohibits employment discrimination against “qualified individuals with disabilities.”

A qualified individual with a disability is:

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

A person with a “disability” is an individual who:

Has a physical or mental impairment that substantially limits one or more of his/her major life activities when using a mitigating measure,
Has a record of such an impairment; or
Is regarded as having such an impairment.⁷

“Major life activities” include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

A “mitigating measure” includes such items as medication or assistive devices, such as a walker or artificial leg. If a person has little or no difficulty performing any major life activity because she or he uses a mitigating measure, then that person will not meet the ADA’s first definition of disability.

AN OVERVIEW OF THE LAW CONTINUED

EXCLUSIONS

Individuals specifically not protected by the ADA include persons currently using drugs illegally. However, people who have been rehabilitated and do not currently use drugs illegally, or are in the process of completing a rehabilitation program may be protected by the ADA.

Certain behavior disorders are excluded from the definition of “individual with a disability.”

WASHINGTON LAW

Under the Washington Law Against Discrimination⁸, disability means the presence of a sensory, mental, or physical disability.

The presence of a sensory, mental or physical disability includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

- (a) Is medically cognizable or diagnosable;
- (b) Exists as a record or history;
- (c) Is perceived to exist whether or not it exists in fact.⁹

WHAT ACTIONS CONSTITUTE DISCRIMINATION?

The ADA specifies the type of actions that may constitute discrimination.

- 1) Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability.
- 2) Participating in a contractual or other arrangement or relationship that subjects an employer's qualified applicant or employee with the disability to discrimination.
- 3) Denying employment opportunities to a qualified individual because he or she has a relationship or association with a person with a disability.
- 4) Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the business.
- 5) Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with the disability, unless they are job-related and necessary for the business.
- 6) Failing to use employment tests in the most effective manner to measure actual ability. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or speaking skills of an employee or applicant with the disability (unless those are the skills the test is designed to measure).
- 7) Discriminating against an individual because he or she has opposed an employment practice of the employer or filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the Act. ¹⁰

Washington Law—Unfair Practices

Under Washington law, the following actions are considered discriminatory:

- 1) To refuse to hire any person because of the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification, or unless the particular disability prevents the proper performance of the particular employee involved.
- 2) To discharge or bar any person from employment because of the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal.
- 3) To discriminate against any person in compensation or in other terms or conditions of because of the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal.
- 4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication.
- 5) To use any form of application for employment, which expresses any limitation, specification, or discrimination as to the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person.
- 6) To make any inquiry regarding prospective employment, which expresses any limitation, specification, or discrimination as to the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person,
- 7) To have any intent to make any such limitation, specification, or discrimination regarding applications or inquiries for prospective employment, unless based upon a bona fide occupational qualification. ¹¹

WHAT DOES REASONABLE ACCOMODATION MEAN?

Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination.

Reasonable accommodation is any change in the work environment **or** in the way things are usually done that results in **equal employment opportunity** for an individual with a disability.

An employer must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with the disability, unless it can show that the accommodation would cause an undue hardship on the operation of its business. The obligation to provide reasonable accommodation applies to the application process as well as to the duration of the employment.

Some examples of Reasonable Accommodation include:

- ✓ Making existing facilities used by employees readily accessible to, and usable by, an individual with a disability;
- ✓ Job restructuring;
- ✓ Modifying work schedules;
- ✓ Reassignment to a vacant position;
- ✓ Acquiring or modifying equipment or devices;
- ✓ Adjusting or modifying examinations, training materials, or policies;
- ✓ Providing qualified readers or interpreters.

Washington Law—Reasonable Accommodation

Reasonable accommodation means measures that:

- (a) Enable equal opportunity in the application process;
- (b) Enable the proper performance of the particular job held or desired;
- (c) Enable the enjoyment of equal benefits, privileges, or terms and conditions of employment.¹²

Undue Hardship

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

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

Also, a reasonable accommodation need not be the best accommodation available, as long as it is effective for the purpose.

WHAT QUESTIONS MAY AN INTERVIEWER ASK?

Pre-Employment Inquiries and Medical Examinations

An interviewer may not ask a job applicant about the existence, nature, or severity of the disability. Applicants may be asked about their ability to perform specific job functions. An interviewer may not make medical inquiries or conduct medical examinations until after a job offer has been made. A job offer may be conditioned on the results of the medical examination or inquiry, but *only if this is required for all entering employees in similar jobs*.

Drug and Alcohol Use

It is not a violation of the ADA for employers to use drug tests to find out if its applicants or employees are currently illegally using drugs.

HOW DO I LET APPLICANTS AND EMPLOYEES KNOW WE ACCOMMODATE INDIVIDUALS WITH DISABILITIES?

Posting Notices

The ADA requires an employer to post notices containing the provisions of the ADA, including the reasonable accommodation obligation, in conspicuous places on its premises. Information about the reasonable accommodation obligation also can be included in job application form, job vacancy notices, and in personnel manual's, and may be communicated orally. An applicant or employee does not have to specifically use the words "reasonable accommodation," to let the employer know that some adjustment or changes are needed to do the job because of limitations caused by disability.

"Qualified Individual with a Disability"

A MORE DETAILED ANALYSIS

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

“Satisfies the record of requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”¹³

There are two steps in determining whether an individual is “qualified” under the ADA:

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

- ✓ Education;
- ✓ Work experience;
- ✓ Training;
- ✓ Skills;
- ✓ Licenses;
- ✓ Certificates;
- ✓ Other job-related requirements, such as good judgment or ability to work with other people.

Example:

The first step in determining whether a mental health counselor who has cerebral palsy is qualified for certain counseling positions requiring a license is to determine if the person is a licensed mental health professional. If not, she or he is not qualified. Or, if it were an agency’s policy that all its managers have at least three years experience working with the same or similar agency, an individual with a disability who has worked for two years for an agency would not be qualified for a managerial position.

This first step is sometimes referred to as determining if the individual with the disability is “otherwise qualified.”

Once the individual with the disability meets the necessary job prerequisites:

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

This second step has two parts:

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

The ADA requires an employer to focus on the essential functions on a job to determine whether a person with the disability is qualified. This is an important nondiscrimination requirement. Many people with disabilities who can perform essential job functions are denied employment because they cannot do things that are only marginal to the job. For example: a file clerk position description may state that the person holding the job answers the telephone, but if in fact the functions of the job are to file and retrieve written materials, and telephones actually or usually are handled by other employees, a person whose hearing impairment prevents use of the telephone and who is qualified to do the basic file clerk functions should not be considered unqualified for this position.

HOW TO IDENTIFY THE ESSENTIAL FUNCTIONS OF THE JOB

Sometimes it is necessary to identify the essential functions of a job in order to know whether an individual with the disability is “qualified” to do the job.

The first consideration is whether employees in the position actually are required to perform the functions.

Example

A job announcement of a job description for office manager may state that typing is a function of the job. If, in fact, the employer has never or seldom required an employee and that position to type, this cannot be considered an essential function.

Let’s say the person holding the job does perform a function.

The next consideration is whether removing that function would fundamentally change the job. Under the ADA a function could be considered essential if:

1. The position exists to perform the function.

Example

A person is hired to do community education. The ability to train is an essential function, because this is the reason that position exists.

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

Example

It may be an essential function for an administrative assistant to answer the telephone if there are only three employees in a very busy office and each employee has to perform many different tasks.

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

Example

An agency wishes to expand its services to elder members of the Vietnamese community. For a new therapist position, in addition to therapist credentials, the agency requires a person who can communicate fluently in the Vietnamese language. Fluent communication in the Vietnamese language is an essential function of the job.

Best Practice Tip

If an agency uses written job descriptions, they should be reviewed to be sure they accurately reflect the actual functions of the current job.

Washington Law—An “Able Worker” and “Bona Fide Occupational Qualification”

Remember, under Washington law, disability is defined as the presence of a sensory, mental, or physical disability.

A condition is a ‘sensory, mental, or physical disability’ if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.

An ‘*able worker with a disability*’ is a person whose disability does not prevent the proper performance, with or without reasonable accommodation, of the particular job in question.¹⁴

A *bona fide occupational qualification* is an exception to the rule that an employer may not discriminate on the basis of disability

Examples where BFOQ’s are not applicable:

An employer refuses to consider a person with a disability for an administrative assistant position on the basis that the person’s disability ‘would make customers and other coworkers uncomfortable. This is not a valid BFOQ.

A person with a disability applies for promotion to a position at a different site within the agency. The agency does not promote the person because doing so would compel the agency to install an assistive device on equipment at that site to enable the person to properly perform the job. This is not a valid BFOQ.¹⁵

WHAT DOES “WITH OR WITHOUT REASONABLE ACCOMMODATION” MEAN?

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

Reasonable Accommodation- The Touchstone For Equal Opportunity

Reasonable accommodation is the key nondiscrimination requirement of the ADA because of the special nature of discrimination faced by people with disabilities. It is the touchstone, if you will, for assuring equal employment opportunity. Many people with disabilities can perform jobs without any need for accommodations. But, many others are excluded from jobs they are qualified to perform because of unnecessary barriers in the workplace and the work environment.

Example

Physical barriers make it difficult to get into and around the worksite or to use necessary work equipment. The way people communicate with each other can limit or exclude some people with disabilities. Rigid work schedules that allow no flexibility for people with special needs caused by disability may exclude others. Finally, barriers in other people’s mind; including unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers may be the only reasons people are excluded.

Such barriers may discriminate against qualified people with disabilities just as much as overt exclusionary practices. For this reason, the *ADA requires reasonable accommodation as a means of overcoming unnecessary barriers to prevent or restrict employment opportunities for otherwise qualified individuals with disabilities.*

As we noted above, an employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee

REASONABLE ACCOMODATION

with a disability, unless the employer can show that the accommodation would impose an undue hardship on the business.

- ✓ Reasonable accommodation is a modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy equal employment opportunity.
- ✓ The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise anytime that a person's disability or job changes.
- ✓ An employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation, unless doing so would cause an undue hardship.
- ✓ An employer does not have to make an accommodation for an individual who is not otherwise qualified for a position.
- ✓ Generally, it is the obligation of an individual with the disability to request a reasonable accommodation. An employer is not required to provide an accommodation if unaware of any need. However, the employer is responsible for notifying job applicants and employees of its obligation to provide accommodations for otherwise qualified individuals with disabilities. (Posting a notice. See below for more information).
- ✓ A qualified individual with a disability has the right to refuse an accommodation. However, if the individual cannot perform the essential functions of the job without the accommodation, he or she may not be qualified for the job.
- ✓ If the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of providing the accommodation or paying that portion of the cost, which would constitute an undue hardship.

Reasonable accommodation allows a qualified individual with the disability to enjoy an equal employment opportunity. An equal employment opportunity

means the opportunity to obtain the same level of performance or to enjoy equal benefits and privileges of employment that are available to a similarly situated employee without the disability.

The ADA requires reasonable accommodation in three aspects of employment:

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

The application process

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

Example

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

Best Practice Tip: To alert an applicant that your agency provides accommodations, you must post notice of the availability of reasonable accommodations. The notice must be:

- 1) Posted prominently in reasonable numbers and locations
- 2) Disseminated internally through memos and e-mail as a regular reminder to staff that reasonable accommodations are made as a matter of routine and as a reminder of whom to contact if they have questions.
- 3) Included in handbooks or manuals intended for applicants or staff.

REASONABLE ACCOMMODATION

- 4) Made available to each applicant including provision in alternate formats, such as electronic or large print, as appropriate.

Some examples of notice for reasonable accommodations are as follows:

Example A: “We want to make sure that applicants with disabilities have effective and meaningful opportunities to participate in our hiring process. If you have a disability and need us to provide a reasonable accommodation or modification or to take steps to insure that our communication with you is effective, please tell a staff person. Questions related to our policy on providing meaningful and effective participation for people who have disabilities should be directed to _____ at _____ (V/TTY).”

Example B: “If you have a disability and need us to provide a reasonable accommodation or modification or to take other steps to insure that you have a meaningful and effective opportunity to participate in our hiring process, please tell a staff person. Questions related to our policy on providing meaningful and effective participation for people who have disabilities should be directed to _____ at _____ (V/TTY).”

Example C: “Reasonable accommodations and aids for effective communication are available for people with disabilities upon request. Questions about this policy should be directed to _____ at _____ (V/TTY).”

Notice of reasonable accommodations should include a list or lists, in an accessible format, of all currently available assistive technology devices and services posted prominently in appropriate locations.

See the Hiring Process, below, for more Best Practice Tips

To perform the essential functions of the job

Reasonable accommodation must be provided to enable a *qualified applicant* to perform the essential functions of the job he or she is seeking, and to enable a *qualified employee* with the disability to perform the essential functions of the job currently held.

Modifications or adjustments may be required:

- In the work environment;
- In the manner or circumstances in which the job customarily performed; or
- In employment policies.

To ensure equal benefits of employment

Reasonable accommodations must be provided to enable an employee with the disability to enjoy benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities.

Example

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

Best practice tip: The above also means when you send staff for training or other events, make sure to inquire about possible accessibility needs and availability in areas such as, transportation, hotels, conference rooms, communication (sign language interpreters), etc.

In considering an accommodation, the focus should be on the ability and limitations of the individual, not on the name of a disability or a particular physical or mental condition. People who have any particular disability may have very different abilities and limitations.

THE PROCESS FOR IDENTIFYING A REASONABLE ACCOMMODATION

HOW DOES THE PROCESS BEGIN?

Requests for Reasonable Accommodation

Requests for reasonable accommodations can be made in plain language. No specific phrases, such as “ADA”, “disability” or “reasonable accommodation” are required in requesting a reasonable accommodation.

DO I NEED PROOF OF THE NEED FOR ACCOMMODATION?

Documentation of the need for accommodation

If an applicant or employee requests an accommodation and the need for the accommodation is not obvious, or if the employer does not believe that the accommodation is needed, the employer may request documentation of the individual’s functional limitations to support the request. For example: an employer may ask for written documentation from a doctor, psychologists, rehabilitation counselor, occupational or physical therapist, independent living specialists, or other professionals with knowledge of the person’s functional limitations. (See below for more detail).

WHAT IS REASONABLE?

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

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

In any case the individual with the disability and the employer should work together to identify the appropriate or effective accommodation.

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

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

WHAT IS THE UNDUE HARDSHIP LIMITATION?

An employer is not required to make a reasonable accommodation if it would impose an undue hardship on the operation of the business. However, if a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship. An undue hardship is an action that requires *significant difficulty or expense* in relation to the size of the employer, the resources available, and the nature of the operation. Whether a particular accommodation will impose an undue hardship must always be determined on a *case-by-case basis*.

IDENTIFYING A REASONABLE ACCOMMODATION

The concept of undue hardship includes any action that is:

- ✓ Unduly costly;
- ✓ Extensive;
- ✓ Substantial;
- ✓ Disruptive; or
- ✓ That would fundamentally alter the nature or operation of the business.

Best Practice Tip

Ask the individual what accommodation is appropriate. Every reasonable accommodation is determined on the individual's needs.

Examples of Reasonable Accommodations include:

- Making facilities accessible and usable;
- Job restructuring, which may involve allocating and redistributing the marginal functions of the job. ¹⁶

Note: Job restructuring does not include reallocating the essential functions of a job as a reasonable accommodation. Essential functions, by definition, are those that a qualified individual must perform, with or without an accommodation. However, an employer can modify when or how the essential functions are performed. Frequently, job restructuring is accomplished redistributing marginal functions of a job that cannot be performed by an individual with a disability to another position.

- Part-time or modified work schedules;
- Reducing chemicals, odors, fragrances in the work environment;
- Flexible leave policies;
- Reassignment to a vacant position; ¹⁷
- Acquisition or modifications of equipment and devices; ¹⁸
- Adjusting and Modifying examinations, training materials and policies; ¹⁹
- Providing qualified readers or print magnification equipment or talking computers;
- Providing qualified interpreters; ²⁰

Other accommodations

There are many other accommodations that may be effective for people with different disabilities in different jobs. Other examples include making transportation provided by the employer accessible; providing a personal assistant for certain job related functions, such as a page turner for a person who has no hands, or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips; the use of a job coach for people with mental retardation and other disabilities who could benefit from individualized on the job training and services provided at no cost by vocational rehabilitation agencies.

What do I do when I receive requests for accommodations?

When a person with a disability makes a request for a reasonable accommodation to any agency staff member the agency is required to respond to that request. Therefore, it is important for all staff to be able to recognize such a request and initiate an appropriate response to that request. Requests for accommodations/modifications/effective communication are requests that include the following two elements:

1. A request for an adjustment or assistance;

AND

2. An indication that the request might be related to a medical condition or disability.

Requests for reasonable accommodations can be made in plain language. No specific phrases, such as “ADA”, “disability” or “reasonable accommodation” are required in requesting a reasonable accommodation. Additionally, requests do not need to be made in writing and can be made in causal conversations, through any mode of communication, to any staff member and at any time - including after such time that an applicant has already begun the hiring process, or after the hire.

IDENTIFYING A REASONABLE ACCOMMODATION

A third party such as a counselor or job coach, or friend or family member may also make requests. However, staff should not implement an accommodation in response to a third party request without first directly verifying with the applicant or employee that the applicant agrees with the request.

What about Verifying a Disability?

Where possible, providing an accommodation should take place at the lowest administrative level that has access to the necessary resources.

The denial of an accommodation should require review and decision-making at the executive director level.

More about Documentation

In some instances it may be appropriate to ask for documentation of the disability underlying a request for an accommodation to make an informed decision about whether to provide the accommodation. However, in many cases such documentation is not necessary and should not be requested.

Documentation of a disability underlying a request for an accommodation should not be requested when:

1. The request for accommodation falls within the range of adjustments that staff would normally make in providing good customer service.

Examples: Requests for assistance reading informational material or filling out forms or requests for an orientation to or instruction on self-serve equipment.

OR

2. The disability is apparent.

OR

3. The accommodation requested would provide no benefit to an individual without an underlying disability.

Examples: Providing sign language interpreters, the provision of assistive technology, the relocation of an activity to an accessible location, or the provision of materials in alternate formats.

Requesting documentation for a disability should usually be avoided. However, there are some instances when such documentation may be necessary.

Documentation of the disability underlying a request for an accommodation may be appropriate when:

1. The disability is not apparent AND the accommodation requested could be of benefit to an individual who does not have a disability.

Examples: Extended time on a test or access to a private workspace.

OR

2. There is reason to suspect an individual may be attempting to abuse the reasonable accommodation/modification/effective communication process to disrupt or harass the program.

OR

3. The connection between the disability and the accommodation requested is unclear.

I think documentation is required.....What next?

In the event that a staff member believes that it may be appropriate to seek documentation of a disability underlying a request for accommodation, that staff member should present the recommendation to the individual designated to handle disability issues. That person will consider the recommendation, and if appropriate, conduct the inquiry.

Disability related inquiries associated with requests for reasonable accommodation should be done through the applicant or employee and be limited to answering the following two questions:

- 1) Does the individual have a disability?

AND

- 2) What limitations or barriers result from the disability in the area in which the individual has requested reasonable accommodation?

IDENTIFYING A REASONABLE ACCOMODATION

In seeking documentation of a disability, staff should either:

1) request that the applicant or employee collect the necessary documentation from the health care provider(s)

Or

2) give the applicant the option to collect the necessary documentation from the health care provider(s) or to sign a release authorizing the agency to directly collect information from the health care providers.

Nevertheless, it is the applicant or employee's responsibility to supply the information.

All disability related information obtained in association with a request for reasonable accommodation must be treated **confidentially**. Such records must be kept in a separate and secure file, be made available on a need-to-know basis only, and be accessible to authorized individuals, such as managers, and enforcement agencies.

Reasonable Accommodation is an Interactive Process

Reasonable accommodations require a problem solving partnership between the applicant or employee and the employer, which is called the "Interactive Process". The Interactive Process involves communication between the applicant or the employee and the agency-employer to identify the most agreeable and suitable solution to providing an accommodation. The success of the interactive process depends on the knowledge and experience contributed from both sides of the partnership.

Generally speaking, the role of the applicant or employee in the Interactive Process is to provide expertise on the impacts of the disability and the types of accommodations likely to be effective. The role of agency personnel is to provide expertise on the agency's hiring process or the agency's needs regarding the employment.

Note that in providing auxiliary aids for effective communication, primary consideration must be given to the customer's preferred mode of communication, and that a decision to use some other mode must be justified by very strong programmatic consideration.

There are four suggested steps to the Interactive Process:

Step One: Consult with the applicant or employee to understand her or his specific disability related limitations as they apply to the particular element[s] that is impacted.

Step Two: In consultation with the applicant or employee, identify potential accommodations and assess how effective each is likely to be in enabling the applicant to have an equal opportunity to participate in the hiring process.

Step Three: Seek additional assistance if necessary. Additional assistance through outside resources should play a supportive role to the problem solving partnership between the applicant or employee and the agency staff. Some sources of assistance are: available in the Appendix.

Step Four: When more than one accommodation would be effective in affording an equal opportunity, consider the individual's preference as well as program issues in making the selection. Note that in providing auxiliary aids, primary consideration must be given to the individual's preference.

DEVELOPING STANDARDS AND SELECTION CRITERIA TO ENSURE EQUAL OPPORTUNITY

Note that staff do not need to complete all four steps in the event that a successful solution has been achieved prior to their completion.

Denying a Request for a Reasonable Accommodation

Factors for Determining that there is No Obligation to Provide a Reasonable Accommodation: The agency may deny a request for a reasonable accommodation on the basis of the following criteria:

- 1) The agency has determined the applicant or employee does not have a disability.
- 2) The agency has determined that the absence of the requested reasonable accommodation would not limit the applicant or employee's ability to have genuine, meaningful participation in and equal opportunity to participate in the agency's, benefits, services, etc.
- 3) The agency has determined there is no accommodation that would be effective.
- 4) Undue Burden: The agency has determined that the provision of the requested accommodation would result in an undue burden (see above) or fundamentally alter the program

Developing Standards And Selection Criteria

Standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability *must be job related and consistent with business necessity.*

Even if a standard is job related and consistent with business necessity, if it screens out an individual with a disability on the basis of disability, the employer *must* consider if the individual could meet the standards *with a reasonable accommodation.*

An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job.

If an individual with a disability cannot perform the marginal function of a job because of the disability, an employer may base a hiring decision only on

the individual's ability to perform the essential functions of the job, with or without a reasonable accommodation.

Some examples of what we mean by job-related and consistent with business necessity:

Job related-

A qualification standard for a secretarial job, "ability to take shorthand dictation" is not job related if the person in the particular secretarial job *actually* transcribes taped dictation.

Business necessity –

An employer may ask the candidates for a clerical job if they have a driver's license, because it would be desirable to have a person in the job that could occasionally run errands or take packages to the post office in an emergency. This requirement is "job related," but relates to an *incidental*, not an essential, job function. If the standard disqualifies a person who could not obtain a driver's license because of a disability, it would not be justified as a "business necessity" for purposes of the ADA.

Even if a qualification standard or selection criteria is job related and consistent with business necessity, it may not be used to exclude an individual with the disability if the individual could satisfy the standard or selection criteria with a reasonable accommodation.

For example: it may be job related and necessary for a business to require that a secretary produce letters and other documents on a word processor. But it would be discriminatory to reject a person whose disability prevented manual keyboard operation, but who could meet the qualification standard using a computer assistive device if providing this device would not impose an undue hardship.

THE HIRING PROCESS

WHAT DO I NEED TO KNOW ABOUT HIRING TO ENSURE EQUAL OPPORTUNITY?

Information about job openings should be accessible to people with different disabilities.

An employer is not obligated to provide written information in various formats in advance, but should make it available in an accessible format on request.

Example

Job information should be available in a location that is accessible to people with mobility impairments. If a job advertisement provides only a telephone number to call for information, a TDD number should be included, unless a telephone relay service has been established. Printed job information in an employment office or on employee bulletin boards should be made available, as needed, to persons with visual or other reading impairments. Preparing information in large print will make it available to some people with visual impairments. Information can be recorded on a cassette or read to applicants with more severe vision impairments or those who have other disabilities, which limit reading ability.

Recruitment

Remember, the ADA is a nondiscrimination law. *It does not require employers to undertake special activities to recruit people with disabilities.* However, it is consistent with the purpose of the ADA for employers to expand their “outreach” to sources of qualified candidates with disabilities. Recruitment activities that have the effect of screening out potential applicants with disabilities may violate the ADA.

Example

If an employer conducts recruitment activity at a college campus, job fair, or other location that is physically inaccessible, or does not make its recruitment activity accessible at such locations to people with visual, hearing or other disabilities, it may be liable if a charge of discrimination is filed.

Pre-Employment Inquiries

An employer may not make any pre-employment inquiries about a disability, or about the nature or severity of the disability:

- ✓ On application forms
- ✓ In job interviews
- ✓ In background or reference checks.

An employer may not make any medical inquiry or conduct any medical examination prior to making a conditional offer of employment.

An employer may ask a job applicant questions about ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability.

An employer may ask all applicants to describe or demonstrate how they will perform the job, with or without an accommodation.

If an individual has a known disability that might interfere with or prevent performance of job functions, she or he may be asked to describe or demonstrate how these functions will be performed, with or without an accommodation, even if the other applicants are not asked to do so. *However*, if a known disability would *not* interfere with performance of job functions, an individual may only be required to describe or demonstrate how she or he will perform a job if this is required of all applicants for the position.

An employer may condition the job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability. ²¹

The Job Application Form

The job application form may not ask any questions related to disability.

The questions should focus on the applicant's ability to perform the job, not on a disability.

Employers have an obligation to make reasonable accommodations to enable an applicant with a disability to apply for a job. Some individuals may require assistance in filling out application forms.

The Job Interview

The employer must provide an accommodation, if needed, to enable an applicant to have equal opportunity in the interview process.

Some accommodations for interviews may include:

Accessible location for people with mobility impairments;

A person who can assist an applicant with limited fine motor skills in filling out forms, if necessary.

A sign language interpreter for a deaf or hearing-impaired person;

A reader for a blind or visually impaired person.

The job interviews should focus on the ability of an applicant. An interviewer may not ask questions about a disability, but may obtain more specific information about the ability to perform job tasks and about any needed accommodation.

Example

If a person has only one arm and an essential function of a job is to drive a car, the interviewer should not ask if or how the disability would affect this person's driving. The person may be asked if he or she has a valid driver's license, and whether she or he can perform any special aspect of driving that is required, such as frequent long distance trips, with or without an accommodation. The interviewer also could obtain needed information about an applicant's ability by describing or demonstrating the specific functions and tasks of the job and asking whether an applicant can perform these functions with or without the reasonable accommodation.

The applicant may be asked to describe or demonstrate how he or she will perform specific job functions, if this is required of everyone applying for a job in this job category, regardless of disability.

Example

An employer might require all applicants for a clerical job to demonstrate typing and phone answering ability by taking a simulated test, but could not require that a person using a wheelchair take this test if other applicants are not required to take it.

Inquiries About Attendance

An interviewer may not ask whether an applicant will need or request leave for medical treatment or for other reasons related to a disability.

The interviewer may provide information on the employer’s regular work hours, leave policies, and any special attendance needs of the job, and ask if the applicant can meet these requirements (provided that the requirements actually are applied to employees in a particular job).

Example

An interviewer may say “Our work requires us to be on-call for emergency room visits. Can you meet this requirement?”

Washington Law—Recruiting And Pre-Employment Inquiries

Under Washington law, preference for hiring persons with disabilities is not a discriminatory action. The State Human Rights Commission provides guidance in avoiding discriminatory language in advertising and recruiting by offering examples of acceptable language and terms. See WAC 162-16-260 and 162-16-290 in the Appendix.

Background and Reference Checks

Before making a conditional offer of employment, an employer may not ask previous employers, family members, or other sources about an applicant's:

- Disability;
- Illness;
- Workers' compensation history.

A previous employer may be asked about:

- Job functions and tasks performed by the applicant;
- The quality and quantity of work performed;
- How job functions were performed; attendance record; other job related issues that did not relate to disability.

If an applicant has a known disability and has indicated that he or she can perform the job with a reasonable accommodation, a previous employer may be asked about accommodations made by that employer.

Testing

If a test screens out or tends to screen out an individual with a disability or class of such individuals on the basis of disability, it must be job related and consistent with business necessity.

When can I deny employment based on health and safety standards?

HEALTH AND SAFETY STANDARDS

There are very specific and stringent requirements to establish that an individual poses a **direct threat** to the health and safety of the individual or others.

You, as an employer may require as a standard that an individual not pose a “direct threat” to the health or safety of the individual or others, *if* this standard is applied to all applicants for a particular job.

Also, you must show that there is:

- √ A significant risk of substantial harm;
- √ The specific risk must be identified;
- √ It must be a current risk, not a future risk or one that is speculative;
- √ The assessment of risk must be based on objective medical or other factual evidence regarding a particular individual; and
- √ Even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of “direct threat” by *reasonable accommodation*.

Examples

An employer cannot assume a person with cerebral palsy who has restricted manual dexterity cannot drive to interviews with clients. The abilities or limitations of a particular individual with cerebral palsy must be evaluated.

An employee with a temporary contagious disease such as tuberculosis may pose a risk to other employees. But with medication, this person’s disease would only be contagious for two weeks. With an accommodation of two weeks leave, this person would not pose a “direct threat.”

An employer may believe there is a risk associated with employing an individual with HIV. However, it is medically established that this disease can only be transmitted through sexual contact, use of infected needles, or other entry into a person’s blood stream. There is little or no likelihood that employing this person would pose a risk of transmitting this disease.

If the perceived risk to health or safety arises from the behavior of an individual with a mental or emotional disability, the employer must identify the specific behavior that would pose the “direct threat.”

Please note:

An assessment of risk cannot be based on speculation that the individual will become unable to perform a job in the future or that the individual may cause increased insurance or worker's compensation costs, or will have excessive absenteeism. The assessment cannot be based on unfounded fears or patronizing assumptions that an individual may endanger himself or herself by performing a particular job.

More Examples

An agency cannot reject an applicant for a job who has a history of mental illness, based on a generalized fear that working in a high stress job could trigger a relapse of the individual's mental illness. Nor could a director reject an applicant with a visual or mobility disability because of a generalized fear of risks to this person in the event of a fire or other emergency.

An individual does not pose a "direct threat" simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability. See Appendix for more detailed information on the ADA and psychiatric disabilities

A determination of "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering the most current medical knowledge and/or the best available objective evidence.

If there is a significant risk, reasonable accommodation must be considered.

AFTER THE HIRE

MEDICAL EXAMINATIONS AND INQUIRIES OF EMPLOYEES

For medical examination or inquiry to be made of an employee, it must be job related and consistent with business necessity. The need for the examination may be triggered by some evidence of problems related to job performance or safety, or an examination may be necessary to determine whether individuals in physically demanding jobs continue to be fit for duty. In either case, the scope of the examination also must be job related.

When an employing is having difficulty performing his or her job effectively.

In such cases, medical examination may be necessary to determine if he or she can perform essential job functions with or without an accommodation. When an employee becomes disabled, he or she is protected by the ADA if she or he can perform the essential functions of the job with or without reasonable accommodation.

Medical information or medical examination may be required:

- When an injury occurs to determine if the individual meets the ADA definition of “individual with the disability.”
- If an accommodation has been requested and information is needed to determine if the individual is covered by the ADA.
- To determine if the individual can perform essential functions of the job currently held, with or without reasonable accommodation, and without posing a “direct threat” to health or safety that cannot be reduced or eliminated by reasonable accommodation.
- To identify an effective accommodation that will enable the individual to perform essential job functions in a current or vacant job for which the individual is qualified.
- An employer may conduct voluntary medical examinations and inquiries as part of the employee health program, as long as this information is not used to discriminate against an employee in any employment practice.

AFTER THE HIRE

Washington Law—Seeking Opinions From Health Care Professionals

Under Washington law, employers may seek a health care professional's opinion on whether a person's disability affects the proper performance of a particular job. However, a health care professional's conclusion will not be considered to be an opinion on whether the person can properly perform the particular job unless it is:

- 1) Based on the individual capabilities of the particular person, and not on generalizations as to the capabilities of all persons with the same disability; and is
- 2) Based on knowledge of the actual sensory, mental, and physical qualifications needed for proper performance of the particular job.

Remember, an employee's health care information must be kept confidential, separate from the employee's regular personnel files. The employer may share health care information only on a need to know basis. Supervisors and/or safety personnel may be informed of an employee's needs only if necessary to make appropriate work assignments or develop appropriate emergency response plans.²²

DISCIPLINE

Main Points

- √ An agency director can hold employees *with* disabilities to the same standards of performance as other similarly situated employees *without* disabilities for performing **essential job functions** (see earlier section) with or without reasonable accommodation.

Note: If the ability to perform marginal functions is affected by the disability, the agency-employer must provide reasonable accommodation, unless to do so would be an unreasonable hardship.

- √ An employee who has an accommodation should not be evaluated on his/her ability to perform any job function without the accommodation, and should not be downgraded because the accommodation is needed.
- √ Employees with disabilities should not be evaluated on a lower standard or disciplined less severely than any other employee.

- √ The agency-employer must provide an employee with a disability with reasonable accommodation, if necessary, to participate in the evaluation process (a sign-language interpreter, example).
- √ If an employee with a disability is not performing well, the agency-employer may require medical and other professional inquiries that are job-related and consistent with business necessity to discover whether the disability is causing the poor performance *and* whether any reasonable accommodation *or* additional accommodation is needed.
- √ An agency-employer may take the same disciplinary action against employees with disabilities as it takes against other employees, if illegal use of drugs or alcohol use affects job performance and/or attendance.

The nondiscrimination requirement of the ADA applies to all employment practices and activities.

Example

An employer may not discriminate against a qualified individual with a disability in requirements affecting promotion, assignment, training, evaluation, discipline, advancement opportunity and discharge; Compensation, insurance, leave, and other benefits and privileges of employment; and Contractual relationships.

An employer may not discriminate or retaliate against any individual, whether or not the individual is disabled, because the individual has opposed a discriminatory practice, filed a discrimination charge, or participated to the in any way in enforcing the ADA.

NONDISCRIMINATION AND OTHER EMPLOYMENT PRACTICES

The ADA specifically provides that an employer or other covered entity may not deny an employment opportunity or benefit to an individual whether or not the individual is disabled, because that individual has a known relationship or association with an individual who has a disability. The term “relationships or association” refers to family relationships and any other social or business relationships or association. *This provision of the law prohibits employers from making employment decisions based on concerns about the disability of a family member of an applicant or employee, or anyone else with whom this person has a relationship or association.*

Example:

An employer may not refuse to hire or fire an individual because the individual has a spouse, child or other dependant who has a disability. The employer may not assume that the individual will be unreliable, have to use leave time, or be away from work in order to care for a family member with the disability,

An employer may not refuse to hire or fire an individual because she or he has a spouse, child or other dependant who has a disability that is either not covered by the employer’s current health insurance plan or that may cause future increased health care costs;

An employer may not refuse to insure, or subject individual to different terms or conditions of insurance, solely because the individual has a spouse, child or other dependant who has a disability.

However, the ADA does not require that an employer provide an employee who is not disabled with a modified work schedule as an accommodation, to enable the employee to care for a spouse or child with a disability. The obligation to make a reasonable accommodation applies only to qualified individuals with disabilities.

DRUG AND ALCOHOL ABUSE

The ADA specifically permits employers to insure that the workplace is free from the illegal use of drugs and use of alcohol, so as to comply with other Federal laws and regulations regarding alcohol and drug use. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and for alcoholics.

ENFORCEMENT PROVISIONS

A job applicant or employee who believes she has been discriminated against on the basis of disability in employment by a private, state, or local government employer, labor union, employment agency, or joint labor management committee can file a charge with the equal employment opportunity commission (EEOC). See Appendix.

An individual, whether disabled or not, also may file a charge if he or she believes that he or she has been discriminated against because of association with a person with a known disability, or believes that he or she has suffered retaliation because of filing a charge or assisting in opposing a discriminatory practice. Another person or organization may also file a charge on behalf of such applicant or employee.

The entity charged with violating the ADA should receive written notification of the charge within 10 days after it is filed.

EEOC. will investigate charges of discrimination. If EEOC believes that discrimination occurred, it will attempt resolve the charge for conciliation and obtain full relief for the aggrieved individual consistent with EEOC's standards for remedies.

If conciliation fails, the EEOC will file suit or issue a "right to sue" letter to the person who filed the charge. (If the charge involves a state or local government agency, the EEOC will refer the case to the Department of Justice for consideration of litigation or issuance of a "right to sue" letter.)

Remedies for violations of Title I of the ADA included hiring, reinstatement, promotion, backpay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. *Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good-faith effort to provide a reasonable accommodation.*

Employers may not retaliate against any applicant or employee who filed a charge, participated in an EEOC investigation or opposes an unlawful employment practice.

Washington Law—Reasonable Cause For Finding An Unfair Practice

If the State Human Rights Commission makes a finding that there is reasonable cause for believing an unfair practice has been or is being committed, the commission's staff will attempt to eliminate the unfair practice by conference, or conciliation.

In case of failure to reach an agreement, an administrative law judge will hold a hearing on the complaint of discrimination. Possible remedies include hiring, reinstatement or upgrading of employees, with or without back pay, or any such other appropriate action. Damages for humiliation and mental suffering will not exceed ten thousand dollars.

ACCESS TO EMPLOYMENT FOR PEOPLE WITH DISABILITIES - A CHECKLIST

PREPPING FOR ACCESS: A QUICK CHECK

Physical Access

Perform a physical access checklist or assessment for access to the facility and inside the facility, including access to equipment and to all spaces used by employees

Policies in Place

Non-discrimination policy on the basis of disability regarding:

- Agency Policies
- Agency Programs
- Physical Access
- Employment

Reasonable Accommodation Policy:

- Recruiting
- Hiring
- Employees

Notices Posted

Post ADA notices in conspicuous public spaces, which contain the provisions of the ADA, including the reasonable accommodation obligation. Information about the agency's non-discrimination policy and reasonable accommodation obligation is also included in the:

- job application form,
- job vacancy notices, and in
- personnel manuals

Post Agency's Non-discrimination Policy regarding Employment

(A statement that the Agency does not discriminate against a qualified individual with a disability in requirements affecting promotion, assignment, training, evaluation, discipline, advancement opportunity, discharge; compensation, insurance, leave, and other benefits and privileges of employment; and contractual relationships)

Reasonable Accommodation Policy

What accommodations are available on request (alternate formats, assistive technology—TDD's, and sign language interpreters, for example)

A CHECKLIST

All notices are available in alternate formats and are posted in manuals/handbooks

Training

All Staff trained on Agency policies and procedures related to disability and accommodation issues.

Technical Assistance

Resources readily available for Technical Assistance on issues related to hiring and employment of people with disabilities.

- External agency or person serving people with disabilities
- Internal staff monitoring compliance with ADA

DEVELOPING STANDARDS AND SELECTION CRITERIA TO ENSURE EQUAL OPPORTUNITY FOR EMPLOYMENT (Pg. 30)

Job Descriptions

Review all written job descriptions.

- Identify Essential Functions of the job
- Identify Marginal Functions of the job
- Qualification standards or selection criteria are job related and consistent with business necessity.
- Standards are uniformly applied to all applicants and employees in that job.

Announcement

Job vacancy is widely distributed to sources of qualified candidates with disabilities, including disability and other community-based organizations.

Information about the reasonable accommodation obligation included on the vacancy announcement.

Information about job openings should be available in various accessible formats on request.

Application Form

No pre-employment inquiries about a disability, or about the nature or severity of a disability on application forms

Information about the reasonable accommodation obligation is included on the application form

Reasonable accommodations available, if necessary, to enable an applicant with a disability to apply for a job, such as assistance with the mechanics of filling out the form

Job Interview

Review Job Description:

- Identify the Essential Functions of the job
- Qualification standards or selection criteria must be job related and consistent with business necessity.
- If such qualifications or criteria screen out an individual with a disability on the basis of disability, could the individual meet the standards with a reasonable accommodation?
- Remember, reasonable accommodation must be explored if accommodation is necessary to allow the individual to meet the standard or criteria.

A CHECKLIST

In the Interview

No pre-employment inquiries about a disability, or about the nature or severity of a disability in job interview, unless, an applicant has a known disability that might interfere with or prevent performance of job functions, or the applicant has a known disability and indicates that he or she can perform the job with a reasonable accommodation.

Reasonable accommodations available, if necessary, to enable an applicant with a disability to have an equal opportunity in the interview process. The employer must provide an accommodation, if needed, to enable an applicant to have equal opportunity in the interview process.

Questions focus on the applicant's ability to perform the job, not on a disability

Any testing must be job related and consistent with business necessity.

After the Interview

Does the applicant meet the necessary job prerequisites?

Can the individual perform the essential functions of the job, with or without reasonable accommodation? (Is the applicant "otherwise qualified" for the position?)

Is accommodation necessary for the individual to perform the job?

- Is there a request for an adjustment or assistance?
- Is the request related to a medical condition or disability?

Quick Checks[Remember the Interactive process, page?]

Use an interactive partnership with the applicant or employee in identifying and developing accommodations.

If an applicant has a known disability and has indicated that he or she can perform the job with a reasonable accommodation, a previous employer may be asked about accommodations made by that employer; otherwise, no pre-employment inquiries about a disability, or about the nature or severity of a disability in background or reference checks.

Is it necessary to verify the disability?

Q: Can the requested accommodation be made as a part of providing good customer service?

A: If YES, no verification necessary.

Q: Is the disability apparent?

A: If YES, no verification necessary.

Q: Would the requested accommodation provide no benefit to an individual without an underlying disability?

A: If YES, no verification necessary.

Verification may be necessary if the answer to any of the above is NO...

OR

If the connection between the disability and the accommodation requested is unclear.

A CHECKLIST

Verification Process

If verification is necessary, submit recommendation for documentation to the staff member designated to handle disability issues.

Ask the applicant or employee if she or he has a disability.....

AND

What limitations or barriers result from the disability in the area in which the individual has requested reasonable accommodation?

Collect documentation from health care providers from the employee or obtain a signed release authorizing the agency to do so.

Confidentiality

All disability related information associated with this request for reasonable accommodation is treated confidentially.....kept in a separate and secure file, available to authorized individuals only.

If accommodation is necessary, is it an undue burden for the agency?

Explore other forms of accommodation; other methods of payment.

HEALTH AND SAFETY (Pg. 37)

Existing Standards

Any standard related to the health and safety of the individual or others is applied to all applicants for this particular job.

Determination

A determination of "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering the most current medical knowledge and/or the best available objective evidence.

If a significant risk of substantial harm exists, reasonable accommodation must be considered to reduce the risk below the level of direct threat.

AFTER THE HIRE...

MEDICAL EXAMINATIONS AND INQUIRIES OF EMPLOYEES

(Pg. 39)

Inquiries

Medical examination or inquiry to be made of the employee is job related and consistent with business necessity

Examples: Does one or more apply to the employee?

An employee is having difficulty performing his or her job effectively.

It is necessary to determine whether individuals in physically demanding jobs continue to be fit for duty.

When an injury occurs to determine if the individual meets the ADA definition of “individual with the disability.”

If an accommodation has been requested and information is needed to determine if the individual is covered by the ADA.

To determine if the individual can perform essential functions of the job currently held, with or without reasonable accommodation, and without posing a “direct threat” to health or safety that cannot be reduced or eliminated by reasonable accommodation.

To identify an effective accommodation that will enable the individual to perform essential job functions in a current or vacant job for which the individual is qualified.

Confidentiality

Employee’s health care information must be kept confidential, separate from the employee’s regular personnel files, available to authorized individuals only.

A CHECKLIST

DISCIPLINE (Pg. 40)

The employee *with* the disability is held to the same standards of performance as other similarly situated employees *without* disabilities for performing **essential job functions**.

If the employee has an accommodation, the employee is evaluated on his/her ability to perform the job functions *with* the accommodation

The employee is not evaluated on a lower standard or disciplined less severely than any other employee.

Reasonable accommodation, if necessary, is available to allow the employee to participate in the evaluation process

If the employee with a disability is not performing well, the agency-employer may require medical and other professional inquiries that are job-related and consistent with business necessity to discover whether the disability is causing the poor performance *and* whether any reasonable accommodation *or* additional accommodation is needed.

RESOURCES

Technical Assistance

For ordering resource directory, contact:

- ADA Regional Business and Disability Technical Assistance Center
- Independent Living Council
- The Job Accommodation Network
- ABLEDATA
- The Governor's Committee on Disabilities and Employment

THE ADA AND PSYCHIATRIC DISABILITIES

The workforce includes many individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood.²³ It is common for employers to have questions about what is a psychiatric disability and whether they may ask about an individual's psychiatric disability. The following information is designed to address these issues.

A PSYCHIATRIC DISABILITY UNDER THE ADA

Remember, Under the ADA, the term “disability” means: “(a) a physical or *mental impairment* that substantially limits one or more of the major lifeactivities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment.”²⁴ (Emphasis added).

MENTAL IMPAIRMENT

A “mental impairment” includes any mental or psychological disorder, emotional or mental illness.

Examples: Major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder),schizophrenia, and personality disorders.

Traits or behaviors *are not* mental impairments.

For example, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.

AN IMPAIRMENT IS NOT AUTOMATICALLY A “DISABILITY”

To rise to the level of a “disability,” an impairment must “substantially limit” one or more major life activities of the individual.

Major Life Activities

The major life activities limited by mental impairments differ from person to person..

Examples: Major life activities can include learning, thinking, concentrating, interacting with others, caring for oneself, speaking, sleeping, performing manual tasks, or working.

Whether an individual is substantially limited in work should be analyzed only if no other major life activity is substantially limited by an impairment.

Substantial Limitation

An impairment is sufficiently severe to substantially limit a major life activity if it prevents or significantly restricts an individual from performing a major life activity as compared to the average person in the general population. Mild limitations will not meet this test.

Effect of Medication

The determination of whether a person has a disability under the ADA must take into consideration whether the person is substantially limited in performing a major life activity **when using a mitigating measure**.

This means that if a person has little or no difficulty performing any major life activity because s/he uses a mitigating measure, then that person **will not** meet the ADA's first definition of disability. (See above).

Length of Impairment

An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time.

Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years.

Conditions that are *temporary* and have no permanent or long-term effects on an individual's major life activities *are not* substantially limiting.

Disclosure of a Psychiatric Disability

As a general rule, an employer **may not** ask questions on a *job application* or *before making an offer of employment* about history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability.

Exceptions—The Hiring Process

The Applicant Asks

If an applicant asks for reasonable accommodation for the hiring process, the employer may ask disability-related questions.

If the need for this accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability. The employer may require the applicant to provide documentation from an appropriate professional concerning his/her disability and functional limitations.

A variety of health professionals may provide such documentation regarding psychiatric disabilities including primary health care professionals, psychiatrists, psychologists, psychiatric nurses, and licensed mental health professionals such as licensed clinical social workers and licensed professional counselors.

An employer should make clear to the applicant why it is requesting such information, i.e., to verify the existence of a disability and the need for an accommodation.

Further, the employer may request only information necessary to accomplish these limited purposes.

Example: An applicant for an administrative assistant position asks to take a typing test in a quiet location rather than in a busy reception area “because of a medical condition.” The agency may make disability-related inquiries at this point because the applicant’s need for reasonable accommodation under the ADA is not obvious based on the statement that an accommodation is needed “because of a medical condition.”

Specifically, the agency may ask the applicant to provide documentation showing that the individual has an impairment that substantially limits a major life activity and that he or she needs to take the typing test in a quiet location because of disability-related functional limitations.

The Applicant Discloses the Disability

The employer may then ask certain limited questions, specifically:

- whether the applicant needs reasonable accommodation; and
- what type of reasonable accommodation would be needed to perform the functions of the job.

After Making an Offer of Employment

If the employer subjects all entering employees in the same job category to the same inquiries or examinations regardless of disability, the employer may require a medical examination (including a psychiatric examination) or ask questions related to disability (including questions about psychiatric disability).

Exceptions—During Employment

Inquiries about disability or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position. In addition, inquiries or examinations are permitted if they are required by another Federal law or regulation.

Remember to Limit the Inquiry

Inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

And, Remember Confidentiality

Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA.

This includes medical information that an individual voluntarily tells his/her employer.

Exceptions:

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first aid and safety personnel may be told if the disability might require emergency treatment; and
- government officials investigating compliance with the ADA must be given relevant information on request.

What If Employees Ask Questions About A Coworker Who Has A Disability?

If employees ask questions about a coworker who has a disability, the employer **must not** disclose any medical information in response, **including** whether it is providing a reasonable accommodation for a particular individual.

The employer may explain that it is acting for legitimate business reasons or in compliance with federal law.

You should be able to refer employees with questions to the employee handbook or employee orientation or training. Materials on the agency's obligations under ADA, including the obligation to provide reasonable accommodation.

REASONABLE ACCOMMODATION

Main Points

Remember, an individual need not mention “ADA” or “reasonable accommodation” to request reasonable accommodations.

The individual just needs to let the agency know that she needs an adjustment or change at work for a reason related to a medical condition.

Someone other than the employee may make the request. But, the employee is entitled to refuse to accept an accommodation that is not needed.

An individual may request an accommodation at any time during the employment.

Examples of Reasonable Accommodation Background

Reasonable accommodations for individuals with disabilities must be determined on a case-by-case basis.

Accommodations for individuals with psychiatric disabilities may involve changes to workplace policies, procedures, and practices, physical changes to the workplace or extra equipment.

In some instances, the appropriate accommodation for an individual may not be immediately apparent. Contact mental health professionals, including psychiatric rehabilitation counselors, who can make suggestions about particular accommodations and help employers and employees communicate effectively about reasonable accommodation.

Remember, the agency is not required to provide an accommodation that poses an undue burden on the agency.

Specific examples of reasonable accommodations:

Time off, modified work schedules, physical changes to the workplace, such as room dividers, sound-proofing or visual barriers for individuals who have disability-related limitations on concentration; *moving an individual away* from noise or other distractions, or *providing equipment*, such as tape recorders to review meetings or training sessions.

Modifying policies to allow employees to do things that are not normally routine for the agency, such as granting additional time off or an adjusted work schedule or unscheduled vacation time.

Adjusting supervisory methods by communicating assignments, instructions or training in the way that is most effective for the individual, such as in writing, by e-mail or in conversation. *Adjusting the level of supervision* or structure to provide

more detailed feedback or day-to-day guidance may allow an otherwise qualified individual to perform essential job functions.

Providing a temporary job coach to assist in training or allowing a job coach paid by a social service agency.

Reassignment to another vacant position (equivalent position if available; otherwise to a lower position) when accommodation in the present job would cause undue hardship or would not be possible. Reassignment is not required if neither an equivalent or lower vacant position is available.

It is not a reasonable accommodation to monitor whether an individual takes *medication* as prescribed. It is the employee's responsibility to decide about medication and to consider the consequences of not taking medication.

WHAT ABOUT EMPLOYEE CONDUCT STANDARDS?

An employer may discipline an individual with a disability for violating a workplace conduct standard, even if the misconduct resulted from the disability, as long as the employer would impose the same discipline on an employee without a disability.

The conduct standard must be job-related and consistent with business necessity.

An employer is not required to excuse **past** misconduct, **but**, the agency must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet the conduct standard in the **future**, barring undue hardship.

Example: An employee has a hostile altercation with her supervisor and threatens the supervisor with physical harm. The agency immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. When she learns that her employment has been terminated, the employee asks the agency to put the termination on hold and to give her a month off for treatment instead.

This is the employee's first request for accommodation and also the first time the agency learns about the employee's disability. The agency is not required to rescind the discharge under these circumstances, because the employee violated a conduct standard — a rule prohibiting threats of physical harm against supervisors — that is job-related for the position in question and consistent with business necessity.

APENDIX

The agency also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. Her employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.

DIRECT THREAT

An individual does not pose a “direct threat” simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability.

A determination of “direct threat” must be based on an individualized assessment of the individual’s present ability to safely perform the functions of the job, considering the most current medical knowledge and/or the best available objective evidence. This includes an assessment of the likelihood and imminence of future violence.

In analyzing direct threat, the agency must seek reasonable medical judgments relying on the most current medical knowledge and/or the best available factual evidence concerning the employee.

RESOURCES

- **The WorkSource Disability Network Technical Assistance Center** at 866-438-3292
ADA guidance; information

- **The Job Accommodation Network**
www.jan.wvu.edu
800—ADA-WORK or 800-526-7234
Accommodation solutions for many different disabilities

- **Governor’s Committee on Disability Issues and Employment (GCDE)**
Lacey WA
(360) 438.3168
(360) 438.3167 (TDD)
Identifies job and worksite accommodations, provides technical assistance on compliance with ADA upon request.

- **Local Washington State Division of Vocational Rehabilitation Partners**
Central Office—information, ask for your local office: 360-438-8940
Help identifying job functions, accommodation solutions, referrals to disability organizations.

- **Washington State Department of Services for the Blind**
206. 721.4422
206. 721.4056 (TDD)
Accommodation solutions; equipment; referrals for large type/brailing

- **Region X Northwest Disability and Business Technical Assistance Center**
800-949-4232
Referrals and individualized responses to information requests

RESOURCES

- **TACID**
6315 s 19th
Tacoma WA
(253) 565.9000
Provides technical assistance on compliance with ADA, and information on accommodations and assistive devices.

- **Community Service Center for Deaf and Hard of Hearing**
(206) 322.4996
Provides technical assistance on compliance with ADA, and information on accommodations and assistive devices for people who are hard of hearing.

- **Washington State Relay Service**
1.800.833.6384
Provides voice to TDD call services.

- **Washington State Human Rights Commission**
360-753-6771
When requested to do so, the commission's staff will advise persons on how to meet particular employment needs consistent with the law against discrimination.

- **ARC**
425-258-2459
Disseminates information on how to provide cognitively accessible integrated services.

- **Washington Coalition of Citizens with Disabilities**
206. 545.7055

- **Community Services for the Blind**
206.525.5556
Provides advice and assistance on accommodations and adaptive equipment for people with vision impairments.

- **Pierce County AIDS Foundation**
Tacoma, WA 98402
253-383-2565 FAX: 597-6682 TTY: 627-7830
Assists persons affected by HIV/AIDS, addresses related health problems, and combats associated stigma and discrimination.

- **ABLEDATA**
Silver Spring, MD
Phone: 800-227-0216 (Voice); 301-608-8912 (TTY).
Fax: 301-608-8958.
E-mail: abledata@orcmacro.com.
Provides custom database searches for information on job or worksite modifications, job accommodations, computer accessories, assistive devices.

- **Bazon Center Mental Health Law**
(202) 467.5730
Identifies job and worksite accommodations and provides technical assistance upon request.

ENDNOTES

1 Adapted from the Congressional findings - Americans with Disabilities Act of 1990, as amended, 42 USC 12101 Sec. 2(a)(9).

2 Ibid. Sec. 2(a)(8).

3 Employers with **fifteen** or more employees are covered by the ADA; Revised Code of Washington (RCW) , Chapter 49.60.

4 Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794

5 A Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act (Manual), U.S. Equal Employment opportunity Commission, January, 1992, p. V-11.

6 Part-time employees are covered if they have been working for the covered employer for twenty or more calendar weeks in the current or preceding year. Religious organizations are covered by the ADA, but they may give employment preference to people of their own religion or religious organization. Indian tribes are exempt from coverage of the ADA.

7 A Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act, supra., p. I-3.

8

Revised Code of Washington (RCW) Chapter 49.60.

9

Washington Administrative Code (WAC) 162-22-020(1) and (2)

10 Manual. at pp. I-4 and I-5.

11 RCW 49.60.180

12

WAC 162-22-065(1).

13 Manual at II-11, citing 29 CFR 1630.2(m).

14 WAC 162-22-020 (2) and (3)

15 WAC 162-16-240.

16 Technical assistance in restructuring or modifying jobs for individuals with specific limitations can be obtained from state vocational rehabilitation agencies and other organizations with expertise in job analysis and in job restructuring for people with various disabilities.

17 In general, accommodation of the assignment should be considered only when an accommodation is not possible in an employee's present job, or when an accommodation in the employee's present job would cause an undue hardship. Reassignment may not be used to limit, segregate, or otherwise discriminate against an employee with the disability. An employer may not reassign people with disabilities only to certain undesirable positions, or only to certain offices or facilities. An employer is not required to create a new job or to bump another employee from a job in order to provide reassignment as a reasonable accommodation. Nor is an employer required to promote an individual with a disability to make such an accommodation.

18 Many assistance devices and modifications are inexpensive. Frequently, applicants and employees with disabilities can suggest effective low-cost devices or equipment. They have had a great deal of experience in accommodating their disabilities, and many are informed about new and available equipment.

19 For tests and examinations— accommodations may be needed to assure the tests or examinations measure the actual ability of an individual to perform job functions, rather than reflecting limitations caused by the disability.

20 A person who is hearing-impaired should be able to communicate effectively with others as required by the duties of the job. Identifying the needs of the individual in relation to specific job tasks will determine whether or when an interpreter may be needed. People with hearing impairments have different communication needs and use different modes of communication. Some use American Sign Language, but others use language that has different manual codes. Some people rely on an oral interpreter who silently mouths words spoken by others to make them easier to lip-read. Many hearing impaired people use their voices to communicate, and some combine talking and signing. The individual should be consulted to determine the most effective means of communication.

21 Remember, information from such sources must be kept confidential.

22 WAC 162-22-090.

23 Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, No. 915.002, 1997, including ADDENDUM. The information in this section on psychiatric disabilities is based on this EEOC guidance available at <http://www.eeoc.gov/policy/docs/psych.html#addendum>.

24 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1996).