

# COMBATING EMPLOYMENT DISCRIMINATION THROUGH THE AMERICANS WITH DISABILITIES ACT



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## **I. Introduction**

In 1990, the federal government enacted the Americans with Disabilities Act (ADA)<sup>1</sup> in an effort to end discrimination against people with disabilities and to facilitate their full participation in society. In October 2008, Congress amended the ADA to overturn decisions by the courts that limited the scope of the ADA's coverage.<sup>2</sup>

A key aspect of the ADA is to ensure that people with disabilities are not barred from the workplace.<sup>3</sup> The ADA broadly provides that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>4</sup> Although this prohibition on employment discrimination appears straightforward, it is not so easily applied. Several inquiries must be made to determine whether the ADA has been violated:

- ▶ What is a “covered entity”?
- ▶ What is a “disability”?

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<sup>1</sup> 42 U.S.C. §§ 12201-12213; 47 U.S.C. § 225.

<sup>2</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, 122 Stat. 3553 (2008).

<sup>3</sup> The employment discrimination provisions are included in Title I of the ADA, 42 U.S.C. §§ 12111-12117, and regulations promulgated by the Equal Employment Opportunity Commission, 29 C.F.R. Pt. 1630. The ADA, though, covers more than employment discrimination. Title II of the ADA prohibits disability discrimination by state and local governments and public transportation providers. 42 U.S.C. §§ 12131-12165. Title III of the ADA prohibits disability discrimination by public accommodations (such as restaurants, hotels, recreational facilities, and private transportation providers). 42 U.S.C. §§ 12181-12189. Title IV of the ADA governs telecommunications relay systems. 47 U.S.C. § 225.

<sup>4</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 5(a), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12112(a)).

- ▶ Who is a “qualified individual with a disability”?
- ▶ What forms of discrimination are prohibited?

These questions raise a number of sub-issues, such as: the propriety of employment testing; the appropriate use of employment standards and medical examinations; and, perhaps most importantly, the reasonable accommodation requirement.

The purposes of this booklet are: (1) to outline the ADA’s answers to these questions based on the statutory language (including the recent amendments to the ADA), regulatory materials, and case law; and (2) to provide guidance about the procedures that may be invoked to remedy unlawful discrimination. The Equal Employment Opportunity Commission (EEOC), which is the federal enforcement agency for ADA employment discrimination complaints, offers a great deal of information about the ADA’s employment discrimination provisions on its website, <http://www.eeoc.gov>. In addition, the EEOC’s ADA Technical Assistance Manual (cited in this Manual as “*EEOC Title I Technical Assistance Manual*”), which provides extensive discussion of the ADA’s employment discrimination provisions and the EEOC’s enforcement process, can be viewed at <http://www.disability-laws.org>.

**PLEASE NOTE: This publication discusses general legal standards. Application of these standards to specific factual situations requires legal advice that this booklet is not intended to and cannot provide, particularly since the ADA’s employment discrimination provisions are subject to constant, evolving, and sometimes conflict interpretations by the courts.- For specific advice, please contact the Disability Rights Network of PA’s Intake Team by phone at 800-692-7443 (voice) or 877-375-7139 (TTY) or by e-mail at [intake@drnpa.org](mailto:intake@drnpa.org).**

## II. What Is A Covered Entity?

Title I of the ADA prohibits discrimination by “covered entit[ies].”<sup>5</sup> That term is defined to include employers with 15 or more employees; employment agencies; labor organizations; and joint labor-management committees.<sup>6</sup> This Manual focuses solely on discrimination by employers.

Employers with fewer than 15 employees may not be subject to the ADA, but they will be subject to the employment discrimination provisions of the Pennsylvania Human Relations Act if they have at least four employees.<sup>7</sup> The Pennsylvania Human Relations Act is the state anti-discrimination law enforced by the Pennsylvania Human Relations Commission. Section VII.B of this Manual provides contact information for the Pennsylvania Human Relations Commission, and you can find out more information about the state law and the Commission at its website, <http://www.phrc.state.pa.us>.

The ADA does *not* prohibit employment discrimination by the following: the federal government (other than instrumentalities of Congress); Indian tribes; and tax-exempt private membership clubs.<sup>8</sup> Additionally, the ADA does not prohibit religious organizations and religious educational organizations from giving job preference to individuals of a particular religion, and such organizations may require their employees to conform to the particular

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<sup>5</sup> 42 U.S.C. § 12112(a).

<sup>6</sup> 42 U.S.C. §§ 12111(2), 12111(5)(A); 29 C.F.R. §§ 1630.2(b), 1630.2(e).

<sup>7</sup> 43 Pa. Cons. Stat. Ann. § 954(b).

<sup>8</sup> 42 U.S.C. §§ 12111(5)(B)(i)-(ii), 12209; 29 C.F.R. § 1630.2(e)(2). However, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, does bar disability discrimination by federal agencies.

organizations' religious beliefs.<sup>9</sup>

States and state agencies, while technically “covered entities,” have been determined to be immune from liability under the ADA. However, a person who has been subject to employment discrimination can sue the head of a state agency or department in his or her “official capacity” under the ADA to recover equitable relief (such as back pay and reinstatement), but may not recover damages from that individual.<sup>10</sup>

A person who is employed by a federal, state, or local government agency, the United States Postal Service, or a private entity that receives federal financial assistance is also protected against disability-based employment discrimination by Section 504 of the

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<sup>9</sup> 42 U.S.C. § 12113(c)(1)-(2); 29 C.F.R. § 1630.16(a). In addition, the courts have developed a “ministerial exception” to federal employment discrimination statutes (including the ADA). Under this exception, the courts will not rule on employment discrimination cases involving employees of a religious entity that hold ministerial or ecclesiastical positions, even positions such as choir directors, because doing so would violate the First Amendment. *See, e.g., Petruska v. Gannon University*, 462 F.3d 294, 303-09 (3d Cir. 2006), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2098 (2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039-43 (7th Cir.), *cert. denied*, 549 U.S. 881 (2006); *Starkman v. Evans*, 198 F.3d 173, 175-77 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000). Many secular or lay employees of religious entities, however, still will be protected by the ADA and other federal employment discrimination statutes. *See, e.g., Petruska v. Gannon University*, 462 F.3d at 304 n.6 (concluding that the courts will examine the employee’s function to determine if the job is ministerial or secular); *Smith v. Raleigh Dist. of North Carolina Conf. of United Methodist Church*, 63 F. Supp. 2d 694, 705-07 & n.11 (E.D.N.C. 1999) (collecting cases).

<sup>10</sup> *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 368-74 & n.9 (2001). As noted in footnote 2 above, Title II of the ADA also bars disability discrimination by state and local governments. The case law is mixed as to whether a government employee can sue his employer under Title II or, instead, must proceed under Title I. *Compare Zimmerman v. Oregon Dep’t of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999) (Title II of the ADA does not cover employment discrimination), *cert. denied*, 531 U.S. 1189 (2001), and *Pennsylvania State Troopers Ass’n v. Pennsylvania*, Civil Action No. 1:06-CV-1079, 2007 WL 853958 at \*6-\*8 (M.D. Pa. Mar. 20, 2007) (same), *amended on reconsideration on other grounds*, 2007 WL 1276914 (M.D. Pa. May 1, 2007), *with Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 820 (11th Cir.) (Title II is available to government employees to challenge employment discrimination under the ADA), *cert. denied*, 525 U.S. 826 (1998).

Rehabilitation Act.<sup>11</sup> Remedies available for violations of Section 504 of the Rehabilitation Act can include damages (but not punitive damages in suits against government entities) as well as equitable relief, such as back pay and reinstatement.<sup>12</sup>

### **III. What Is A Disability?**

The ADA's protection against employment discrimination extends only to "individuals with disabilities."<sup>13</sup> The question of what constitutes a disability covered by the ADA has been the subject of extensive litigation since the law's enactment in 1990. Decisions by the Supreme Court and lower courts on this issue significantly restricted the coverage of the Act by narrowly interpreting the meaning of "disability." As a result, some individuals with disabilities such as epilepsy, diabetes, cancer, mental illness, mental retardation, and cerebral palsy were unable to litigate the question of whether they had been subject to discrimination because the courts had decided they did not have "disabilities" as defined by the ADA. These decisions led Congress to amend the ADA in 2008 to restore protection for a broad range of individuals with disabilities,

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<sup>11</sup> 29 U.S.C. § 794.

<sup>12</sup> See *Barnes v. Gorman*, 536 U.S. 181, 189-90 (2002); *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152, 156-57 (11th Cir. 1994).

<sup>13</sup> 42 U.S.C. § 12112(a). A few provisions of Title I of the ADA apply to all individuals regardless of whether they have disabilities. See, e.g., *Shaver v. Independent Stave Co.*, 350 F.3d 716, 722 (8th Cir. 2003) (need not have a disability to challenge disclosure of medical information under ADA); *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 94 (2d Cir. 2005) (need not have disability to challenge medical examinations or inquiries under ADA); *Fredenburg v. Contra Costa County Dep't of Health Services*, 172 F.3d 1176, 1182 (9th Cir. 1999) (need not have a disability to challenge medical examinations under the ADA); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 593-95 (10th Cir. 1998) (need not have a disability to challenge pre-employment inquiries under ADA), *cert. denied*, 526 U.S. 1065 (1999). On the other hand, the ADA does not allow for "reverse discrimination" claims on behalf of individuals without disabilities who contend that they were subject to discrimination due to their lack of disabilities. *ADA Amendments Act of 2008*, Pub. L. 110-325, § 6(a)(1), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12201(g)).

as the ADA originally intended.<sup>14</sup> Congress, in amending the ADA, observed that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”<sup>15</sup> In other words, the focus should be shifted from whether a person has a disability to whether discrimination on the basis of disability has occurred.<sup>16</sup>

The ADA broadly defines “disability” include:

- ▶ Individuals who have physical or mental impairments that substantially limit one or more major life activities (sometimes known as “actual disability”); or
- ▶ Individuals who have records or histories of such impairments; or
- ▶ Individuals who are regarded as having such impairments (sometimes known as “perceived disability”).<sup>17</sup>

Congress in the 2008 amendments directed courts that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by this Act.”<sup>18</sup>

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<sup>14</sup> See H.R. Rep. No. 110-730, pt. 1, at 7 (2008); H.R. Rep. No. 110-730, pt. 2, at 5 (2008).

<sup>15</sup> *ADA Amendments Act*, Pub. L. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008) (codified as amended at 42 U.S.C. § 12101 Note).

<sup>16</sup> H.R. Rep. No. 110-730, pt. 1, at 7 (2008).

<sup>17</sup> 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(g); *EEOC Title I Technical Assistance Manual* § I-2.2.

<sup>18</sup> *ADA Amendments Act*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102(4)(A)).

The ADA Amendments Act became effective on January 1, 2009.<sup>19</sup> It is not clear, however, whether the less restrictive definitions of “disability” will be applied to cases that either were filed or arose prior to that date.

**A. What Is An “Impairment”?**

The first issue in determining whether a person has a disability (actual, historical, or perceived) is to assess whether a physical or mental impairment is involved. Physical impairments include physiological disorders or conditions, cosmetic disfigurement, and anatomical loss.<sup>20</sup> Examples of physical impairments include: cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, paralysis, tuberculosis, visual or hearing impairments, and HIV infection or AIDS. Mental impairments include mental or psychological disorders such as mental retardation, emotional or mental illness, organic brain syndrome, and specific learning disabilities.<sup>21</sup> These lists of impairments are not exhaustive. There are many other impairments that may give rise to a disability under the ADA. You should note, too, that the EEOC has developed “Question and Answer” fact sheets that discuss the ADA’s employment discrimination provisions in the context of specific common impairments (hearing impairments, visual impairments, cancer, intellectual impairments, diabetes, and epilepsy). You can view these documents at <http://www.eeoc.gov/types/ada.html>.

While individuals who have completed or are currently participating in drug rehabilitation programs and who are no longer using illegal drugs are considered individuals

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<sup>19</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 8, 122 Stat. 3553, 3559 (2008).

<sup>20</sup> 29 C.F.R. § 1630.2(h)(1); *EEOC Title I Technical Assistance Manual* § I-2.2(a)(i).

<sup>21</sup> 29 C.F.R. § 1630.2(h)(2); *EEOC Title I Technical Assistance Manual* § I-2.2(a)(i).

with disabilities under the ADA, persons who are currently engaging in illegal drug use are *not* protected by the ADA.<sup>22</sup> In addition, Congress excluded from the ADA’s protections persons claiming discrimination based on the following: transvestism; transsexualism; pedophilia; exhibitionism; voyeurism; kleptomania; pyromania; compulsive gambling; homosexuality; and bisexuality.<sup>23</sup>

An impairment will constitute a disability only if it substantially limits one or more of the individual’s major life activities. Determining whether an impairment substantially limits a major life activity must be done on an individualized, case-by-case basis.<sup>24</sup> The following sections address more specifically what constitutes a “major life activity” and what it means to be “substantially limited” in a major life activity.

**B. What Is A “Major Life Activity”?**

The 2008 amendments to the ADA provide an extensive list of major life activities -- “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>25</sup> Major life activities also include “major bodily functions,” such as immune system functions; normal cell growth; and digestive, bowel, bladder, neurological,

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<sup>22</sup> 42 U.S.C. § 12114; 29 C.F.R. §§ 1630.3(a)-(b); *EEOC Title I Technical Assistance Manual* §§ I- 8.2-I.8.5.

<sup>23</sup> 42 U.S.C. § 12208; 29 C.F.R. §§ 1630.3(d)-(e); *EEOC Title I Technical Assistance Manual* § I-2.2(a).

<sup>24</sup> *See* 29 C.F.R. Pt. 1630, App., § 1630.2(j); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 151 (2d Cir. 1998).

<sup>25</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102(2)(A)).

brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>26</sup> These lists are not intended to be exhaustive.<sup>27</sup> Other major life activities, for example, might include: interacting with others; writing; engaging in sexual activities; drinking; chewing; swallowing; reaching; and applying fine motor coordination.<sup>28</sup> An impairment need only substantially limit one major life activity to be considered a disability under the ADA.<sup>29</sup>

### C. What Does “Substantially Limited Mean”?

At this juncture, the precise definition of “substantially limited” is somewhat up in the air. Congress did not define the term in either the ADA or the ADA Amendments Act.<sup>30</sup> The ADA Amendments Act, however, does offer some guidance on the question, as discussed below. Congress also conferred on the EEOC authority to make regulations concerning the definition of disability,<sup>31</sup> and such regulations will likely provide a more certain definition of the term “substantially limits.”

A major life activity is substantially limited when the person either (1) is unable to

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<sup>26</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102(2)(B)).

<sup>27</sup> *See* H.R. Rep. No. 110-730, pt. 1, at 11 (2008).

<sup>28</sup> *See* H.R. Rep. No. 110-730, pt. 1, at 11 (2008).

<sup>29</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3556 (2008) (codified as amended at 42 U.S.C. § 12102(4)(C)).

<sup>30</sup> Earlier versions of the ADA Amendments Act would have defined “substantially limits” to mean “materially restricts.” *See* H.R. Rep. No. 110-730, pt. 1, at 2, 6, 9-10 (2008). The House Committee on Education and Labor explained that “‘materially restricted’ is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation.” *Id.* at 10. This definition, however, was deleted from the final version of the legislation and no alternative definition was included in the final legislation.

<sup>31</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 6(a), 122 Stat. 3553, 3558 (2008) (codified as amended at 42 U.S.C. § 12206).

perform the activity, or (2) is to some degree restricted as to the condition, manner, or duration in which s/he can perform the activity compared to the average person in the general population.<sup>32</sup> Rejecting both the EEOC's and Supreme Court's interpretations of the ADA, Congress in the 2008 ADA amendments made clear that a major life activity need not "significantly" or "severely" restrict a person's major life activity to be considered "substantially" limiting."<sup>33</sup> However, Congress intended that the restriction must be more than moderately limiting and that it is not sufficient if the restriction is merely minor.<sup>34</sup>

Factors that may be relevant to assess whether an impairment substantially limits a major life activity include:

- ▶ the nature of the impairment;
- ▶ the severity of the impairment;
- ▶ the duration or expected duration of the impairment;
- ▶ the actual or anticipated long-term impact (that is, the effects) of the

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<sup>32</sup> See 29 C.F.R. § 1630.2(j)(1); *EEOC Title I Technical Assistance Manual* § I-2.2(a)(iii).

<sup>33</sup> In the ADA Amendments Act, Congress included findings that the EEOC's regulations -- which defined "substantially limits" as "significantly restricts" -- and the holding in *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184 (2002) -- defining "substantially limits" as "severely restricts" -- are both inconsistent with congressional intent by requiring a greater degree of limitation and a higher standard than Congress intended. *ADA Amendments Act of 2008*, Pub. L. 110-325, §§ 2(a)(7)-(8), 122 Stat. 3553, 3554 (2008) (codified as amended at 42 U.S.C. § 12101 Note). Congress then stated that the purposes of the ADA Amendments Act was to repudiate *Williams* and to request that the EEOC amend its definition of "substantially limits." *Id.* §§ 2(b)(4)-(6) (codified as amended at 42 U.S.C. § 12101 Note). The ADA Amendments Act also includes a "rule of construction" that requires the courts to interpret the term "substantially limits" in a way that is consistent with the findings and purposes of the ADA Amendments Act. *Id.* § 4(a) (codified as amended at 42 U.S.C. § 12102(4)(B)).

<sup>34</sup> See H.R. Rep. No. 110-730, pt. 1, at 10 (2008).

impairment.<sup>35</sup>

Temporary, non-chronic impairments (such as a broken leg, flu, or recovery from surgery) generally will not be considered to be substantially limiting, even if they result in hospitalization, intensive treatment, or an absence from work that results in termination.<sup>36</sup>

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.<sup>37</sup> Individuals with disabilities, such as epilepsy, cancer, or multiple sclerosis, will thus be covered by the ADA if they can demonstrate that, when the impairment is active, it substantially limits a major life activity.<sup>38</sup> For example, an individual with epilepsy who has seizures that result in short-term loss of control over major life activities (such as, ability to communicate, think, and major bodily functions) would have a disability under the ADA, even if those seizures occur only rarely.<sup>39</sup>

A person with multiple impairments that combine to substantially limit one or more major life activities may be determined to have a disability, even though no single impairment is

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<sup>35</sup> 29 C.F.R. § 1630.2(j)(2); 29 C.F.R. Pt. 1630, App. § 1630.2(j); *EEOC Title I Technical Assistance Manual* § I-2.2(a)(iii).

<sup>36</sup> See 29 C.F.R. Pt. 1630, App. § 1630.2(j); *Samuels v. Kansas City School Dist.*, 437 F.3d 797, 802 (8th Cir. 2006); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002). As discussed below, the ADA Amendments Act makes clear that transitory or minor impairments will not suffice to cover a person under the “regarded as” prong of the ADA’s disability definition. Congress, though, did not include a similar provision with respect to individuals with actual disabilities or those with records of disabilities. This, however, should not be construed to mean that transitory or minor disabilities are covered. The legislative history makes clear that persons with transitory or minor impairments are not covered by the ADA. See H.R. Rep. No. 110-730, pt. 1, at 14 (2008).

<sup>37</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3556 (2008) (codified as amended at 42 U.S.C. § 12102(4)(D)).

<sup>38</sup> See H.R. Rep. No. 110-730, pt. 2, at 19 (2008).

substantially limiting.<sup>40</sup>

Importantly, in assessing whether an individual's impairment is substantially limiting, the focus must be on what the individual cannot do or can do only with difficulty. The fact that an individual is able to perform to some extent the major life activity does not preclude a finding that he is substantially limited if he is able to do so only with extreme difficulty, "through sheer force of will, learned accommodations, and careful planning."<sup>41</sup> Thus, for example, an individual with a learning disability who performs well academically or otherwise may still be substantially limited in activities such as reading, writing, thinking, speaking, or learning so as to qualify for protection as an individual with a disability under the ADA.<sup>42</sup>

In determining whether an impairment substantially limits a major life activity, it is generally *not* appropriate to consider whether "mitigating measures" are available or used to lessen or even eliminate the impact of the impairment.<sup>43</sup> Mitigating measures include, for example, medication, medical equipment, prosthetics, hearing aids and cochlear implants,

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<sup>39</sup> See H.R. Rep. No. 110-730, pt. 2, at 19 (2008).

<sup>40</sup> *EEOC Title I Technical Assistance Manual* § I-2.2(a)(iii); see also H.R. Rep. No. 110-730, pt. 1, at 10 (2008).

<sup>41</sup> *Emory v. AstraZeneca Pharmaceuticals L.P.*, 401 F.3d 174, 180-81, 183 (3d Cir. 2005) (fact that person with cerebral palsy could perform a number of activities did not preclude finding that he was substantially limited in ability to perform manual tasks given his inability to tie his shoes, cut his food, remove heavy dishes from the oven, cut his nails, etc.).

<sup>42</sup> See H.R. Rep. No. 110-730, pt. 1, at 10 (2008).

<sup>43</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3556 (2008) (codified as amended at 42 U.S.C. § 12102(4)(E)(i)). This provision of the ADA Amendments Act overrules the Supreme Court's holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and its companion cases, which required courts to consider the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity. See *ADA Amendments Act of 2008*, Pub. L. 110-325, §§ 2(a)(4), 2(b)(2), 122 Stat. 3553,

mobility devices, reasonable accommodations, and learned behavioral or adaptive neurological modifications.<sup>44</sup> The only types of mitigating measures that can be considered to determine whether an impairment substantially limits a major life activity are ordinary eyeglasses or contact lenses that are intended to fully correct visual acuity or eliminate refractive error.<sup>45</sup>

The courts will consider whether an individual is substantially limited in the major life activity of working only if he is not substantially limited in any other major life activities.<sup>46</sup> To be substantially limited in the major life activity of working, an individual must show that he is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable skills, training, and abilities. The inability to perform a single, particular job does not render a person substantially limited in the major life activity of working.<sup>47</sup> In making this determination, courts will consider the number and types of jobs utilizing similar training, knowledge, skills or ability within the geographic area to which the individual has reasonable access and from which the individual also is

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3553-54 (2008) (codified as amended at 42 U.S.C. § 12101 Note).

<sup>44</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3556 (2008) (codified as amended at 42 U.S.C. § 12102(4)(E)(i)(I)-(IV)). The list of mitigating measures in the ADA Amendments Act is non-exhaustive. H.R. Rep. No. 110-730, pt. 2, at 20 (2008). The use of a job coach or service animal, for example, might also be included in the list of mitigating measures. *Id.*

<sup>45</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3556 (2008) (codified as amended at 42 U.S.C. §§ 12102(4)(E)(ii), 12102(4)(E)(iii)(I)). “Low-vision devices” that magnify, enhance, or otherwise augment a visual image are mitigating measures that cannot be considered in assessing whether an individual has a disability. *Id.* (codified as amended at 42 U.S.C. §§ 12102(4)(E)(i)(I), 12104(E)(iii)(II)).

<sup>46</sup> 29 C.F.R. Pt. 1630, App., § 1630.2(j).

<sup>47</sup> 29 C.F.R. § 1630.2(j)(3)(i); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999).

disqualified due to his impairment.<sup>48</sup>

Although the ADA Amendments Act is intended to make it easier to show that individuals with impairments have “disabilities” and, thus, are protected by the ADA, it remains to be seen how courts will interpret these provisions. Individuals should still be prepared to show that they have impairments that substantially limit a major life activity, either through testimony of the individual and his treating physicians, or, if necessary, testimony of a vocational expert.<sup>49</sup>

**D. What Is A “Record” Of Disability?**

Even if an individual does not have an actual impairment, he may be considered a person with a disability who is protected by the ADA if he has a “record” of such an impairment.<sup>50</sup> The intent of this provision is to assure that people are not discriminated against because of a history of disability, such as former cancer patients, persons with histories of mental illness, and those who formerly were addicted to illegal drugs but who have successfully received treatment.<sup>51</sup> This provision also offers protection to individuals who have been misclassified or misdiagnosed

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<sup>48</sup> 29 C.F.R. § 1630.2(j)(3)(ii).

<sup>49</sup> See *Zwygart v. Bd. of County Commissioners*, 483 F.3d 1086, 1092-93 (10th Cir. 2007) (holding that person claiming that he was substantially limited in ability to work must put forward specific evidence about his vocational training, the geographic area to which he has access, and the number and types of jobs he could work); *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085 (8th Cir. 2007) (testimony of vocational expert that plaintiff’s restrictions prevented him from performing 50 percent of jobs in the market was sufficient to show a substantial limitation in the major life activity of working).

<sup>50</sup> 42 U.S.C. § 12102(2)(B).

<sup>51</sup> See 29 C.F.R. § 1630.2(k); 29 C.F.R. Pt. 1630, App. § 1630.2(k); *EEOC Title I Technical Assistance Manual* § I-2.2(b).

as having a disability.<sup>52</sup>

It is important to remember that to show that a person has a record of a disability so as to be protected by the ADA, he must prove that he has a history of or was misdiagnosed as having a physical or mental impairment that substantially limited at least one major life activity. For example, if a person previously received treatment for mild depression that did not substantially limit any of his major life activities, he will not be deemed to have a record of a disability and will not be protected by the ADA.

**E. What Does It Mean to Be “Regarded As” Having A Disability?**

An individual will also be protected against discrimination by the ADA if she is “regarded as” having a disability.<sup>53</sup> The purpose of this provision is to prevent an individual from facing adverse job actions because of myths, fears, and stereotypes associated with disabilities.<sup>54</sup>

The 2008 ADA Amendments Act clarifies that an individual who asserts that he has a disability under the “regarded as” prong is *not* required to show that the perceived or actual impairment substantially limits a major life activity.<sup>55</sup> Rather, an individual will be “regarded as” having a disability, and, therefore, will be covered by the ADA, if she establishes that she was subject to discrimination barred by the ADA because of an actual or perceived mental or

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<sup>52</sup> See 29 C.F.R. § 1630.2(k); 29 C.F.R. Pt. 1630, App. § 1630.2(k); *EEOC Title I Technical Assistance Manual* § I-2.2(b).

<sup>53</sup> 42 U.S.C. § 12102(2)(C).

<sup>54</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(l); *EEOC Title I Technical Assistance Manual* § 2.2(c); H.R. Rep. No. 110-730, pt. 1, at 13 (2008).

<sup>55</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102(3)(A)).

physical impairment, regardless of whether the impairment actually limits or is perceived to limit a major life activity unless the individual has an impairment that is transitory (with an actual or expected duration of 6 months or less) or minor.<sup>56</sup> Thus, for example, a person who is denied a job because he is HIV-positive would be able to establish liability under the “regarded as” prong of the ADA without any proof that the diagnosis impacts any major life activity in any way. On the other hand, an employer will not be liable for refusing to hire a person with a sprained ankle or the flu.

#### **IV. Who Is A Qualified Individual with A Disability?**

Simply having a disability does not guarantee that the ADA will protect a person from an adverse job decision. Rather, the ADA extends protection against employment discrimination only to “*qualified individuals with disabilities.*”<sup>57</sup> The determination of whether an individual is qualified should be made at the time of the employment decision.<sup>58</sup> In making this determination, the employer may *not* speculate whether the individual may become unable to perform his job in the future or may cause increased health insurance premiums or workers’ compensation costs.<sup>59</sup>

An individual with a disability will be deemed to be qualified if she has the requisite job-related skills for the position and can perform the essential functions of the job with or without

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<sup>56</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. §§ 12102(3)(A)-(B)).

<sup>57</sup> 42 U.S.C. § 12112(a).

<sup>58</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(m).

<sup>59</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(m).

reasonable accommodation.<sup>60</sup> Thus, a determination of whether a person with disability is “qualified” requires three inquiries: (1) does the individual satisfy the job-related requirements for the position; (2) what are the essential functions of the job; and (3) can the individual perform the job’s essential functions with or without “reasonable accommodation.”<sup>61</sup>

**A. What Are The Job-Related Requirements?**

An individual must first establish that he satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, or other requirements for the job.<sup>62</sup> For example, if a person with cerebral palsy applies for a job as a certified public accountant, he will not be qualified if he does not have the appropriate license.<sup>63</sup>

Job requirements, however, must actually be related to the job and consistent with business necessity. Employers will be liable under the ADA if they use job requirements that screen out or tend to screen individuals with disabilities that are not actually job-related and consistent with business necessity.<sup>64</sup> For example, a restaurant that requires dishwasher applicants to pass an algebra test would probably violate the ADA because such a test screens out individuals with intellectual disabilities and is not related to the job of dishwashing or otherwise consistent with business necessity.

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<sup>60</sup> 20 C.F.R. § 1630.2(m).

<sup>61</sup> 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m); 29 C.F.R. Pt. 1630, App. § 1630.2(m); *EEOC Title I Technical Assistance Manual* § I-2.3.

<sup>62</sup> 29 C.F.R. § 1630.2(m); 29 C.F.R. Pt. 1630, App. § 1630.2(m).

<sup>63</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(m); *EEOC Title I Technical Assistance Manual* § I-2.3.

**B. What Are The Essential Functions of the Job?**

If an individual meets the general job-related criteria for the position, he will be deemed to be “qualified” if he can perform the essential functions of the job with or without reasonable accommodation.<sup>65</sup> The term “essential functions” refers to the fundamental job duties of the employment position.<sup>66</sup>

To identify a job’s essential functions, it initially must be determined whether the employer actually requires employees who hold that position to perform the particular function.<sup>67</sup> It is not enough for an employer to state that a function is essential if, in fact, no employee holding that job has performed the function.<sup>68</sup>

If employees actually are required to perform the function, the next question is whether the job would be fundamentally altered if the function were removed.<sup>69</sup> Several factors should be considered: (1) does the job exist to perform that function; (2) are there a limited number of employees who are able to perform that function; (3) is the function so highly specialized that the person holding the job was hired for his/her expertise or ability to perform that function.<sup>70</sup>

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<sup>64</sup> 42 U.S.C. § 12112(b)(6); *EEOC Title I Technical Assistance Manual* § I-2.3.

<sup>65</sup> 42 U.S.C. § 12111(8).

<sup>66</sup> 29 C.F.R. § 1630.2(n).

<sup>67</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a).

<sup>68</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a).

<sup>69</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a).

<sup>70</sup> 29 C.F.R. § 1630.2(n)(2); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a).

Evidence of whether a particular job function is essential can include, but is not limited to, the following information:

- ▶ The employer’s judgment as to whether the functions are essential. The ADA is not intended to second guess the employer’s judgment about quality and quantity standards nor is it intended to require an employer to establish lower standards for the job.<sup>71</sup>
- ▶ Up-to-date, written job descriptions prepared prior to advertising or interviewing applicants for the job.<sup>72</sup>
- ▶ The amount of time spent on the job performing the function.<sup>73</sup>
- ▶ The consequences of not requiring the employee to perform the function.<sup>74</sup>
- ▶ The terms of a collective bargaining agreement.<sup>75</sup>
- ▶ The work experience of persons who held the job in the past and those who

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<sup>71</sup> 29 C.F.R. § 1630.2(n)(3)(i); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(a). For example, an employer may decide that its typists must be able to accurately type 75 words per minute. The employer need not establish that less speed or accuracy would be inadequate. However, the employer does need to show that it actually does require its typists to perform at that level. *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(a).

<sup>72</sup> 29 C.F.R. § 1630.2(n)(3)(ii); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(b). Job descriptions, however, must accurately reflect that the actual functions of the current job. *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(b).

<sup>73</sup> 29 C.F.R. § 1630.2(n)(3)(iii); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(c).

<sup>74</sup> 29 C.F.R. § 1630.2(n)(3)(iv); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(d). A function that is critical may be “essential,” even if it is performed infrequently (such as a fireman carrying a person from a burning building or a clerical worker who is the only person available to answer business calls even if such calls are not frequent). *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(d).

<sup>75</sup> 29 C.F.R. § 1630.2(n)(3)(v); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(e).

currently perform similar job duties.<sup>76</sup>

**C. What Are Reasonable Accommodations?**

Many individuals with disabilities are qualified to perform the essential functions of jobs without the need for any accommodation. However, if an individual with a disability who is otherwise qualified cannot perform one or more essential job functions because of her disability, the employer must consider whether there are reasonable modifications or adjustments that would enable the person to perform these functions.<sup>77</sup>

**Example:** An essential function of a job is to input and retrieve information from a computer. An applicant with a visual disability would be able to perform that function if the employer purchased and installed inexpensive voice recognition software to enable the applicant to communicate with the computer. The individual, then, is a qualified person with a disability since he is able to perform the essential job functions with reasonable accommodations.<sup>78</sup>

The reasonable accommodation concept is a key nondiscrimination requirement under the ADA. Not only is it imperative for an employer to consider reasonable accommodations in assessing whether a person with a disability is qualified to perform the essential functions of the job, but it is also an independent violation of the ADA for the employer to fail to provide reasonable accommodations to applicants and employees. The reasonable accommodation requirement is discussed further in Section V.D below.

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<sup>76</sup> 29 C.F.R. § 1630.2(n)(3)(vi-vii); 29 C.F.R. Pt. 1630, App. § 1630.2(n); *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(f).

<sup>77</sup> 42 U.S.C. § 12111(8); *EEOC Title I Technical Assistance Manual* § I-2.3(c).

<sup>78</sup> See *EEOC Title I Technical Assistance Manual* § I-2.3(a)(3)(b).

**D. What Is The Impact of A Disability Benefits Application?**

Problems may arise if a person with a disability has been terminated from or leaves a job, then applies for disability benefits (such as Social Security), and then files an ADA claim. A disability benefits application sometimes requires the applicant to state that he is unable to work. If the applicant makes such a statement to receive benefits and then files an ADA complaint, the employer can argue that the individual was not qualified because he stated that he cannot work. A disability benefits application will bar a subsequent ADA claim unless the individual can provide a sufficient explanation as to why the ADA claim is not inconsistent with the statement made in the prior application for benefits.<sup>79</sup>

**V. What Forms of Discrimination Are Prohibited?**

The ADA prohibits a wide array of practices by employers that discriminate against individuals with disabilities and otherwise impede their rights under the ADA, including:

- ▶ Refusing to hire, failing to promote, or terminating a qualified person based on disability;
- ▶ Denying equal job benefits (such as rates of pay or fringe benefits) based on disability;
- ▶ Failing to make reasonable accommodations unless the employer can show that the accommodation will result in an undue burden;
- ▶ Limiting, segregating, or classifying a job applicant or employee in such a way as to adversely affect his opportunities based on disability;

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<sup>79</sup> See *Cleveland v. Policy Mgmt. Systems Corp.*, 526 U.S. 795, 800-07 (1999); *Krensavage v. Bayer Corp.*, No. 06-4302, 2008 WL 177802 (3d Cir. Jan. 22, 2008); *Opsteen v. Keller Structures, Inc.*, 408 F.3d 390, 391-93 (7th Cir. 2005); *Williams v. London Utility Comm'n*, 375 F.3d 424, 429 (6th Cir. 2004); *Motley v. New Jersey State Police*, 196 F.3d 160, 164-67 (3d Cir. 1999), *cert. denied*, 529 U.S. 1087 (2000); *cf. Voeltz v. Arctic Cat, Inc.*, 406 F.3d 1047, 1050-51 (8th Cir. 2005) (holding that whether employee's explanation is sufficient is a jury question).

- ▶ Excluding or otherwise denying equal jobs or benefits to a qualified individual due to the known disability of the individual with whom the qualified individual is known to have a relationship or association;
- ▶ Using qualification standards, employment tests, or other selection criteria that screen out (or tend to screen out) individuals with a disability (or a class of individuals with disabilities) unless the standards, tests, or criteria are shown to be job-related for the job in question and are consistent with business necessity;
- ▶ Failing to select and administer employment tests that reflect the true skills and aptitudes of applicants or employees with disabilities as opposed to tests which highlight such individuals' sensory, manual, or speaking impairments;
- ▶ Retaliating against any individual who has opposed an employer's violation of the ADA or who has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce the ADA; and
- ▶ Coercing, intimidating, harassing, threatening, or interfering with any individual in the exercise or enjoyment of any right granted under the ADA or because she has encouraged any other person to enjoy her rights under the ADA.<sup>80</sup>

Below are more detailed descriptions of some of the types of employment discrimination and related actions prohibited by the ADA.

**A. Limiting, Segregating, and Classifying**

The ADA prohibits an employer from limiting, segregating, or classifying a job applicant or employee in such a way that will adversely affect his or her opportunities due to disability.<sup>81</sup> One purpose of this provision is to ensure that employers do not make job decisions based on myths and stereotypes about an individual's disability. Thus, an employer cannot limit the duties of an employee based on a presumption of what is best for the individual with a disability or a presumption about his/her abilities. It would also violate this provision to deny employment to a person with a disability based on generalized fears about the safety of the individual with a

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<sup>80</sup> 42 U.S.C. §§ 12112(a)-(b), 12203; 29 C.F.R. §§ 1630.4-1630.14.

<sup>81</sup> 42 U.S.C. § 12112(b)(1); 29 C.F.R. § 1630.5.

disability (such as mental illness) or potential rate of absenteeism. This prohibition also bars segregation of employees with disabilities. Accordingly, an employer cannot provide separate work areas, lunch rooms, or lounges for such individuals.<sup>82</sup>

**B. Health Insurance and Other Benefits**

The ADA requires that an employer offer employees with disabilities equal access to the health insurance coverage and other benefits that the employer offers to other employees with disabilities.<sup>83</sup> The ADA does not, however, prohibit employers from offering a policy containing coverage limitations, exclusions, or other provisions that adversely impact people with disabilities as long as the same health plan is provided to all employees.<sup>84</sup> For example, an employer may offer a health insurance or disability benefits policy that:

- ▶ contains a “pre-existing conditions” clause;
- ▶ limits or excludes from coverage certain procedures or treatments (such as limiting the number of blood transfusions or barring coverage for “experimental” treatments or “elective” surgery);
- ▶ provides less extensive benefits for certain types of conditions than other types of conditions (such as a health insurance policy that limits the number of inpatient days for mental illness but has no limit on physical illnesses or a long-term disability policy that provides benefits for only two years for disability due to mental illness but provides benefits up to age 65 for disability due to physical illness).<sup>85</sup>

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<sup>82</sup> 29 C.F.R. Pt. 1630, App. § 1630.5.

<sup>83</sup> 42 U.S.C. §§ 12111(a), 12112(b)(1); 29 C.F.R. Pt. 1630, App. § 1630.5; *EEOC Title I Technical Assistance Manual* § I-7.9.

<sup>84</sup> 29 C.F.R. Pt. 1630, App. § 1630.5; *EEOC Title I Technical Assistance Manual* § I-7.9.

<sup>85</sup> 29 C.F.R. Pt. 1630, App. § 1630.5; *EEOC Title I Technical Assistance Manual* § I-7.9; EEOC, *Interim Health Insurance Guidance* (1993) (available at <http://www.eeoc.gov/policy/docs/health.html>); *see also* 42 U.S.C. § 12201(c) (ADA “safe harbor” provisions for insurance). Generally, courts have rejected ADA employment discrimination claims that challenge lesser or limited coverage in insurance policies for some disabilities as long as all

Two other federal statutes enacted after the ADA place some limits on insurance disparities in the workplace. First, the Mental Health Parity Act (MHPA), as amended in October 2008, requires many employers to assure equivalency in health insurance benefits for mental and physical disabilities under certain circumstances.<sup>86</sup> The MHPA bars covered employers from: (1) imposing annual or lifetime limits on mental health benefits that are greater than those imposed on medical/surgical benefits; (2) imposing financial requirements (such as deductibles and co-payments) for mental health benefits that are more restrictive than the predominant financial requirements applied to substantially all medical/surgical benefits provided by the plan; and (3) imposing treatment requirements for mental health benefits (such as limits on the number of visits) that are more restrictive than the predominant treatment requirements applied to substantially all medical/surgical benefits provided by the plan.<sup>87</sup> The MHPA, however, does not require an employer to provide *any* mental health benefits under its plan. Thus, if an employer provides only medical/surgical benefits and offers no mental health benefits at all, then the MHPA's parity requirements are inapplicable.<sup>88</sup>

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employees are afforded the same plan. *See Fitts v. Federal Nat'l Mortg. Ass'n*, 236 F.3d 1, 4 (D.C. Cir. 2001); *EEOC v. Aramark Corp., Inc.*, 208 F.3d 266, 269-73 (D.C. Cir. 2000); *EEOC v. Staten Island Savings Bank*, 207 F.3d 144, 148-53 (2d Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116-18 (9th Cir. 2000); *Kimber v. Thikol Corp.*, 196 F.3d 1092, 1101 (10th Cir. 1999); *Lewis v. Kmart Corp.*, 180 F.3d 166, 170-72 (4th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608-10 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015-16 (6th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1084 (1998).

<sup>86</sup> 29 U.S.C. § 1185a; 42 U.S.C. § 300gg-5. The MHPA applies to employers with more than 50 employees. 29 U.S.C. § 1185a(c); 42 U.S.C. § 300gg-5(c).

<sup>87</sup> 29 U.S.C. § 1185a(a); 42 U.S.C. § 300gg-5(a).

<sup>88</sup> 29 U.S.C. § 1185a(b)(1); 42 U.S.C. § 300gg-5(b)(1).

Second, the Health Insurance Portability and Accountability Act (HIPAA) limits the maximum time for which an employer's group health plan can exclude coverage for a pre-existing condition.<sup>89</sup> HIPAA also prohibits discrimination with respect to eligibility to participate in a group health insurance plan based on the individual's or a dependent of the individual's health status; medical condition (including both physical and mental illnesses); claims experience; receipt of health care; medical history; genetic information; and disability.<sup>90</sup> HIPAA also does not allow group health plans to require individuals to pay higher premiums based on the health status of the individual or his dependents.<sup>91</sup> HIPAA, though, does not require the provision of particular benefits nor does it prohibit limitations on benefits.<sup>92</sup>

Aside from health and other insurance benefits, an employer's leave policies (such as paid sick and vacation time) will not violate the ADA -- even though they may adversely impact individuals with disabilities -- as long as those policies are uniformly applied to all employees. For example, an employer can reduce number of paid sick leave days so long as the reduction is applied to all employees and the change was adopted for a non-discriminatory reason.<sup>93</sup>

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<sup>89</sup> 29 U.S.C. § 1181.

<sup>90</sup> 29 U.S.C. § 1182(a)(1).

<sup>91</sup> 29 U.S.C. § 1182(b)(1). Group health insurance plans, though, may offer discounts or rebates in return for adherence to health promotion or disease prevention programs. 29 U.S.C. § 1182(b)(2)(B).

<sup>92</sup> 29 U.S.C. § 1182(a)(2).

<sup>93</sup> 29 C.F.R. Pt. 1630, App. § 1630.5. Depending on the circumstances, however, a request for a limited period of unpaid leave in excess of the leave time permitted to all employees may be a reasonable accommodation that the employer must provide under the ADA. See 29 C.F.R. Pt. 1630, App. § 1630.2(o); *EEOC Title I Technical Assistance Manual* § I-3.5; *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 185 n.5 (2d Cir. 2006) (collecting cases). In addition, certain employees may be entitled to leave time under the Family and Medical Leave

**C. Relationships with Individuals with Disabilities**

The ADA prohibits employment discrimination against an employee or applicant based on his having a familial, social, business, or other relationship or association with an individual with a disability.<sup>94</sup> This provision, for example, bars an employer from discharging an employee whose spouse has incurred high costs under the employer's health insurance policy due to a disability.<sup>95</sup> Similarly, an employer's fear that an employee who performs volunteer work with people with AIDS will contract the disease cannot justify dismissal under the ADA<sup>96</sup>

The ADA does *not* require an employer to provide an employee who does not have a disability with a reasonable accommodation, such as a modified work schedule, because of the needs of a person with a disability with which the employee has a relationship. The ADA's reasonable accommodation requirement extends only to employees who themselves have disabilities and need the accommodation for their own disability.<sup>97</sup>

**D. Failure to Make Reasonable Accommodations**

The ADA requires employers to make "reasonable accommodations" to the known

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Act, 29 U.S.C. § 2601 *et seq.*. A brief DRN fact sheet about the Family and Medical Leave Act is available at <http://www.drnpa.org/File/publications/family-and-medical-leave-act.pdf> and more detailed information is available at the United States Department of Labor's website located at <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>

<sup>94</sup> 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8; 29 C.F.R. Pt. 1630, App. § 1630.8; *EEOC Title I Technical Assistance Manual* § I-7.4.

<sup>95</sup> *See Dewitt v. Proctor Hosp.*, 517 F.3d 944, 947-49 (7th Cir. 2008).

<sup>96</sup> 29 C.F.R. Pt. 1630, App. § 1630.8; *EEOC Title I Technical Assistance Manual* § I-7.4.

<sup>97</sup> 29 C.F.R. Pt. 1630, App. § 1630.8; *EEOC Title I Technical Assistance Manual* § I-7.4; *Overley v. Covenant Transport, Inc.*, 178 Fed. Appx. 488, 493 (6th Cir. 2006). An employee who is covered by the Family and Medical Leave Act, however, may be entitled to leave, including intermittent leave, to care for certain family members. Resources to learn more about

physical or mental impairments of an otherwise qualified person with a disability who is a job applicant or employee unless the employer can demonstrate that the accommodations would impose an “undue hardship” on the employer’s business.<sup>98</sup> An employer, however, is not required to make reasonable accommodations for any individual who is covered by the ADA solely because he is “regarded as” having a disability; rather, the reasonable accommodation requirement protects only those individuals who have impairments that substantially limit a major life activity and those with records of impairments that substantially limited a major life activity.<sup>99</sup>

Reasonable accommodation is necessary because of the special nature of discrimination faced by people with disabilities. Some people with disabilities, for example, face physical barriers that may make it difficult to get into and around the work site or use necessary equipment. Others may be excluded by rigid work schedules that do not provide people with disabilities with flexibility for medical care. The reasonable accommodation requirement assures that unnecessary barriers to employment are reduced or eliminated to enable people with disabilities to participate fully in the workplace.<sup>100</sup>

The ADA’s reasonable accommodation requirement extends to: (1) the application and interviewing process; (2) job functions; and (3) the benefits and privileges of employment.<sup>101</sup> A

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the Family Medical Leave Act are listed in footnote 93.

<sup>98</sup> 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.

<sup>99</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 6(a), 122 Stat. 3553, 3558 (2008) (codified as amended at 42 U.S.C. § 12201(h)).

<sup>100</sup> *See EEOC Title I Technical Assistance Manual* § I-3.2.

<sup>101</sup> *See* 29 C.F.R. § 1630.2(o); 29 C.F.R. Pt. 1630, App. § 1630.2(o)

reasonable accommodation need not be the best accommodation available, as long as it is effective to afford the person with the disability the opportunity to be considered for the job, to perform the job, or to enjoy equal benefits and privileges of the job.<sup>102</sup>

The types of accommodations that might be reasonable are extensive. Examples of potential reasonable accommodations include:

- ▶ providing assistance to fill out an application form to an individual with a visual disability;
- ▶ making existing facilities, such as lunchrooms, restrooms, and the employee's workspace, accessible to and usable by individuals with disabilities;
- ▶ restructuring a job by reallocating or redistributing marginal (but not essential) job functions;
- ▶ modifying the work schedule of the individual with a disability;
- ▶ acquiring or modifying examinations, training materials, or policies;
- ▶ providing qualified readers or interpreters for the employee with a disability;
- ▶ allowing the employee with a disability to use accrued paid leave or provide additional unpaid leave for necessary treatment;
- ▶ providing reserved parking spaces;
- ▶ allowing an employee to bring a service animal to work;
- ▶ allowing an employee to provide equipment or devices at work that the employer is not required to provide.<sup>103</sup>

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<sup>102</sup> *EEOC Title I Technical Assistance Manual* § I-3.4.

<sup>103</sup> 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2); 29 C.F.R. Pt. 1630, App. § 1630.2(o); *EEOC Title I Technical Assistance Manual* §§ I-3.3, I-3.5, I-3.10. The fact that Congress and the EEOC identified particular types of potential accommodations does not mean that an employer is always required to provide an employee with the accommodation. The question of whether the accommodation must be provided must be assessed in light of the facts of the particular case, including whether it would result in an undue hardship on the employer. See, e.g., *Brannon v. Lupo Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008) (noting that while a medical leave of absence may, in some cases, be a reasonable accommodation, the employee failed to show that additional time off to recuperate would have enabled her to have consistent

Another potential form of reasonable accommodation is reassignment to a vacant position for which the employee is qualified.<sup>104</sup> This type of accommodation is available only when no other reasonable accommodation will enable the employee to perform the essential functions of his present job.<sup>105</sup> In this type of situation, the employer can reassign the individual to a position that is equivalent to the employee's present job in terms of pay and job status if such a position is available and the employee is qualified.<sup>106</sup> The employer may reassign the individual to a lower graded position if there are no vacant equivalent positions for which the individual is qualified, but the employer is not required to maintain the employee at the salary of his prior position.<sup>107</sup>

There are, however, significant limits on reassignment as a reasonable accommodation.

- ▶ An employer is *not* required to create a new position for an employee with a disability or to remove other employees to create a vacancy to which an employee with a disability can be reassigned.<sup>108</sup>

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job attendance); *White v. York International Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) (noting that although the EEOC guidelines stated that reassignment may be a reasonable accommodation, the ADA did not require the employer to offer the employee reassignment where the employee was unable to perform the essential functions of other jobs).

<sup>104</sup> 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii); 29 C.F.R. Pt. 1630, App. § 1630; *EEOC Title I Technical Assistance Manual* §§ I-3.5, I-3.10(5); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161-70 (10th Cir. 1999) (en banc); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 677 (7th Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580-81 (3d Cir. 1998); *EEOC v. Amego, Inc.*, 110 F.3d 135, 147 (1st Cir. 1998); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995).

<sup>105</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(o); *EEOC Title I Technical Assistance Manual* § I-3.10(5).

<sup>106</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(o); *EEOC Title I Technical Assistance Manual* § I-3.10(5).

<sup>107</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(o); *EEOC Title I Technical Assistance Manual* § I-3.10(5).

<sup>108</sup> *EEOC Title I Technical Assistance Manual* § I-3.10(5).

- ▶ An employer generally is *not* required to reassign an employee with a disability if another employee is entitled to that position under an established seniority system.<sup>109</sup>
- ▶ Some courts have held that an employer must only allow the employee with a disability to compete for another job and is *not* required to offer him the position if there is a better applicant available. Other courts, however, have held that reassignment of the employee with a disability is mandatory if he is qualified for the job.<sup>110</sup>

The ADA's reasonable accommodation requirement does not require the employer to make adjustments or modifications that are primarily for the personal benefit of the individual with a disability outside of his job (such as buying the individual a wheelchair). The employer, however, may be required to provide items that are specifically designed to meet job-related needs, such as special eyeglasses that enable use of the office's computer monitors that the employee does not need outside of work.<sup>111</sup>

An employer is not obligated to make reasonable accommodations for an employee with

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<sup>109</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002); *EEOC Title I Technical Assistance Manual* § I-3.10(5). An employee, however, may present evidence of "special circumstances" that warrant deviation from the seniority policy in order to prove that reassignment in such circumstances is reasonable. *US Airways, Inc. v. Barnett*, 535 U.S. at 406; *EEOC Title I Technical Assistance Manual* § I-3.10(5). Special circumstances might, for example, exist if the employer retains the right to unilaterally alter the seniority system and has regularly done so. *EEOC Title I Technical Assistance Manual* § I-3.10(5).

<sup>110</sup> *Compare Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482-84 (8th Cir. 2007) (holding that an employer must allow an employee with a disability to apply for reassignment to a vacant position, but need not offer the position to the employee if there is a better applicant), *cert. dismissed*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1116 (2008); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000) (same), *with Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-70 (10th Cir. 1999) (en banc) (holding that the employer must reassign the employee with a disability to a vacant position if he is qualified); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA*, Question 29 (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> (same).

<sup>111</sup> 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Technical Assistance Manual* § I-3.4.

a disability if the employer is not aware that the disability exists.<sup>112</sup> If the employer knows that the employee has a disability and observes that she is having trouble performing her job, the employer may ask whether the employee needs a reasonable accommodation.<sup>113</sup> Generally, though, it is the responsibility of the person with a disability to inform the employer of the need for an accommodation.<sup>114</sup> When an employee requests an accommodation and the need for accommodation is not obvious, the employer may ask the individual to provide medical documentation of the disability and functional limitations to support the request.<sup>115</sup>

In many instances, an appropriate accommodation will be obvious and can be made without difficulty and at little or no cost. In some cases, however, the appropriate accommodation may not be so easily identified or the employer may have concerns about the difficulty or cost of providing an accommodation. In these instances, it is necessary for the

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<sup>112</sup> 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Technical Assistance Manual* § I-3.6.

<sup>113</sup> 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Title I Technical Assistance Manual* § I-3.6; *see also Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135-36 (2d Cir. 2008) (in upholding jury verdict for employee with cerebral palsy on failure to accommodate claim, the court held that the employer is required to initiate an interactive process to explore reasonable accommodations when the employee's disability is obvious or his disability is otherwise known to the employer, regardless of whether the employee requests an accommodation or considers himself to have a disability).

<sup>114</sup> 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Title I Technical Assistance Manual* § I-3.6. The employee, though, need not specifically ask for a "reasonable accommodation" or submit a formal, written request as long as she or someone acting on her behalf somehow conveys to the employer that she needs some adjustment or change to the job due to her disability. *EEOC Technical Assistance Manual* § I-3.6; *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 313 (3d Cir. 1999); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998); *Bultemeyer v. Fort-Wayne Comm. Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996).

<sup>115</sup> 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Title I Technical Assistance Manual* § I-3.6; *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 656 (6th Cir. 2002); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

employer to initiate an informal, “interactive process” with the individual with the disability.<sup>116</sup>

In doing so, the employer should: (1) analyze the job and determine its purpose and essential functions; (2) consult with the employee to identify the job-related limitations caused by his disability and how those limitations can be overcome through an accommodation; (3) consult with the employee to identify the effectiveness of potential accommodations; and (4) consider the preference of the employee in selecting an accommodation.<sup>117</sup>

An employer is not required to provide an accommodation if doing so will impose an “undue hardship” on the operation of its business.<sup>118</sup> An accommodation will create an undue hardship if it will result in “significant difficulty or expense” when considered in light of the following factors:

- ▶ the nature and cost of the accommodation, taking into account the availability of tax credits and deductions, and/or outside funding;
- ▶ the overall financial resources of the facility or facilities involved;
- ▶ the number of persons employed at the facility;
- ▶ the effect on expenses or resources, or the impact otherwise of the

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<sup>116</sup> 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Title I Technical Assistance Manual* § I-3.7.

<sup>117</sup> 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. Pt. 1630, App. § 1630.9; *EEOC Title I Technical Assistance Manual* §§ I-3.7, I-3.8; *Freadman v. Metropolitan Prop. & Cas. Ins. Co.*, 484 F.3d 91, 104 (1st Cir. 2007); *Dark v. Curry County*, 451 F.3d 1078, 1088 (9th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 902 (8th Cir. 2006); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 329-31 (3d Cir. 2003); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 312-20 (3d Cir. 1999); *Bultemeyer v. Fort-Wayne Comm. Schools*, 100 F.3d 1281, 1285-87 (7th Cir. 1996).

<sup>118</sup> 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. §§ 1630.9, 1630.15(d); 29 C.F.R. Pt. 1630, App. §§ 1630.2(p), 1630.15(d); *EEOC Title I Technical Assistance Manual* § I-3.9; *Taylor v. Rice*, 451 F.3d 898, 908-09 (D.C. Cir. 2006); *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 121-22 (2d Cir. 2004).

accommodation on the operation of the facility, including the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

- ▶ the overall financial resources of the employer;
- ▶ the overall size of the employer's business;
- ▶ the number, type, and location of the employer's facilities; and
- ▶ the type of operation(s) of the employer.<sup>119</sup>

In considering whether an accommodation is an undue hardship, it is appropriate to consider whether the cost can be offset by a source other than the employer, such as a vocational rehabilitation agency or tax credits. In the absence of such a cost offset, the individual with the disability should be given the option of providing the accommodation or paying that portion of the cost that would constitute the undue hardship.<sup>120</sup>

In 2002, the EEOC published an Enforcement Guidance titled "Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," which provides extensive information about this issue and can be viewed at <http://www.eeoc.gov/policy/docs/accommodation.html>.

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<sup>119</sup> 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); 29 C.F.R. Pt. 1630, App. § 1630.2(p); *EEOC Title I Technical Assistance Manual* § I-3.9.

<sup>120</sup> 29 C.F.R. Pt. 1630, App. § 1630.2(p).

## **E. Selection Criteria**

Under the ADA, it is unlawful to use qualification standards, employment tests, or other selection criteria that screen out (or tend to screen out) individuals with disabilities (or a class of individuals with disabilities) unless the criteria used are shown to be job-related for the particular position and are consistent with business necessity.<sup>121</sup> The ADA specifically prohibits employers from using job qualification standards based on an individual's uncorrected vision unless the standard is shown to be job-related for the position in question and consistent with business necessity.<sup>122</sup>

Neither these nor any other provisions of the ADA prohibits an employer from establishing job-related qualification standards (including educational levels, skills, work experience, and physical and mental health requirements) as long as they are necessary for job performance, health, and safety. This provision is geared to assuring only that employers do not exclude individuals with disabilities from jobs that they can perform based on selection criteria that are not job-related or not consistent with business necessity.<sup>123</sup>

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<sup>121</sup> 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10; 29 C.F.R. Pt. 1630, App. § 1630.10; *EEOC Title I Technical Assistance Manual* §§ I-4.1 to-I-4.4.

<sup>122</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 5(b), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12113(c)). Even though correctable vision is unlikely to qualify as an actual disability, a person with correctable vision who is excluded from a job due to the use of an unnecessary job qualification that measures uncorrected vision could still challenge the standard as a person who is “regarded as” having a disability.

<sup>123</sup> 29 C.F.R. Pt. 1630, App. § 1630.10; *EEOC Title I Technical Assistance Manual* § I-4.1. “Job-relatedness” requires the employer to show that the qualification fairly and accurately measures the ability to perform the essential functions of the job. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc). To be “consistent with business necessity,” a job qualification must substantially promote the business’s needs. *Id.* For safety-based qualifications, the court will take into account the magnitude of the possible harm and the probability of the harm’s occurrence. *Id.*

In most cases, job requirements that include an across-the-board exclusion based on disability will not survive scrutiny.<sup>124</sup> For example, an employer may not exclude all persons who have epilepsy from jobs that require the use of dangerous machinery, but, instead, must individually evaluate whether any particular person with epilepsy would pose a direct threat if he operated such machinery.<sup>125</sup> On the other hand, courts have held that employers may apply a government physical qualification standard to its employees, such as the United States Department of Transportation's commercial drivers' standards.<sup>126</sup>

Standards that measure a person's physical or mental ability to perform a job (such as the ability to lift a certain number of pounds for a certain number of hours) are more likely to survive ADA scrutiny. Still, if those standards screen out otherwise qualified individuals with disabilities, the employer must show that they are actually necessary for the job and that the job cannot be restructured to accommodate the individual with a disability.<sup>127</sup>

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<sup>124</sup> *EEOC Title I Technical Assistance Manual* § I-4.4; *Kapche v. City of San Antonio*, 304 F.3d 493, 497-500 (5th Cir. 2002) (questioning blanket exclusion of applicants with insulin-dependent diabetes from positions as police officers in light of new technology that could enable such individuals to drive safely and remanding the case for further proceedings).

<sup>125</sup> *EEOC Title I Technical Assistance Manual* § I-4.4. However, the ADA does not override federal health and safety laws and regulations that exclude people with certain disabilities from certain jobs. *EEOC Title I Technical Assistance Manual* §§ I-4.4, I-4.6.

<sup>126</sup> See *Coleman v. Keystone Freight Corp.*, 142 Fed. Appx. 83, 87 (3d Cir. 2005); *Clark v. Southeastern Pennsylvania Transp. Auth.*, Civil Action No. 06-4497, 2008 WL 219223 at \*9 (E.D. Pa. Jan. 25, 2008). However, employers who apply government safety standards to jobs that are not covered by such standards must show that the application of such standards is job-related, consistent with business necessity and that performance cannot be accomplished with reasonable accommodation. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 995-97 (9th Cir. 2007) (en banc).

<sup>127</sup> 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. §§ 1630.10, 1630.15(b)(1); *EEOC Title I Technical Assistance Manual* §§ I-4.3, I-4.4

## **F. Employment Tests**

Under the ADA, an employer must select and administer employment tests in the most effective manner to ensure that the tests accurately reflect the job-related skills, aptitude, or other factors of an individual with a disability, including sensory, manual, or speaking skills.<sup>128</sup> For individuals with visual impairments (including vision that can be corrected with ordinary eyeglasses and contacted lenses), this means that employers cannot use employment tests based on an individual's uncorrected vision unless the test is shown to be job-related and consistent with business necessity.<sup>129</sup> For individuals with other types of sensory, manual, or speaking impairments, this requirement and the ADA's reasonable accommodation requirement mean that employers must administer employment tests to eligible applicants with impaired sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.<sup>130</sup> For example:

- ▶ A person with dyslexia can be given the option to take a written test orally if dyslexia substantially limits his ability to read.
- ▶ A test can be administered in large print or Braille for a person with a visual disability.
- ▶ Extra time can be provided to complete a test for individuals with learning

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<sup>128</sup> 42 U.S.C. § 12112(b)(7); 29 C.F.R. § 1630.11; 29 C.F.R. Pt. 1630, App. § 1630.11; *EEOC Title I Technical Assistance Manual* § I-5.6.

<sup>129</sup> *ADA Amendments Act of 2008*, Pub. L. 110-325, § 6(b), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12213(c)).

<sup>130</sup> 29 C.F.R. Pt. 1630, App. § 1630.11; *EEOC Title I Technical Assistance Manual* § I-5.6.

or cognitive disabilities.<sup>131</sup>

If it is not possible to use alternative test formats, the employer may be required, as a reasonable accommodation, to test the skill in another manner (such as through an interview, education, or work experience requirements).<sup>132</sup>

The individual with the disability should inform the employer of the need for an accommodation prior to the test (or during the test if the applicant discovers at that time that an accommodation is necessary). The employer may request (on a test announcement or application form) that individuals with disabilities notify the employer within a reasonable time prior to the test of the need for an accommodation and may request the applicants to provide medical documentation of the need for accommodation.<sup>133</sup>

An employer may not be required to accommodate an individual on a test if the test is designed to measure a skill that is job-related and an essential job function that cannot be performed with accommodation. For example, an employer administers a timed, reading comprehension test to hire proofreaders since reading independently and within time limits is an essential job function. An employer probably would be allowed to deny an accommodation to an applicant with dyslexia who requested more time to take the test since there would be no similar accommodation on the job that could be provided without an undue hardship.<sup>134</sup>

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<sup>131</sup> 29 C.F.R. Pt. 1630, App. § 1630.11; *EEOC Title I Technical Assistance Manual* § I-5.6.

<sup>132</sup> *EEOC Title I Technical Assistance Manual* § I-5.6.

<sup>133</sup> 29 C.F.R. Pt. 1630, App. § 1630.11; *EEOC Title I Technical Assistance Manual* § I-5.6.

<sup>134</sup> 29 C.F.R. Pt. 1630, App. § 1630.11; *EEOC Title I Technical Assistance Manual* § I-5.6.

## **G. Pre-Employment Inquiries and Medical Examinations/Inquiries**

The ADA has detailed rules concerning the pre-employment inquiries about an applicant's disability and medical examinations of applicants and employees.<sup>135</sup> The EEOC has published three helpful documents that explore these issues in detail and can offer further guidance:

- ▶ “*Enforcement Guidance: Preemployment Disability Related Questions and Medical Examinations*,” which is available at <http://www.eeoc.gov/policy/docs/preemp.html>;
- ▶ “*Enforcement Guidance: Disability Related Inquiries and Medical Examinations of Employees Under the ADA*,” which is available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>;
- ▶ “*Questions and Answers*” on its *Enforcement Guidance on Disability Related Inquiries and Medical Examinations of Employees*,” which is available at <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.

### **1. Pre-Employment Inquiries**

The ADA generally prohibits pre-employment inquiries about an applicant's disability in applications, on job interviews, or in background or reference checks.<sup>136</sup> For example, an employer may *not*:

- ▶ ask whether the applicant has been treated for specific conditions or diseases;
- ▶ ask what conditions or diseases the applicant has been treated for;
- ▶ ask whether the applicant has been hospitalized, and, if so, for what;
- ▶ ask whether the applicant has ever been treated by a psychiatrist or psychologist;
- ▶ ask whether there is any health-related reason or disability that would preclude

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<sup>135</sup> 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14.

<sup>136</sup> 42 U.S.C. §12112(d)(2)(A); 29 C.F.R. § 1630.13(a); 29 C.F.R. Pt. 1630, App. § 1630.13(a); *EEOC Title I Technical Assistance Manual* § I- 5.5.

the applicant from performing the job;

- ▶ ask how many days the person was absent from work at prior jobs due to illness;
- ▶ ask whether the applicant is taking prescribed drugs;
- ▶ ask whether the applicant has been treated for substance abuse;
- ▶ ask whether the applicant has ever filed a claim for workers' compensation;
- ▶ take into account the impact of the applicant's disability on the company's health insurance plan in making an employment decision.<sup>137</sup>

The ADA's prohibition on pre-employment inquiries, however, does not prevent an employer from obtaining necessary medical information needed to assess an applicant's qualifications and assure health and safety on the job.<sup>138</sup> Before making a job offer, therefore, an employer may ask questions about an applicant's ability to perform specific job functions if they are essential to the job. For example:

- ▶ An employer interviewing an applicant with one arm for a job that requires driving may not ask if or how the applicant's disability would affect his ability to perform the job. The employer, however, may ask whether he has a valid driver's license, inquire into his accident record, and ascertain whether he can drive long distances (if that is part of the job) with or without accommodation.<sup>139</sup>
- ▶ An interviewer may describe the physical requirements of the job (such as the amount of lifting required) and ask whether the person is capable of performing those physical requirements with or without reasonable accommodation.<sup>140</sup>
- ▶ An interviewer may *not* ask a person with one leg to demonstrate her ability to perform a job unless it requires all job applicants to demonstrate their ability to do

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<sup>137</sup> *EEOC Title I Technical Assistance Manual* § I-5.5(b)

<sup>138</sup> *EEOC Title I Technical Assistance Manual* § I-5.5.

<sup>139</sup> *EEOC Title I Technical Assistance Manual* § I-5.5 (f).

<sup>140</sup> *EEOC Title I Technical Assistance Manual* § I-5.5(d).

so.<sup>141</sup>

In addition, an employer may not ask whether an applicant will need or request leave for medical treatment or other reasons related to a disability. The employer, though, may inform the applicant about the hours she will be expected to work and the leave time that is available and ask the applicant whether she can meet those requirements.<sup>142</sup>

## **2. Medical Examinations and Inquiries**

The ADA details the circumstances under which medical examinations and inquiries are permissible.<sup>143</sup> There are different rules that apply for: (1) job applicants; (2) individuals who have received conditional offers of employment; and (3) employees.<sup>144</sup> An employer that makes medical inquiries or requires medical examinations other than those inquiries and examinations

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<sup>141</sup> *EEOC Title I Technical Assistance Manual* § I-5.5(f).

<sup>142</sup> *EEOC Title I Technical Assistance Manual* § I-5.5(f).

<sup>143</sup> 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14; 29 C.F.R. Pt. 1630, App. §§ 1630.13, 1630.14. Not all tests are “medical.” A medical examination” is a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health. Medical examinations include vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs. EEOC, *Questions and Answers on Enforcement Guidance on Disability Related Medical Examinations and Inquiries*, Question # 2. In addition, at least one court has held that a personality test is a medical examination and may not be administered prior to employment. See *Karraker v. Rent-A-Center*, 411 F.3d 831, 835-37 (7th Cir. 2005). There are a number of procedures and tests that employers may require that are *not* considered medical examinations, including: blood and urine tests to determine the current illegal use of drugs; physical agility and physical fitness tests; and polygraph examinations. *Id.*; see also 29 C.F.R. Pt. 1630, App. § 1630.14(a); *EEOC Title I Technical Assistance Manual* §§ I-6.1, I-8.9.

<sup>144</sup> 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14; 29 C.F.R. Pt. 1630, App. §§ 1630.13, 1630.14.

specifically allowed by the ADA will be deemed to engage in unlawful discrimination.<sup>145</sup>

*Examinations and Inquiries of Job Applicants* -- An employer may not require a job applicant to take a medical examination or to respond to medical inquiries.<sup>146</sup> Specifically, an employer may not:

- ▶ ask an applicant to complete a pre-employment medical questionnaire, medical history, or medical examination as part of the selection process;
- ▶ inquire into the applicant's workers' compensation history;
- ▶ ask an applicant how she came to have a disability or the prognosis or treatment; or
- ▶ inquire whether the applicant will have to leave work for treatment or use leave time as a result of her disability (though the employer may explain the attendance requirements of the job and ask whether the applicant can meet them).<sup>147</sup>

*Examinations and Inquiries of Individuals Who Have Received Conditional Offers of Employment* -- The ADA recognizes that employers may conduct medical examinations and make medical inquiries to determine if the applicant can perform certain jobs effectively and safely. The ADA requires, however, that such examinations and inquiries be made as a separate,

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<sup>145</sup> 42 U.S.C. § 12112(d)(1); 29 C.F.R. § 1630.13; 29 C.F.R. Pt. 1630, App. § 1630.13. An employer can also conduct *voluntary* medical examinations and inquiries as part of an employee health program that is available to all employees at the work site. If the employer conducts such voluntary examinations and inquiries, he must maintain the information in a confidential manner and may not use the information in a way which would be contrary to the ADA. 42 U.S.C. § 12112(d)(4)(B)-(C); 29 C.F.R. § 1630.14(d); *EEOC Title I Technical Assistance Manual* § I-6.6.

<sup>146</sup> 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.13(a); 29 C.F.R. Pt. 1630, App. § 1630.13(a); *EEOC Title I Technical Assistance Manual* §§ I-6.1, I-6.3. As discussed in the prior section, an employer may inquire into whether job applicants are able to perform the essential functions of the job.

<sup>147</sup> 29 C.F.R. Pt. 1630, App. § 1630.14(a); *EEOC Title I Technical Assistance Manual* § I-6.3; EEOC, *Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations*.

second step of the job selection process. The employer, therefore, can make a job offer conditional on the satisfactory outcome of a medical examination or inquiry, provided that the employer requires such examination or inquiry for all entering employees within the job category.<sup>148</sup> Medical examinations and inquiries conducted at this stage do not have to be job-related or consistent with business necessity.<sup>149</sup>

*Post-Employment Medical Examinations and Inquiries* -- After employment has begun, an employer may require an employee to undergo a medical examination or make medical inquiries only to the extent that such examinations (or inquiries) are job-related and consistent with business necessity.<sup>150</sup> For example, medical examinations or inquiries of employees may be appropriate under the following circumstances:

- ▶ if there is some evidence that the employee is having a problem relating to job performance or safety;
- ▶ if it is necessary to determine whether individuals in physically demanding jobs continue to be fit for duty;

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<sup>148</sup> 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b); 29 C.F.R. Pt. 1630, App. § 1630.14(b); *EEOC Title I Technical Assistance Manual* §§ I-6.1, I-6-4. Although post-offer, pre-employment medical examinations and inquiries are permissible if administered uniformly to all entering employees in the job category, the employer may administer follow-up tests or ask follow-up inquiries to particular individuals when the examination indicates that further information is needed. *EEOC Title I Technical Assistance Manual* § I-6.4.

<sup>149</sup> 29 C.F.R. § 1630.14(b)(3); 29 C.F.R. Pt. 1630, App. § 1630.14(b); *EEOC Title I Technical Assistance Manual* § I-6.4. However, if the examination or inquiry is one that screens out or tends to screen out individuals with disabilities, the exclusionary criteria must be job-related and consistent with business necessity and the employer must consider whether the performance of essential job functions can be accomplished with reasonable accommodations. 29 C.F.R. § 1630.14(b)(3); 29 C.F.R. Pt. 1630, App. § 1630.14(b); *EEOC Title I Technical Assistance Manual* § I-6.4.

<sup>150</sup> 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c); 29 C.F.R. Pt. 1630, App. § 1630.14(c); *EEOC Title I Technical Assistance Manual* §§ I-6.1, I-6.6.

- ▶ to comply with medical standards or requirements established by federal law; or
- ▶ if it is part of the process of determining whether a reasonable accommodation is necessary and appropriate.<sup>151</sup>

*Confidentiality Requirements* -- The ADA requires that employers maintain the results of any medical examinations and inquiries in medical files that are separate from the employees' personnel records and must treat as confidential all information from the medical examinations and inquiries.<sup>152</sup> The employer may not disclose this information other than to inform: (1) supervisors and managers of necessary restrictions and accommodations; (2) first aid and safety personnel if the disability might require emergency treatment; and (3) government officials investigating compliance with the ADA.<sup>153</sup>

## **H. Harassment**

Although it is not expressly mentioned in Title I of the ADA or the EEOC's regulations, many courts have held that certain workplace harassment or "hostile work environment" claims

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<sup>151</sup> 29 C.F.R. Pt. 1630, App. § 1630.14(c); *EEOC Title I Technical Assistance Manual* § I-6.6; *see also Ward v. Merck & Co., Inc.*, 226 Fed. Appx. 131, 141 (3d Cir. 2007) (employer does not violate ADA by requiring fitness for duty examination); *Thomas v. Corwin*, 483 F.3d 516, 527-28 (8th Cir. 2007) (employer did not violate ADA by requiring fitness for duty examination of employee); *Pence v. Tenneco Automotive Operating Co., Inc.*, 169 Fed. Appx. 808, 812 (4th Cir. 2006) (employer does not violate ADA by requiring medical examination of employee if it has reason to believe the employee cannot perform his job); *Rosenquist v. Ottaway Newspapers, Inc.*, 90 Fed. Appx. 564, 565 (2d Cir. 2004) (same).

<sup>152</sup> 42 U.S.C. §§ 12112(d)(3)(B), 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(b)(1), 1630.14(b)(c)(1); *EEOC Title I Technical Assistance Manual* §§ I-6.5, I-6.6.

<sup>153</sup> 42 U.S.C. §§ 12112(d)(3)(B), 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(b)(1), 1630.14(b)(c)(1); *EEOC Title I Technical Assistance Manual* §§ I-6.5, I-6; *see also Cripe v. Mineta*, Civil Action No. 03-2206 (RWR), 2006 WL 1805728 at \*5-\*6 (D.D.C. June 29, 2006) (agency may be liable for failing to keep medical information confidential); *Fisher v. Harvey*, Civil Action No. 1:05-CV-102, 2006 WL 2370207 at \*4-\*5 (E.D. Tenn. 2006) (same).

are actionable under Title I.<sup>154</sup> Harassment by itself is not a violation of the ADA. Rather, the employee must show: (1) that the conduct was unwelcome; (2) that the conduct had the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment; (3) that the conduct was based on the person's protected status (such as disability); and (4) that the harassment was "sufficiently severe and pervasive" so as to alter the conditions of the person's employment and create an abusive working environment.<sup>155</sup>

Title I of the ADA only subjects the employer to liability; it does not allow supervisors or co-workers to be sued for damages for harassment. An employer, however, may be "vicariously" liable for damages due to harassment by supervisors or co-workers under certain circumstances.

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<sup>154</sup> See, e.g., *Lanman v. Johnson County*, 393 F.3d 1151, 1155-56 (10th Cir. 2004); *Shaver v. Independent Stave Co.*, 350 F.3d 716, 719-20 (8th Cir. 2003); *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229, 234-35 (5th Cir. 2001); *Fox v. General Motors Corp.*, 247 F.3d 169, 175-76 (4th Cir. 2001). An employment harassment claim may also be actionable under Title V of the ADA, 42 U.S.C. § 12203(b). See *Brown v. City of Tucson*, 336 F.3d 1181, 1190-93 (9th Cir. 2003).

<sup>155</sup> See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986); *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229, 236 (5th Cir. 2001); *Fox v. General Motors Corp.*, 247 F.3d 169, 178 (4th Cir. 2001). Isolated comments, name-calling, or a general teasing environment is unlikely to be considered severe and pervasive harassment sufficient to constitute a violation of the ADA. See *Mason v. Wyeth, Inc.*, 183 Fed. Appx. 353, 361-63 (4th Cir. 2006); *Coulson v. The Goodyear Tire & Rubber Co.*, 31 Fed. Appx. 851, 858 (6th Cir. 2002); *Rozier-Thompson v. Burlington Coat Factory Warehouse of Pocono Crossing, Inc.*, Civil Action No. 3:05CV456-JRS, 2006 WL 1889651 at \*6-\*7 (E.D. Va. July 7, 2006); *Robinson v. Veneman*, Civil Action No. 05-0358 (JR), 2006 WL 2474148 at \*3 (D.D.C. Aug. 25, 2006); *Johnson v. City of New York*, 326 F. Supp. 2d 364, 371 (E.D.N.Y. 2004). Also, harassment that is based on a personality dispute, rather than the employee's disability, will not give rise to liability for harassment. See *Trepka v. Bd. of Educ.*, 28 Fed. Appx. 455, 461 (6th Cir. 2002); *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 667 (3d Cir. 1999).

*Harassment by Supervisors* -- An employer will be liable for harassment by a supervisor that results in a “tangible employment action” -- such as firing, demoting, or failing to promote -- regardless of whether the employer took any steps to prevent or correct the harassment.<sup>156</sup> If, however, the harassment by a supervisor does not result in a tangible employment action, an employer will not be liable as long as: (1) it exercised reasonable care to prevent and correct the harassing behavior by establishing, disseminating, and enforcing an anti-harassment policy and complaint procedure; and (2) if the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer (such as by failing to use the complaint procedures).<sup>157</sup>

*Harassment by Co-Workers* -- In order to hold an employer liable for harassment by co-workers, an individual must show that the employer was negligent. This means that the individual must prove that management officials knew or reasonably should have known about the harassment and failed to take reasonable steps to remedy the harassment once it was on notice.<sup>158</sup>

## **I. Retaliation**

Although Title I of the ADA does not prohibit retaliation, Title V of the ADA bars

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<sup>156</sup> See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

<sup>157</sup> See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 101-03 (2d Cir. 2006); EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

<sup>158</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998); *Petrosino v. Bell Atlantic*, 385 F.3d 210, 225 (2d Cir. 2004); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004); *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999).

employers from retaliating against any individual who has opposed any act or practice made unlawful by the ADA or who has made a charge, testified, assisted, or participated in an investigation, proceeding or hearing under the ADA.<sup>159</sup>

Unless there is direct evidence that the employer retaliated against an individual, an individual will have to prove retaliation indirectly by establishing the following three factors:

- ▶ She engaged in “protected activity.” “Protected activity” includes both opposition to a practice that is believed to be unlawful employment discrimination (such as complaining to anyone about alleged discrimination; threatening to file a charge of discrimination; and refusing to obey an order that is reasonably believed to be retaliatory) and participation in an employment discrimination proceeding (including filing a charge of discrimination; cooperating with an employer’s internal investigation or a government investigation; serving as a witness in a government investigation or litigation).
- ▶ She was subject to an “adverse employment action.” An “adverse employment action” includes firing, denial of promotion, and negative evaluations.
- ▶ There is a “causal link” between the protected activity and the adverse employment action. A “causal link” is a connection that tends to show that the employer’s adverse action was due to the individual’s engaging in protected activity. This can be shown, for example, if the employer’s adverse action closely follows the individual’s engaging in protected activity.

If the individual proves these elements, the employer can avoid liability only by showing that the adverse action was taken for a legitimate, non-discriminatory reason (such as poor job performance). If the employer is able to identify a legitimate, non-discriminatory reason, the employee must show that the reason is a mere pretext for retaliation.<sup>160</sup>

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<sup>159</sup> 42 U.S.C. § 12203(a).

<sup>160</sup> See *Cassimy v. Bd. of Educ.*, 461 F.3d 932, 938 (7th Cir. 2006); *Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1228 (10th Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007); *Mershon v. St. Louis University*, 442 F.3d 1069, 1074 (8th Cir. 2006); *Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005); EEOC, *Retaliation*, available at <http://www.eeoc.gov/types/retaliation.html>.

## VI. What Defenses Can Be Asserted By Employers?

While the ADA prohibits employment discrimination based on disability, it does allow employers to assert certain limited defenses to discrimination claims. The primary defenses to various types of discrimination claims are described briefly in this section.

First, an employer faced with a charge that it discriminated on the basis of disability may avoid liability if it can establish that its action was justified by a legitimate, non-discriminatory reason.<sup>161</sup> For example, an employer charged with failing to promote a person who has epilepsy to a sales position because he did not want the employee to interact with the public (in case of a seizure) may defend such a charge by establishing that the employee was not promoted due to inadequate job performance.

Second, an employer charged with using qualification standards, selection criteria, or tests that screen out or tend to screen out persons with disabilities may defend against such a charge by demonstrating (1) that the criteria are job-related and consistent with business necessity, and (2) that the job cannot be performed by persons with disabilities even with reasonable accommodations.<sup>162</sup>

Third, an employer may refuse to employ a person if he would pose a “direct threat.”<sup>163</sup>

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<sup>161</sup> 29 C.F.R. § 1630.15(a); 29 C.F.R. Pt. 1630, App. § 1630.15(a).

<sup>162</sup> 42 U.S.C. § 12113(a); 29 C.F.R. §§ 1630.15(b)(1), 1630.15(c); 29 C.F.R. Pt. 1630, App. § 1630.15(b) and (c); *EEOC Title I Technical Assistance Manual* §§ I-4.-I.4.4.

<sup>163</sup> 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2); 29 C.F.R. Pt. 1630, App. § 1630.15(b) and (c); *EEOC Title I Technical Assistance Manual* § I-4.5; *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002). An employer also may fire an employee who actually makes threats. Making threats would be considered a legitimate, non-discriminatory reason for firing an employee and the employer would not have to show that the employee posed a “direct threat” to justify the decision. *See Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 170-71 (2d Cir. 2006); *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 813 (6th Cir. 1999), *cert. denied*, 530

“Direct threat” means a significant risk of substantial harm to the health or safety to the individual himself or to others. Relevant factors to be considered include: (1) the significance of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of potential harm.<sup>164</sup> An employer cannot base its direct threat defense on mere speculation, assumptions, or stereotypes about the disability; rather, the employer must base its determination on an individualized assessment of the specific risk related to the particular individual in light of objective medical or other evidence.<sup>165</sup> Where there is a significant risk of substantial harm to health or safety, the employer still must consider whether there is any reasonable accommodation that would eliminate or reduce the risk below the level of a “direct threat.”<sup>166</sup>

Fourth, as discussed in section V.D above, an employer is not required to make a reasonable accommodation if doing so would create an undue hardship on the operation of its business.

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U.S. 1262 (2000); *Palmer v. Circuit Court of Cook County*, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 522 U.S. 1096 (1998).

<sup>164</sup> 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r); 29 C.F.R. Pt. 1630, App. § 1630.2(r); *EEOC Title I Technical Assistance Manual* § I-4.5; *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007); *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 170 (2d Cir. 2006); *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 660 (7th Cir. 2005); *Waddell v. Valley Forge Dental Assoc., Inc.*, 276 F.3d 1275, 1280 (11th Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002).

<sup>165</sup> 29 C.F.R. § 1630.2(r); 29 C.F.R. Pt. 1630, App. § 1630.2(r); *EEOC Title I Technical Assistance Manual* § I-4.5; *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007); *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 170 (2d Cir. 2006); *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 660 (7th Cir. 2005). For example, a law firm may not reject an applicant who has a history of mental illness for a job as an attorney based on speculation that the high stress atmosphere may trigger a relapse. 29 C.F.R. Pt. 1630, App. § 1630.2(r).

<sup>166</sup> *EEOC Title I Technical Assistance Manual* § I-4.5(5).

Fifth, an employer may refuse to allow an individual who has an infectious or communicable disease that may be transmitted through food handling (as identified by the Department of Health and Human Services) to work in a food handling job unless the danger can be eliminated by use of a reasonable accommodation.<sup>167</sup> The Centers for Disease Control and Prevention at the Department of Health and Human Services has issued a brief list of infectious diseases to which this defense applies. The list does not include AIDS or HIV infection.<sup>168</sup>

## **VII. How Can You Challenge Employment Discrimination?**

An individual who believes she has been subjected to employment discrimination must file a charge with the Equal Employment Opportunity Commission (EEOC), the agency with the responsibility to enforce the ADA's employment discrimination provisions.<sup>169</sup> As discussed in section VII.A below, an individual may *not* file an employment discrimination lawsuit under the ADA until she has filed a charge with the EEOC and the EEOC has issued a "right to sue" letter." The ADA requires active or former employees to "exhaust their administrative remedies" in this way.

### **A. Filing a Complaint with the EEOC**

There are three possible EEOC sites at which employment discrimination charges may be filed: (1) the Office of the EEOC in Washington, D.C.; (2) the field offices of the EEOC; or (3)

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<sup>167</sup> 42 U.S.C. § 12113(d)(2); 29 C.F.R. § 1630.16(e)(1); 29 C.F.R. Pt. 1630, App. § 1630.16(e); *EEOC Title I Technical Assistance Manual* § I-4.5.

<sup>168</sup> CDC, *Notice of Annual Update of List of Infectious and Communicable Diseases that Are Transmitted through Handling the Food Supply*, 71 Fed. Reg. 56,152-02, 2006 WL 2725805 (Sept. 26, 2006); *see also EEOC Title I Technical Assistance Manual* § I-4.5.

<sup>169</sup> 42 U.S.C. § 12117; 29 C.F.R. § 1601.8; *EEOC Title I Technical Assistance Manual* § I-10.1-I-10.3.

a state or local “Fair Employment Practices Agency” that the EEOC has authorized to investigate charges of discrimination under the ADA.<sup>170</sup> The Pennsylvania Human Relations Commission, the Pittsburgh Commission on Human Relations, and the Philadelphia Commission on Human Relations are all designated and certified Fair Employment Practices Agencies Under the ADA.<sup>171</sup> Procedures for filing directly with the Pennsylvania Human Relations Commission are discussed below in section VII.B. This booklet will not discuss filing with the local commissions.<sup>172</sup>

There are two EEOC field offices in Pennsylvania at which charges may be filed:

EEOC -- Philadelphia District Office  
801 Market Street, Suite 1300  
Philadelphia, PA 19107-3127

EEOC – Pittsburgh Area Office  
Liberty Center  
1001 Liberty Avenue, Suite 300  
Pittsburgh, PA 15222-4187

You can contact the EEOC by phone at: 800-669-4000 (EEOC National Contact Center voice) or 800-669-6820 (EEOC National Contact Center TTY).

Although appointments are not necessary to file, you are strongly encouraged to call the toll-free numbers listed above to schedule an appointment. You should allow at least 1 to 2 hours for the office visit. It is advisable to write down as much of the information required in a

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<sup>170</sup> 29 C.F.R. § 1601.8; *EEOC Title I Technical Assistance Manual* §§ I-10.2-10.3.

<sup>171</sup> 29 C.F.R. § 1601.74.

<sup>172</sup> Information about the Philadelphia Commission on Human Relations is available at its website, <http://www.phila.gov/humanrelations/>. Information about the Pittsburgh Commission on Human Relations is available at its website, <http://www.city.pittsburgh.pa.us/chr/>.

written charge (detailed below) before you go to the EEOC office and to bring with you copies of any documents relevant to your claim. If you need special assistance (such as an interpreter), you should advise the EEOC office before you go.

If you cannot get to an EEOC office in person, you can file a written charge by mailing it to the nearest EEOC field office in an envelope marked “ATTENTION: INTAKE.” The charge must be in writing, signed, and verified.<sup>173</sup> “Verified” basically means that it is sworn to or affirmed before a notary public or designated representative of the EEOC.<sup>174</sup> After the EEOC receives a written charge, it will contact the individual for an in-depth interview.

Whether you file a charge in person or by mail, you should have the following information available to include in your charge:

- ▶ The full name, address, and telephone number of the individual filing the charge. You may also need the individual’s Social Security number and date of birth.
- ▶ The full name, address, and telephone number of the employer against whom the charge is made. You may also need to know the number of employees (or, at least, whether there are more than 15 employees so as to be subject to the ADA).
- ▶ A clear and concise statement of the events that constitute the alleged violation of the ADA, including the disability of the individual filing the charge, the date of the alleged discriminatory acts, and details about what happened.
- ▶ The names, addresses, and telephone numbers of any witnesses.
- ▶ Any documents that support the charge.
- ▶ Whether the individual has filed the same or similar charge with a state or local Fair Employment Practices Agency; and
- ▶ The name, address, and telephone number of a person who knows where to

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<sup>173</sup> 29 C.F.R. § 1601.7(a); *EEOC Title I Technical Assistance Manual* § I-10.3.

<sup>174</sup> 29 C.F.R. § 1601.3(a).

contact the person wishing to file the charge.<sup>175</sup>

If the charge is one that can be processed by a Fair Employment Practices Agency, such as the Pennsylvania Human Relations Commission, the EEOC may refer the charge to that Agency. The Fair Employment Practices Agency then has an exclusive right to process the charge for a period of 60 days. After the expiration of that period, the EEOC may process the charge.<sup>176</sup>

A charge of discrimination under the ADA must be filed within 180 days of the alleged act of discrimination.<sup>177</sup> In Pennsylvania, however, the 180-day deadline is extended to 300 days after the act occurred as long as the complainant initially files a complaint with the Pennsylvania Human Relations Commission (though this can be accomplished by asking the EEOC to cross-file or dual- file the charge with the Pennsylvania Human Relations Commission at the time a charge is filed with the EEOC).<sup>178</sup> A charge is deemed to be filed when it is received by the EEOC, not when it is mailed.<sup>179</sup> **Failure to file a charge within this time period may result in**

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<sup>175</sup> 29 C.F.R. § 1601.12(a); *EEOC Title I Technical Assistance Manual* § I-10.3.

<sup>176</sup> 29 C.F.R. §§ 1601.13(a)(3)-(4).

<sup>177</sup> 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5(e)(1)); 29 C.F.R. § 1601.13(a)(1).

<sup>178</sup> 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5(e)(1)); 29 C.F.R. § 1601.13(a)(4)(ii)(A)). The time period within which a charge of discrimination must be filed is the “statute of limitations.” While an ADA claim can be filed within 300 days of the discriminatory act, any claim for disability discrimination under the Pennsylvania Human Relations Act (PHRA) must generally be filed within 180 days of the discriminatory act. 43 Pa. Cons. Stat. Ann. § 959(h). The Pennsylvania law can sometimes provide for more generous relief than the ADA so that it is usually appropriate to file claims under both the ADA and the PHRA. As such, it is best to file within 180 days of the discriminatory act to preserve your claims under both statutes.

<sup>179</sup> 29 C.F.R. §§ 1601.13(a)(1), 1601.13(a)(2), 1601.13(a)(4)(ii)(A).

**the charge being dismissed without further recourse against the employer. A person who believes discrimination has occurred therefore should contact the EEOC promptly.**<sup>180</sup>

Further information about filing charges with the EEOC is available in the EEOC's Title I Technical Assistance Manual and on the EEOC's website at [http://www.eeoc.gov/charge/overview\\_charge\\_filing.html](http://www.eeoc.gov/charge/overview_charge_filing.html).

Once the EEOC receives the charge, it will notify the employer within 10 days and then commence its investigation.<sup>181</sup>

During its investigation, the EEOC may dismiss the charge without making a final determination if:

- ▶ The charge was not timely because it was not filed within the 300 days of the discriminatory act.
- ▶ The charge does not state a claim covered by the ADA (for example, the charge is against an employer who is not a "covered entity" under the ADA, such as one with fewer than 15 employees).
- ▶ The person making the charge does not cooperate, cannot be located, or fails to

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<sup>180</sup> When there are multiple acts of discrimination (such as a failure to promote and a failure to provide reasonable accommodation), the time period for filing a discrimination complaint is measured separately for each incident. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-15 (2002). However, if the discriminatory acts reflect a series of related violations (such as repeated promotion denials), the individual may be able to challenge violations that occurred outside of the limitations period as long as at least one of the discriminatory acts took place within the limitations period because the acts are seen as part of a "continuing violation." See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982). It is not enough that a violation that occurred outside of the limitations period simply has a continuing effect within the limitations period. Thus, a person's claim arising from negative evaluations based on disability that resulted in ongoing lower pay, the person must file his EEOC complaint within 300 days of the date of the negative evaluations. The fact that the individual continues to receive lower pay long after the negative reviews will not extend the statute of limitations. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162, 2169 (2007).

<sup>181</sup> 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5(b)); 29 C.F.R. §§ 1601.14-1601.16; *EEOC Title I Technical Assistance Manual* § I-10.3.

respond within 30 days to an EEOC notice of dismissal.

- ▶ The employer has made a settlement offer in writing that the EEOC determines would provide full relief for the harm alleged, but the individual making the charge refuses to accept the offer within 30 days.<sup>182</sup>

When the EEOC dismisses a charge, it issues to the person a notice of his right to file a lawsuit in federal court within 90 days after receipt of the notice.<sup>183</sup> This is known as a **“right to sue letter.”**

If the charge is not dismissed for one of the reasons stated above, the EEOC’s investigation will generally result in either a determination of “no cause” or a determination of “reasonable cause.” The EEOC also may attempt to settle the dispute before issuing a determination.<sup>184</sup>

The EEOC will make a “no cause” determination if, on completing its investigation, it finds that there is no reasonable cause to believe that an unlawful employment practice has occurred.<sup>185</sup> If the EEOC makes such a determination, it will issue a right to sue letter to the person who filed the charge that informs him that he can file a lawsuit in federal district court within 90 days of receipt of the right to sue letter.<sup>186</sup>

The EEOC will issue a “reasonable cause” determination if, based on its investigation, it concludes that an unlawful employment act occurred (or is occurring).<sup>187</sup> After a reasonable

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<sup>182</sup> 29 C.F.R. §§ 1601.18(a)-(d).

<sup>183</sup> 29 C.F.R. §§ 1601.28(b)(3), 1601.28(e).

<sup>184</sup> 29 C.F.R. § 1601.20.

<sup>185</sup> 29 C.F.R. § 1601.19(a); *EEOC Title I Technical Assistance Manual* § I-10.3.

<sup>186</sup> 29 C.F.R. § 1601.19(a); *EEOC Title I Technical Assistance Manual* § I-10.3.

<sup>187</sup> 29 C.F.R. § 1601.21(a); *EEOC Title I Technical Assistance Manual* § I-10.3.

cause finding, the EEOC will try to obtain voluntary compliance by the employer using the “conciliation process.”<sup>188</sup> If the EEOC is unable to secure voluntary compliance, it will issue a right to sue letter that informs the individual of his right to file suit within 90 days of receipt of the notice.<sup>189</sup>

If the EEOC has not completed its investigation and made a determination of either “no cause” or “reasonable cause” within 180 days after the charge is filed, the individual who filed the charge may (but does not have to) request in writing that the EEOC issue a right to sue letter.<sup>190</sup> Upon receiving such a request, the EEOC must issue a right to sue letter that advises the party of his right to file a federal lawsuit within 90 days of receipt of the letter.<sup>191</sup> Once a right to sue letter is issued, the EEOC will terminate its investigation of the charge.<sup>192</sup>

If the EEOC refers the charge to a designated and certified Fair Employment Practices

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<sup>188</sup> 29 C.F.R. §1601.24.

<sup>189</sup> 29 C.F.R. §§ 1601.28(b)(1), 1601.28(e).

<sup>190</sup> 29 C.F.R. § 1601.28(a)(1). The EEOC has adopted a regulation that allows an individual to request and receive a right to sue letter prior to the expiration of the 180-day period if the EEOC determines that it is unlikely to be able to complete its investigation within 180 days. 29 C.F.R. § 1601.28(a)(2). Some courts, though, have held that this regulation is invalid and that courts cannot decide claims in which the plaintiffs received right to sue letters prior to the expiration of the 180-day period. *See, e.g., Martini v. Federal National Mortgage Ass’n*, 178 F.3d 1336, 1347 (D.C. Cir. 1999); *Lemke v. Int’l Total Services*, 56 F. Supp. 2d 472, 477 (D.N.J. 1999), *aff’d mem.*, 225 F.3d 649 (3d Cir. 2000), *cert. denied*, 531 U.S. 1152 (2001); *Henschke v. New York Hosp.-Cornell Med. Ctr.*, 821 F. Supp. 166, 171 (S.D.N.Y. 1993). Other courts, though, have concluded that the regulation is valid. *See, e.g., Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1061 (11th Cir. 1994); *Evans v. Maax-KSD Corp.*, Civil Action No. 06-2804, 2006 WL 3488708 at \*3-\*6 (E.D. Pa. Nov. 30, 2006); *Seybert v. West Chester Univ.*, 83 F. Supp. 2d 547, 550-52 (E.D. Pa. 2000). In general, though, it is preferable to avoid seeking an early right to sue letter.

<sup>191</sup> 29 C.F.R. §§ 1601.28(a)(1), 1601.28(e).

<sup>192</sup> 29 C.F.R. § 1601.28(a)(3).

Agency, such as the Pennsylvania Human Relations Commission, and the Fair Employment Practices Agency makes final findings, the EEOC must accept those findings as final.<sup>193</sup> However, the individual making the charge may request within 15 days of the Fair Employment Practices Agency's action that the EEOC conduct a "substantial weight" review.<sup>194</sup> This type of review gives substantial deference to the Fair Employment Practices Agency's determinations.<sup>195</sup>

**B. Filing a Complaint with the Pennsylvania Commission on Human Relations**

As discussed above, an individual may file an ADA charge directly with the Pennsylvania Human Relations Commission (rather than the EEOC) since the EEOC has designated and certified that agency as a Fair Employment Practices Agency.

Individuals should contact one of the following three regional offices of the Pennsylvania Human Relations Commission to file a complaint by telephone, writing, or going in person. The appropriate regional office is determined by the location of the discriminatory act -- not the county in which you live.

For Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties, contact:  
Pennsylvania Human Relations Commission  
Philadelphia Regional Office  
711 State Office Building  
1400 Spring Garden Street  
Philadelphia, PA 19130-2488  
(215) 560-2496 (voice)  
(215) 560-3599 (TTY)

For Adams, Bedford, Berks, Blair, Bradford, Cambria, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northampton,

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<sup>193</sup> 29 C.F.R. § 1601.77.

<sup>194</sup> 29 C.F.R. §§ 1601.76.

<sup>195</sup> 29 C.F.R. § 1601.21(e)

Northumberland, Perry, Pike, Schuylkill, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming and York Counties, contact:

Pennsylvania Human Relations Commission  
Harrisburg Regional Office  
Riverfront Office Center -- 5th Floor  
1101-25 South Front Street  
Harrisburg, PA 17104-2515  
(717) 787-9784 (voice)  
(717) 787-7279 (TTY)

For Allegheny, Armstrong, Beaver, Butler, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Potter, Venango, Warren, Washington and Westmoreland. Counties, contact:

Pennsylvania Human Relations Commission  
Pittsburgh Regional Office  
11th Floor State Office Building  
300 Liberty Avenue  
Pittsburgh, PA 15222-1210  
(412) 565-5395 (voice)  
(412) 565-5711 (TTY)

The intake investigator will secure the relevant information and draft the formal complaint for the notarized signature of the individual making the complaint. You should be prepared to provide the intake investigator with the following information:

- ▶ The full name, address, and telephone number of the individual filing the charge.
- ▶ The full name, address, and telephone number of the employer against whom the charge is made.
- ▶ A clear and concise statement of the events that constitute the alleged violation of the ADA, including the disability of the individual filing the charge, the date of the alleged discriminatory acts, and details about what happened.
- ▶ The names, addresses, and telephone numbers of any witnesses.
- ▶ Any documents that support your charge.

If you decide to submit your own written complaint to the Pennsylvania Human Relations

Commission, it should be sent to the appropriate regional office identified above and should be enclosed in an envelope marked: “ATTENTION: INTAKE SUPERVISOR.” The complaint should include the information listed above and should also state that the person making the charge has either a job or a non-job related disability for purposes of workers’ compensation. The complaint must be verified, consisting of a sworn oath or affirmation or an unsworn statement by the signer to the effect that the complaint is being made subject to the penalties of 18 Pa. Cons. Stat. Ann. § 4904 (relating to unsworn falsification to authorities).<sup>196</sup>

A discrimination charge under the Pennsylvania Human Relations Act must be filed with the Pennsylvania Human Relations Commission within 180 days after the alleged discriminatory act occurred.<sup>197</sup> **Failure to file a charge of discrimination within this time period may result in the charge being dismissed without further recourse against the employer.**

If an individual initial presents his charge to a Fair Employment Practices Agency, such as the Pennsylvania Human Relations Commission, rather than the EEOC, she may request that the Fair Employment Practices Agency present his or her charge to the EEOC. The Fair Employment Practices Agency will submit the charge to the EEOC within 60 days after the charge was presented to the Fair Employment Practices Agency or upon termination of the Fair Employment Practice Agency’s proceedings or upon waiver of its exclusive right to process the charge, whichever occurs earlier.<sup>198</sup> The EEOC must receive the charge from the Fair

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<sup>196</sup> 16 Pa. Code § 42.32.

<sup>197</sup> 43 Pa. Cons. Stat. Ann. § 959(h); 16 Pa. Code § 42.14. As noted above, a person can file an ADA disability discrimination claim with the EEOC within 300 days. However, if he also wants to file a Pennsylvania Human Relations Act claim (which may provide for greater relief than the ADA), he must file within 180 days to be timely.

<sup>198</sup> 29 C.F.R. § 1601.13(b)(1).

Employment Practices Agency within 300 days of the alleged discriminatory act for the charge to be considered timely.<sup>199</sup>

If an individual presents her charge to a Fair Employment Practices Agency (rather than the EEOC), but does not request that the Fair Employment Practices Agency present the charge to the EEOC, he may still be able to file a timely charge with the EEOC under certain circumstances. If the Fair Employment Practices Agency's proceedings have terminated, the individual may then file a charge with the EEOC within 30 days after notice of the termination of the proceedings or within 300 days of the alleged violation, whichever is earlier.<sup>200</sup> If the Fair Employment Practices Agency's proceedings have not been terminated, an individual may present a charge to the EEOC within 300 days from the date of the alleged discriminatory act.<sup>201</sup>

### **C. Private Lawsuits and Remedies**

After the individual receives a right to sue letter from the EEOC, she has 90 days within which to file a lawsuit in federal court.<sup>202</sup> Failure to file a lawsuit within this time period will result in dismissal of the case.

If a court finds that the employer violated the ADA, the court may require the employer to remedy the violations by issuing an injunction to prohibit future discriminatory acts or by ordering reinstatement or hiring of an employee with or without back pay.<sup>203</sup> The court may also award compensatory damages, which includes monetary losses to compensate the individual for

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<sup>199</sup> 29 C.F.R. § 1601.13(b)(1).

<sup>200</sup> 29 C.F.R. § 1601.13(b)(2)(ii).

<sup>201</sup> 29 C.F.R. § 1601.13(b)(2)(iii).

<sup>202</sup> 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5(f)(1)).

out-of-pocket expenses (such as moving costs, job search expenses, and psychiatric treatment) and emotional harm (such as pain, suffering, humiliation, and mental anguish).<sup>204</sup> If the defendant engaged in discrimination “with malice or with reckless disregard to the federally protected rights of the individual,” the court can award punitive damages as punishment to the employer.<sup>205</sup>

The maximum amount of compensatory damages for future monetary losses and emotional harm and for punitive damages is limited based upon the number of employees employed by the defendant as follows:

- ▶ 15 to 100 employees - \$50,000
- ▶ 101 to 200 employees -- \$100,000
- ▶ 200 to 500 employees -- \$200,000
- ▶ more than 500 employees -- \$300,000.<sup>206</sup>

The court also may award a prevailing party reasonable attorneys’ fees, litigation

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<sup>203</sup> 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5(g)).

<sup>204</sup> 42 U.S.C. § 1981a(a)(2); EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (July 1992), available at <http://www.eeoc.gov/policy/docs/damages.html>. A person with a disability may not recover *any* damages if the claim involves the employer’s failure to make a reasonable accommodation and the employer proves that he has made good faith efforts, in consultation with the individual with the disability, to identify and make a reasonable accommodation that would not create an undue burden. 42 U.S.C. § 1981a(a)(3).

<sup>205</sup> 42 U.S.C. § 1981a(b)(1). However, an individual cannot recover punitive damages against a municipal defendant (such as a city or town). *Barnes v. Gorman*, 536 U.S. 181, 189-90 (2002).

<sup>206</sup> 42 U.S.C. § 1981a(b)(3). These caps on damages do not include “front pay.” *Pollard v. E.I. duPont de Numbers & Co.*, 532 U.S. 843, 848 (2001).

expenses (such as expert witness fees), and court costs.<sup>207</sup>

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<sup>207</sup> 42 U.S.C. § 12205.