INTERSECTION OF CANNABIS, CRIMINAL LAW AND EMPLOYMENT LAW

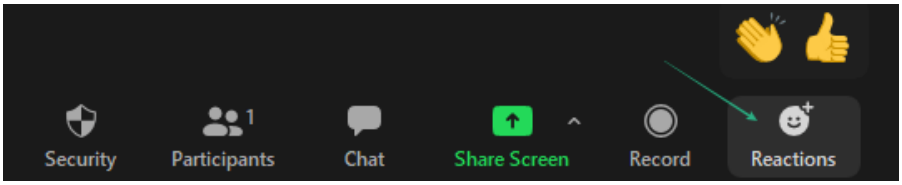
WEBSTER-BATCHELDER INNS OF COURT

OCTOBER 7, 2020

TABLE 1

Throughout the presentation, the presenters will poll the audience about various issues. To respond, please use the reactions function on Zoom.

To do so, click "Reactions" at the bottom of your screen.



Select the thumbs up for yes, and the hand clap for no.

Contents

Inns Presentation-Intersection of Cannabis, Criminal Law and Employment Law

NARRATOR: A young woman with long, curly hair, clutching the wheel tightly with her hands at the '10' and '2' positions, drives a well-worn 2002 Subaru Outback northbound on Route 95. She has just crossed into New Hampshire from Massachusetts. Her speedometer shows she is traveling well below the 65 mph speed limit. She is wearing jeans that came torn from the store, and a tie-dye shirt full of psychedelic imagery, including the well-known iconic images of rainbow-colored dancing bears. The Grateful Dead song "Fire on the Mountain" plays softly on her car radio. She is talking on a cellphone to a friend – in a car way too old to have "hands-free" calling, so we can hear only her side of the conversation. On the dashboard is a pack of cigarettes, which seems to have caught her eye.

> *[Spicoli, the driver, needs a vehicle background and should turn sideways so it looks like she is driving the vehicle. She should have separate device playing "Fire on the Mountain" in the background]*

SPICOLI: "Hey, if I sound a little **freaked out**, its because I didn't take my medicine. But anyway, **you won't believe the shit I picked up in Boston**"

[pause as if other party to call is talking between lines]

SPICOLI: "You better believe it. One taste and you will be **blown away**"
…
"Spent twice as much as I could afford but you can't get this shit every day"
…
"Good thing Dusty's been sleeping the whole ride. If he wasn't sleeping, he probably wouldda **gone through half of this** by now, leave us nothing but **crumbs**."
…
"So much better than what we can get in Portland"
…
"Thinking about this stuff has **almost** taken my mind off Dusty's cigs that he left on the dashboard."
…
"Anyway, this stuff is dope. Every mofo is going to want to come to our party now!"
…
"You want to see it?"
…
"Here I'll send you a **Snap"**

-

— Punchline: holds up Mike's Pastries box, pointing a cellphone (camera) at it

*Props needed: white baker's box, baker's twine, black marker "**Mike's Pastries".** And some kind of makeshift vehicle set. Another device to play Grateful Dead song*.

NARRATOR [BRYAN]: Meanwhile, State Trooper Farva heads northbound on Route 95, just north of the Hampton tolls. Country music plays softly on AM radio in the cruiser. Just ahead of him, an old beat up Subaru catches his eye. He radios in to dispatch; because of his earpiece, we can only hear one side of the conversation.

FARVA: "RC dispatch- I've got an 11-54, **suspicious vehicle**, 2006 Toyota Tundra, N-bound 95 just one mile north of MA border, Maine registration G R 8 F L D D. As in, **Grateful DeadHeads**, if you get my drift."
"I've found in many prior investigations that the **overwhelming plurality** of Grateful Dead fans carry schedule I narcotics, including marijuana when traveling between States."
I'm also seeing some signs here that the operator may be under the influence of the **schedule I controlled drug marijuana**. Gripping the steering wheel at the 10 and 2 positions, staring straight ahead when I pulled alongside, as if she is trying to **avoid attention** from law enforcement. Putting on turn signal to change lanes even when there are no cars around, a sign of the driver's **paranoia**, not wanting to be pulled over. Plenty of vehicles on the road, but she is the only one going 10 miles **UNDER** the speed limit.
Whoa! Something glowing, burning just flew out the driver's side window. I just saw the **unmistakable, signature glow of a marijuana cigarette**.
[lights flash]

[Skit continues but now the "Trooper" is out of the car so standing up and facing the camera directly and Christine, playing Jess Spicoli, has a vehicle background and sits sideways to the camera so it looks like she is driving]

Trooper with flashlight, stops before talking to driver, radios (talk to hand) "I've got an OVERWHELMING odor of fresh marijuana coming from this vehicle. Looks like we're about to hit **pay dirt**.

FARVA: Ma'm, can I see your license and registration.

FARVA: [pause] where are you headed?

SPICOLI: [acting very nervous] I'm headed home to Portland officer. Umm, not the bad Portland, officer. The one in Maine.

FARVA: where are you traveling from?

SPICOLI: We just went down to Boston for a daytrip. Do you mind if I ask, why did you pull me over officer?

FARVA: Well for starters I watched you or your friend over here commit a violation of NH RSA 163-B:3, “Littering”. Wait a second, is your friend ok?

SPICOLI: That’s Dusty. He’s always sleeping

FARVA: so it must have been you who threw that marijuana joint out the window.

SPICOLI: oh no officer. That was a regular cigarette, from Dusty’s pack. I started to light it, but then I remembered I promised my girlfriend I would quit, so I threw it out. Sorry about that.

FARVA: that’s a nice story, quitting smoking because your girlfriend tryin’ to spruce you up. But come on Ms. Spicoli. I could smell the marijuana smell coming from this car before I even got up to your window. It stings my nostrils just to be within close proximity to the illicit substance.

SPICOLI: well officer, you can see how nervous I am, I’ve got a wicked anxiety disorder, I have a cannabis prescription, I grow my own medicine…. I could never drive in Boston without my anxiety medication.

FARVA: so how much of this … medicine do you have in your car? Because I happen to know, Ms. Spicoli, that Maine puts some pretty low limits on how much medical marijuana you can have, something like two ounces max.

SPICOLI: [looking and sounding more nervous] only like a gram or two officer

FARVA: can I see your medical marijuana card ma’m.

SPICOLI: [fumbling around] here you go Trooper … (looks down like looking at badge] Trooper Farva.

FARVA: Ma’m, can I look through your car and just make sure and confirm that you are carrying a **lawful** quantity of marijuana?”

SPICOLI: well here is my medicine, [pulls out a case, shows some bagged vegetative matter and butane honey oil.] “See, just like maybe a 1/2 ounce of flower, maybe 30 grams butane honey oil, totally a medical prescription dosage.”

FARVA: What’s in that big white box?

SPICOLI: Umm, some macaroons, almond chocolate biscotti, Amaretti, Italian wedding cookies,…

FARVA: **Riiiiight**. Why don't you just let me search your car, it will take a few minutes, if you're telling the truth, you'll be on your way.

SPICOLI: [long pause and looking very nervous] I'm really sorry officer, this is my mom's car, I don't feel comfortable letting you search it.

> *Props needed: makeshift vehicle set, device to play "If the South woulda won" by Hank Williiams Jr.", flashing lights (I have, e.g., bicycle brake lights, and a headlamp), flashlight, little notepad and pen, hat like troopers wear, peanut brittle (the butane honey oil)*

Part II

NARRATOR: Our errant traveler was ultimately detained by our overzealous officer. By the time she was booked it was 3:30 in the morning and she was beginning to worry that she would be late for her 6AM shift at Market Basket in Dover, NH where she stocks the produce department. As soon as she gets the chance, she makes a call.

SPICOLI: [Talking into her cell phone] Boss, sorry but I probably won't be able to make it in for my shift this morning. I got arrested for possession of totally legal weed – ridiculous, right? I have it for my anxiety, ya know – they shouldn't be able to do this to me. I don't need all this extra stress, with my condition, I'll definitely need to take some more medication when I get out of here, if you know what I mean [haha]. Anyway, I'll call you again to let you know when I'll be back at work. Thanks

On the above stated date and time, I was traveling northbound on Rte 95 . As I continued north, I observed a vehicle in front of me in which the operator threw something glowing out of the window and onto the roadway. The vehicle was a 2002 'Eddie Bauer' Subaru Outback, color maroon, bearing Maine registration GR8FLDD At that time, knowing fans of the Grateful Dead almost always carry illegal drugs when they travel between States, I activated my blue emergency lights and stopped the vehicle on Interstate 95 just north of the entrance to the Liquor Store.

At that time, I exited my cruiser and made contact with the female operator, identified to be

Jess Spicoli
DOB: xx-xx-1993.

Also in the vehicle was a passenger that was asleep on my approach, later identified to be

Dusty Kindbud
DOB: xx-xx-1994.

Immediately upon contact at the driver's side window, I smelled an overwhelming odor of fresh marijuana coming from within the vehicle. I identified myself and asked Spicoli for her license and registration. Spicoli complied and as she did so I observed her eyes to be red and glassy. I then asked Spicoli where she was coming from and where she was going. Spicoli advised that she was coming from her parent's house in Chelmsford and that she was traveling home to Maine. At that time, I asked Spicoli if she would mind stepping from the vehicle to speak with me. She agreed and willingly stepped from the vehicle and spoke with me at the rear of her vehicle. At that time, I advised Spicoli of my observation of the odor coming from within her vehicle. Spicoli immediately stated that she had a medical marijuana card in Maine, and uses cannabis that she grows herself to treat her anxiety disorder.

I then asked him how much marijuana she had within the vehicle. Spicoli advised that she may have a gram or two. Spicoli began stuttering and shaking and appeared very nervous. I then asked Spicoli where she had it within the vehicle and if she had her medical card with her Spicoli handed her medical card to me. Spicoli pulled a long black thin case from the rear seats of her vehicle which contained pieces of parchment paper with a small quantity of what Spicoli identified as Butane Honey Oil.

I then advised Spicoli that I did not believe that she was being honest with me and that the odor coming from her vehicle was much stronger than the smell of the oils and that it was one of fresh marijuana. I told Spicoli to open her mouth and stick her tongue out. She did so. I observed she did not have the characteristic "green tongue" of someone who has recently smoked marijuana.

I then asked him if she had more marijuana within the vehicle. Spicoli then advised that she had her "flower" within a small pelican case in the vehicle. I then asked him if she would retrieve it. Spicoli advised that she would and again walked to the rear portion of her vehicle and pulled a small black pelican storage case from the rear seats. As he did so, I also observed a much larger pelican case in that same area along with a large backpack and glass marijuana "bong". Spicoli then showed me the contents of the small pelican case. Inside were two bags containing marijuana. Spicoli advised me that each of the bags had "about 1/2 ounce" of marijuana. I then asked her how much she could carry with her medical card. She advised that she could carry 2.5 ounces. I then asked her if she had documentation from her doctor advising of the amount that she could carry. Spicoli then checked within the vehicle for the documentation and advised she did not have it.

As I stood at the vehicle I could still smell a very strong odor of fresh marijuana coming from within the vehicle. At that time, I asked Spicoli if there was any more marijuana within the vehicle. Spicoli advised that she did not. I then advised her that I wanted to be sure that there was not any further marijuana or other contraband within the vehicle and I asked her if she would willingly consent to a search of her vehicle. Spicoli quickly advised that she would not consent to a search. At that time I had Spicoli stand at the rear of the vehicle and I made contact with KINDBUD who was still asleep.

KINDBUD awoke as I knocked on the passenger window and I asked him if he would step from the vehicle to speak with me. He agreed and I spoke with him at the front of the vehicle. I then asked KINDBUD where the two were coming from and where they were traveling to. KINDBUD then advised that they were coming from Chelmsford MA. I asked him about the marijuana and BHO in the vehicle. KINDBUD said that its not his and it doesn't matter because that stuff is legal in Massachusetts.

I then again spoke with Spicoli. I told her I was not convinced that she was allowed to carry the quantity of marijuana and BHO that I had observed. I then asked Spicoli if she was refusing a search of her vehicle and I advised her of her rights in relation to the search. Spicoli again advised that she would not allow a search of her vehicle. At that time, I advised Spicoli that her vehicle would be seized and towed to the Troop A Barracks pending the application for a search warrant. I further advised her that she was going to be placed under arrest for Transporting Drugs for the Butane Honey Oil she had within his vehicle. I also advised that her marijuana would be seized pending documentation of her medical marijuana permit and amounts she could legally possess. Tr. PONCHARELLO arrived on scene and placed Spicoli into handcuffs. Spicoli was then searched and secured in the rear of Tr. Poncharello's cruiser.

A search warrant application was completed with the above information and it was reviewed by Judge LeFrancois of the Seabrook District Court. The warrant was approved and the search was completed of the vehicle. A separate report documents the items seized from the vehicle.

2015-12-22T01 Signature:

CANNABIS AND CARS - CRIMINAL PROCEDURE ISSUES

-- ISSUES IMPLICATED IN THE "*STATE V. SPICOLI*" FACT PATTERN --

THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT UNREASONABLE SEIZURES

Part I, Article 19 of the New Hampshire Constitution provides in part: "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. The Fourth Amendment similarly provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…."

Recently enacted Article 2-b of the State Constitution adds the following language which has not yet been construed by the Court: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

Evidence obtained in violation of a defendant's rights under Part I, Article 19 of the State Constitution and/or the Fourth Amendment is inadmissible under the exclusionary rule. An exception to this rule may apply if the State proves that the taint of the primary illegality is purged. *State v. De La Cruz*, 158 N.H. 564, 566 (2009).

TRAFFIC STOPS ARE SEIZURES

A traffic stop is a "seizure" which must be supported by reasonable suspicion that the driver has committed, is committing, or is about to commit a traffic violation or crime. *State v. McKinnon-Andrews*, 151 N.H. 19, 22 (2004). If the officer observes a traffic violation, that will constitute reasonable suspicion to make a traffic stop. *State v. Brodeur*, 126 N.H. 411, 416 (1985)(center line violation); *State v. Pepin*, 155 N.H. 364 (2007)(officer's observation of "squealing tires" did not constitute reasonable suspicion to justify stop).

If the officer observes erratic operation that does not involve a specific traffic violation, the officer may have reasonable suspicion to make a stop either based on suspicion of impaired driving, or under a community caretaking justification as the driver may be ill or the vehicle may have a dangerous mechanical issue. *State v. Craveiro*, 155 N.H. 423 (2007)(police chief not justified in stopping vehicle that drove through a flooded road).

SCOPE OF INVESTIGATIVE STOP

The scope of such an investigative stop "must be carefully tailored to its underlying justification, must be temporary, and last no longer than is necessary to effectuate the purpose of the stop." *State v. Wong*, 138 N.H. 56, 63 (1993).

The scope of a stop may be expanded to investigate other suspected illegal activity only "if the officer has a reasonable and articulable suspicion that other criminal activity is afoot." *State v. Hight*, 146 N.H. 746, 748-49, 781 A.2d 11 (2001) (quotation omitted).

Even if a traffic stop was justified by something innocuous like a headlight out, the officer may expand the scope of the stop beyond merely issuing a ticket or warning if the officer develops reasonable suspicion for other issues such as impaired driving, possession of illegal drugs, or a minor transporting alcoholic beverages. *State v. Livingston*, 153 N.H. 399 (2006)(an odor of burnt marijuana coupled with observations of bloodshot eyes, may justify a continued investigatory detention); *State v. Moore*, 151 N.H. 288 (2004) (officer may prolong detention to determine the source of an odor of alcoholic beverage coming from defendant's vehicle).

The officer may not, however, expand the scope of the detention, even if done in a manner that does not really prolong the detention, absent reasonable suspicion to justify the continued intrusion into motorist's privacy. *State v. Blesdell-Moore*, 166 N.H. 183 (2014). In *Blesdell-Moore*, although the officer had not smelled marijuana or visually observed items consistent with marijuana use / possession, the officer asked to see the defendant's tongue and check for "green tongue", a supposed sign of recent marijuana use. Even though this quick look inside defendant's mouth did not temporally prolong the detention, the Court held that the request violated Part I, Article 19. "[T]he scope of this initially valid traffic stop was unlawfully expanded when [the officer] asked to see the defendant's tongue and took additional steps to investigate whether the defendant had possessed or consumed marijuana."

<u>PRETEXTUAL STOPS</u>

Pretextual stops are acceptable under the state and federal constitution, if, despite the officer's motives, a valid basis did exist for the stop. *State v. McBreairty*, 142 N.H. 12, 15 (1997); *Whren v. United States*, 517 U.S. 806 (1996).

THE SMELL OF MARIJUANA AS JUSTIFICATION FOR EXPANDED DETENTION

Let's say during a vehicle stop, an officer smells the odor of marijuana coming from the vehicle, but does not suspect impaired driving or has ruled out impaired driving during the stop. (Driving under the influence of cannabis is a misdemeanor). What can the officer do, now that possession of small amounts of marijuana has been decriminalized, and the statute specifically states that police cannot make a custodial arrest for possession of ¾ oz or less of marijuana?

The Court recently and for the first time tackled this issue in the context of NH's decriminalization of marijuana and legalization of medical cannabis. *State v. Perez*, 2020 N.H. LEXIS 95 (May 15, 2020). Possession of 3/4oz of marijuana or less is a non-criminal violation. Possession of a larger amount of marijuana is a misdemeanor. Possession of marijuana with intent to distribute is a felony. So, does the odor of marijuana coming from a vehicle provide reasonable suspicion that the operator of the vehicle has committed, is committing, or is about to commit a crime? The Court began by stating:

> we disagree that, post-decriminalization, the odor of marijuana is now a wholly innocent factor in determining whether reasonable, articulable suspicion of criminal activity exists. However, we also recognize that the odor of marijuana is not wholly synonymous with criminal activity.

The Court proceeded to hold that the smell of marijuana, standing alone, does not provide reasonable suspicion to continue to detain the driver and vehicle. However, the Court held that the odor of marijuana may be considered as a factor which may be considered, in the totality of circumstances, in determining whether the officer had reasonable suspicion to extend the detention.

Ultimately, the Court upheld the trial court's denial of motion to suppress based on the following totality of circumstances: "(1) the odor of marijuana; (2) the tardiness of the stop; (3) the nervous and odd behavior of the passengers; (4) the extra cell phone [three phones, two passengers]; (5) the fact that the vehicle was rented; and (6) the defendant's criminal record, combined to create a reasonable, articulable suspicion of drug activity."

Prior to the decriminalization of marijuana, the Court treated it as a simpler issue: the odor of marijuana does provide reasonable suspicion to extend a detention of the operator of a vehicle. *State v. Livingston*, 153 N.H. 399 (2006). In *Livingston*, an officer stopped truck to determine if it was complying with federal motor carrier safety regulations. The officer quickly ruled out that the vehicle even fell within the scope of those regulations. Nevertheless, the officer continued the detention based on a new justification: smell of burnt marijuana in vehicle, along with facts that driver had bloodshot eyes and appeared

nervous. The Court held: "While [officer's] authority to detain the defendant under the administrative search exception ended when he looked at the vehicle registration and ascertained that the vehicle was not a commercial vehicle, we conclude that [the officer] had reasonable suspicion to detain the defendant and question him regarding the presence of marijuana in his vehicle."

In *State v. Joyce*, 159 N.H. 440 (2009), the Court held that the smell of fresh marijuana coming from passenger, only after she exits vehicle, does not provide reasonable suspicion to detain the driver.

SIGNS OF NERVOUSNESS AS JUSTIFICATION FOR EXPANDED DETENTION

The Court has repeatedly characterized driver's nervousness as an innocent behavior which, even when causing physical manifestations such as shaky hands, does not justify expanding the scope of a detention. *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014) ("Absent additional facts, we decline to find that otherwise innocent factors like nervousness and bloodshot eyes are sufficient to support reasonable suspicion."); *State v. Joyce*, 159 N.H. 440, 447 (2009).

Why did the Court describe bloodshot eyes as an innocent factor? Common sense suggests that late at night, lacking sleep, exposure to workplace irritants, problems with contact lenses, etc can cause bloodshot eyes. Thus, the *Blesdell-Moore* Court approvingly quoted a Maryland court decision: "'In the absence of any testimony or scientific evidence as to some direct, observable correlation between eyes that are bloodshot, even extremely so, and drug usage or, intuitively less likely, drug possession, we find this fact to carry little, if any, weight.'")(quoting *Ferris v. State*, 355 Md. 356, 735 A.2d 491, 508, 510 (Md. 1999)).

WARRANTLESS SEIZURES OF APPARENT CONTRABAND VISIBLE WITHIN VEHICLE

In *State v. Cora*, 170 N.H. 186 (2017), the Court held that an officer may reach into a vehicle and seize visible contraband without obtaining a warrant or the driver's consent. In so ruling, the Court overruled in part its 1995 decision in *State v. Sterndale*, 139 N.H. 445 (1995)(rejecting the federal "automobile exception" to the warrant requirement under Part I, Article 19).

It must be readily apparent, however, that the item seized is contraband. Compare *State v. Ball,* 124 N.H. 226 (1983)(holding that officer violated Part I, Article 19 by seizing what the officer believed to be a partially consumed handrolled marijuana cigarette or "joint", because its incriminating nature was not immediately apparent) with *State v. Whiting*, 127 N.H. 110 (1985)(officer's

warrantless seizure of handrolled cigarette was justified by indicia of potential impaired driving).

MARIJUANA DECRIMINALIZATION – OVERVIEW OF NH'S LAW

- Covers marijuana in its "flower" (plant) form, edibles, hashish, other marijuana products
- Decriminalizes possession of ¾ ounce or less of marijuana, 5 grams or less of hashish, or a "personal-use amount of a regulated marijuana-infused product"…
- Different rules depending on whether subject is 21 or over, or between 18 and 21.
- Officer cannot arrest person or seize vehicle. Just issue a ticket. Unless the person refuses to provide ID and/or refuses to identify self.
- Defendant can mail in the ticket with the $100 fine payment, like a routine traffic ticket.
- Any prosecution is a sealed case, whether mailed in as a guilty plea or brought to court for trial.

MEDICAL MARIJUANA – NH RESIDENTS AND VISITORS

Overview of New Hampshire's Law

- The "Qualifying Patient" shall not be subject to arrest, prosecution or penalty for possession of up to two ounces of "usable cannabis".
- The law grants a presumption of lawful therapeutic use to the qualifying patient who possesses a valid registry identification card and no more than two ounces of cannabis.
- The presumption may be rebutted by evidence that "conduct related to cannabis was not for the purpose of treating or alleviating the qualifying patient's qualifying medical condition… [or its symptoms]"
- A "designated caregiver" enjoys the same protections.
- Not exempt from arrest or prosecution for being under the influence of cannabis while operating a motor vehicle, commercial vehicle, boat, vessel, or any other vehicle propelled or drawn by power other than muscular power. 126-W:3(II)(a)(1).
- The list of qualifying medical conditions was, initially, extremely limited compared to other States, but has gradually expanded by legislative amendment. Nevertheless, for example, the current list does not include the "anxiety disorder" that the driver in the hypothetical referred to.

What issues are presented by the hypothetical?

- NH's registered medical marijuana patients must obtain the marijuana from a licensed facility… Maine patients can grow their own.
- NH law requires out of state marijuana card holders to possess two

documents – the equivalent of a registry card holder and another document where the physician documents the qualifying medical condition.

- Anxiety disorder is not a qualifying medical condition in NH.
- Maine's law, by contrast, has no list of qualifying medical conditions. It's up to the physician whether to qualify the person for medical cannabis.
- NH law allows patient to possess only two ounces of marijuana.
- Maine law allows patient to possess 2.5 ounces of usable marijuana outside patient's home. But patient can grow up to 6 plants, which can produce several pounds of marijuana.
- Does "full faith and credit clause" of US Constitution apply?

WHAT ABOUT THE SUPREMACY CLAUSE AND THE CONTINUING FEDERAL BAN ON MARIJUANA POSSESSION FOR ANY PURPOSE?

The First Circuit stated, in a case that did not involve conduct legal or decriminalized under State law: "The case law is consentient that when a law enforcement officer detects the odor of marijuana emanating from a confined area, such as the passenger compartment of a motor vehicle, that olfactory evidence furnishes the officer with probable cause to conduct a search of the confined area." *United States v. Staula*, 80 F.3d 596, 602 (1st Cir. 1996). *See State v. Moore*, 90 Ohio St. 3d 47, 734 N.E.2d 804 (2000) (Lists many state and federal courts that have concluded that the detection of the odor of marijuana, alone, by an experienced law enforcement officer is sufficient to establish probable cause to conduct a reasonable search).

NEW HAMPSHIRE'S MARIJUANA DECRIMINALIZATION LAW – EXCERPTS

318-B:2-c Personal Possession of Marijuana. –

I. In this section:

(a) "Marijuana" includes the leaves, stems, flowers, and seeds of all species of the plant genus cannabis, but shall not include the resin extracted …

(b) "Personal-use amount of a regulated marijuana-infused product" means one or more products that is comprised of marijuana, marijuana extracts, or resins and other ingredients and is intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures, which was obtained from a state where marijuana sales to adults are legal and regulated under state law, and which is in its original, child-resistant, labeled packaging when it is being stored, and which contains a total of no more than 300 milligrams of tetrahydrocannabinol.

II. Except as provided in RSA 126-X, **any person who knowingly possesses 3/4 of an ounce or less of marijuana, including adulterants or dilutants, shall be guilty of a violation**, and subject to the penalties provided in paragraph V.

III. Except as provided in RSA 126-X, **any person who knowingly possesses 5 grams or less of hashish, including adulterants or dilutants, shall be guilty of a violation**, and subject to the penalties provided in paragraph V.

IV. Except as provided in RSA 126-X, any person 21 years of age or older possessing a **personal-use amount of a regulated marijuana-infused product** shall be guilty of a violation,

and subject to the penalties provided in paragraph V. Persons 18 years of age or older and under 21 years of age who knowingly possess marijuana-infused products shall be guilty of a misdemeanor.

V. (a) Except as provided in this paragraph, any person 18 years of age or older who is convicted of violating paragraph II or III, or any person 21 years of age or older who is convicted of violating paragraph IV **shall be subject to a fine of $100 for a first or second offense** under this paragraph, or a fine of up to $300 for any subsequent offense within any 3-year period; however, any person convicted based upon a complaint which alleged that the person had 3 or more prior convictions for violations of paragraph II, III or IV, or under reasonably equivalent offenses in an out-of-state jurisdiction since the effective date of this paragraph, within a 3-year period preceding the fourth offense shall be guilty of a class B misdemeanor. The offender shall forfeit the marijuana, regulated marijuana-infused products, or hashish to the state. A court shall waive the fine for a single conviction within a 3-year period upon proof that person has completed a substance abuse assessment by a licensed drug and alcohol counselor within 60 days of the conviction. …

(b) Any person under 18 years of age who is convicted of violating paragraph II or III shall forfeit the marijuana or hashish and shall be subject to a delinquency petition under RSA 169-B:6.

VI. (a) **Except as provided in this section, no person shall be subject to arrest for a violation of paragraph II, III, or IV and shall be released provided the law enforcement officer does not have lawful grounds for arrest for a different offense**.

(b) Nothing in this chapter shall be construed to prohibit a law enforcement agency from investigating or charging a person for a violation of RSA 265-A.

(c) Nothing in this chapter shall be construed as forbidding any police officer from taking into custody any minor who is found violating paragraph II, III, or IV.

(d) Any person in possession of an identification card, license, or other form of identification issued by the state or any state, country, city, or town, or any college or university, who fails to produce the same upon request of a police officer or who refuses to truthfully provide his or her name, address, and date of birth to a police officer who has informed the person that he or she has been found to be in possession of what appears to the officer to be 3/4 of an ounce or less of marijuana, a personal-use amount of a regulated marijuana-infused product, or 5 grams or less of hashish, may be arrested for a violation of paragraph II, III, or IV.

VII. All fines imposed pursuant to this section shall be deposited into the alcohol abuse prevention and treatment fund established in RSA 176-A:1 and utilized for evidence-informed substance abuse prevention programs.

VIII. (a) **No record that includes personally identifiable information resulting from a violation of this section shall be made accessible to the public, federal agencies, or agencies from other states or countries.**

(b) Every state, county, or local law enforcement agency that collects and reports data for the Federal Bureau of Investigation Uniform Crime Reporting Program shall collect data on the number of violations of paragraph II, III, or IV. The data collected pursuant to this paragraph shall be available to the public. A law enforcement agency may update the data annually and may make this data available on the agency's public Internet website.

Source. 2017, 248:2, eff. Sept. 16, 2017.

NEW HAMPSHIRE’S MEDICAL MARIJUANA LAW – EXCERPTS

126-X:2 Therapeutic Use of Cannabis Protections. –
I. A qualifying patient shall not be subject to arrest by state or local law enforcement, prosecution or penalty under state or municipal law, or denied any right or privilege for the therapeutic use of cannabis in accordance with this chapter, if the qualifying patient possesses an amount of cannabis that does not exceed the following:
(a) Two ounces of usable cannabis; and
(b) Any amount of unusable cannabis.
II. A designated caregiver shall not be subject to arrest by state or local law enforcement, prosecution or penalty under state or municipal law, or denied any right or privilege for the therapeutic use of cannabis in accordance with this chapter on behalf of a qualifying patient if the designated caregiver possesses an amount of cannabis that does not exceed the following:
(a) Two ounces of usable cannabis, or the total amount allowable for the number of qualifying patients for which he or she is a designated caregiver; and
(b) Any amount of unusable cannabis.
III. …
IV. (a) A qualifying patient is presumed to be lawfully engaged in the therapeutic use of cannabis in accordance with this chapter if the qualifying patient possesses a valid registry identification card and possesses an amount of cannabis that does not exceed the amount allowed under this chapter.
(b) …
(c) The presumptions made in subparagraphs (a) and (b) may be rebutted by evidence that conduct related to cannabis was not for the purpose of treating or alleviating the qualifying patient's qualifying medical condition or symptoms or effects of the treatment associated with the qualifying medical condition, in accordance with this chapter.
V. A valid registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows, in the jurisdiction of issuance, a visiting qualifying patient to possess cannabis for therapeutic purposes, shall have the same force and effect as a valid registry identification card issued by the department in this state, provided that:
(a) The visiting qualifying patient shall also produce a statement from his or her provider stating that the visiting qualifying patient has a qualifying medical condition as defined in RSA 126-X:1; and
(b) A visiting qualifying patient shall not cultivate or purchase cannabis in New Hampshire or obtain cannabis from alternative treatment centers or from a qualifying New Hampshire patient.
VI. …
VIII. A provider shall not be subject to arrest by state or local law enforcement, prosecution or penalty under state or municipal law, or denied any right or privilege, including but not limited to a civil penalty or disciplinary action by the New Hampshire board of medicine or any other occupational or professional licensing entity, solely for providing written certifications, provided that nothing shall prevent a professional licensing entity from sanctioning a provider for failing to properly evaluate a patient's medical condition.
IX. An alternative treatment center shall not be subject to prosecution under state or municipal

law, search, or inspection, except by the department pursuant to RSA 126-X:7, IX; seizure; or penalty in any manner under state or municipal law for acting pursuant to this chapter and department rules to:
(a) Acquire or purchase cannabis seeds or seedlings;
(b) Possess, cultivate, manufacture, or transport cannabis and seedlings; or
(c) Deliver, transfer, supply, sell, or dispense cannabis and related supplies and educational materials to qualifying patients who have designated the alternative treatment center to provide for them, to designated caregivers on behalf of the qualifying patients who have designated the alternative treatment center, or to other alternative treatment centers.
X. An alternative treatment center agent shall not be subject to arrest by state or local law enforcement, prosecution or penalty in any manner under state or municipal law, search, or denied any right or privilege for working for an alternative treatment center pursuant to this chapter and department rules to engage in any of the actions listed in paragraph IX.
XI. Any cannabis, cannabis paraphernalia, licit property, or interest in licit property that is possessed, owned, or used in connection with the therapeutic use of cannabis as allowed under this chapter, or acts incidental to such use, shall not be seized or forfeited if the basis for the seizure or forfeiture is activity related to cannabis that is exempt from state criminal penalties under this chapter.
XII. An individual shall not be subject to arrest by state or local law enforcement, prosecution or penalty under state or municipal law, or denied any right or privilege, including but not limited to a civil penalty or disciplinary action by a court or occupational or professional licensing entity, simply for being in the presence or vicinity of the therapeutic use of cannabis as allowed under this chapter.
XIII. …
Source. 2013, 242:1, eff. July 23, 2013. 2015, 143:1, eff. Aug. 11, 2015. 2016, 247:4, eff. June 10, 2016.

126-X:3 Prohibitions and Limitations on the Therapeutic Use of Cannabis. –
I. A qualifying patient may use cannabis on privately-owned real property only with written permission of the property owner or, in the case of leased property, with the permission of the tenant in possession of the property, except that a tenant shall not allow a qualifying patient to smoke cannabis on rented property if smoking on the property violates the lease or the lessor's rental policies that apply to all tenants at the property. However, a tenant may permit a qualifying patient to use cannabis on leased property by ingestion or inhalation through vaporization even if smoking is prohibited by the lease or rental policies. For purposes of this chapter, vaporization shall mean the inhalation of cannabis without the combustion of the cannabis.
II. Nothing in this chapter shall exempt any person from arrest or prosecution for:
(a) Being under the influence of cannabis while:
(1) Operating a motor vehicle, commercial vehicle, boat, vessel, or any other vehicle propelled or drawn by power other than muscular power; or
(2) In his or her place of employment, without the written permission of the employer; or
(3) Operating heavy machinery or handling a dangerous instrumentality.
(b) The use or possession of cannabis by a qualifying patient or designated caregiver for purposes other than for therapeutic use as permitted by this chapter;

(c) The smoking or vaporization of cannabis in any public place, including:
(1) A public bus or other public vehicle; or
(2) Any public park, public beach, or public field.
(d) The possession of cannabis in any of the following:
(1) The building and grounds of any preschool, elementary, or secondary school, which are located in an area designated as a drug free zone; or
(2) A place of employment, without the written permission of the employer; or
(3) Any correctional facility; or
(4) Any public recreation center or youth center; or
(5) Any law enforcement facility.
III. Nothing in this chapter shall be construed to require:
(a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis; or
(b) Any individual or entity in lawful possession of property to allow a guest, client, customer, or other visitor to use cannabis on or in that property; or
(c) ….
VI. Any qualifying patient or designated caregiver who sells cannabis to another person who is not a qualifying patient or designated caregiver under this chapter shall be subject to the penalties specified in RSA 318-B:26, IX-a, shall have his or her registry identification card revoked, and shall be subject to other penalties as provided in RSA 318-B:26.
VII. The department may revoke the registry identification card of a qualifying patient or designated caregiver for violation of rules adopted by the department or for violation of any other provision of this chapter, and the qualifying patient or designated caregiver shall be subject to any other penalties established in law for the violation.
….

Overview of federal and New Hampshire marijuana laws for employers

Federal Controlled Substances Act

- Production, processing and sale of marijuana is completely illegal under federal law; everyone producing, processing and selling marijuana – even in a state where it's legal for medical or recreational purposes – is committing a federal crime
- Marijuana is a Schedule I substance under the U.S. Controlled Substances Act, grouped with the most dangerous drugs, including LSD and heroin
- Some bi-partisan bills to change legal status, but so far no changes to federal law

Obama Administration

- Obama Justice Department had issued a series of written policy memos instructing U.S. Attorneys not to interfere with state legalization efforts, unless certain enumerated federal enforcement priorities are implicated (Cole Memo)

Trump Administration

- President Trump has made a variety of conflicting statements
- Former Attorney General Jeff Sessions has rescinded the Cole Memo
- Has instructed and permitted U.S. Attorneys to use their discretion in determining whether to move against operators in states with legal marijuana
- The views of local U.S. Attorneys on marijuana legalization are (and always have been) extremely critical, and now there is no longer a national standard for prosecutorial discretion
- There have been some legislative efforts to address the disconnect between federal and state law, none of which have been successful

NEW HAMPSHIRE: Medical Marijuana

126-X:3 Prohibitions and Limitations on the Therapeutic Use of Cannabis.

I. A qualifying patient may use cannabis on privately-owned real property only with written permission of the property owner or, in the case of leased property, with the permission of the tenant in possession of the property, except that a tenant shall not allow a qualifying patient to smoke cannabis on rented property if smoking on the property violates the lease or the lessor's rental policies that apply to all tenants at the property. However, a tenant may permit a qualifying patient to use cannabis on leased property by ingestion or inhalation through vaporization even if smoking is prohibited by the lease or rental policies. For purposes of this chapter, vaporization shall mean the inhalation of cannabis without the combustion of the cannabis . . .

III. **Nothing in this chapter shall be construed to require**:
(a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis; or
(b) Any individual or entity in lawful possession of property to allow a guest, client, customer, or other visitor to use cannabis on or in that property; or
(c) **Any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment . . .. This chapter shall in no way limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.**

Employer Concerns and Considerations

1. Conflict with federal laws
    - DOT drug testing requirements.
    - Controlled Substances Act

2. Federal Drug Free Workplace Act of 1988
    - Applies to all federal grantees and some federal contractors
    - Requires grantee/contractors to provide a “drug-free workplace”
    - Among other things, requires policy statement to EEs informing them that the unlawful possession/use, etc. of a controlled substance is prohibited in the workplace
    - Must report drug convictions to federal agency
    - Does not require drug testing
    - Does not encompass off-duty drug use

Employer Concerns and Considerations, Cont.

3. Criminal accomplice liability

   - "Whoever commits an offense against the United States or aids, abets, counsels, commands induces or procures its commission, is punishable as a principal . . . ." 18 U.S.C. § 2(a)-(b).

4. Civil liability

   - Negligent hiring and retention
   - Respondent Superior

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

EEOC-CVG-2003-1

Concise Display Name:

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA

Issue Date:

10-17-2002

General Topics:

Disability

Summary:

This document addresses the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship under Title I of the ADA.

Citation:

ADA, Rehabilitation Act, 29 CFR Part 1630, 29 CFR Part 1614

Document Applicant:

Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

Previous Revision:

Yes. This document replaced a 1999 guidance document by the same name.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

	NOTICE	Number 915.002
EEOC		
		October 17, 2002

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

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

Table of Contents

INTRODUCTION

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

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

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and

modified schedules. Reassignment issues addressed include who is entitled to reassignment and the

extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

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

GENERAL PRINCIPLES

Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (the "ADA")[(1)] requires an employer[(2)] to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[(3)]There are three categories of "reasonable accommodations":

> "(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[(4)]

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

Reasonable accommodation is available to qualified applicants and employees with disabilities.[(5)]

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

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

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

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;"[(8)] this means it is "reasonable" if it appears to be "feasible" or "plausible."[(9)] An accommodation also must be effective in meeting the needs of the individual.[(10)] In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY[(11)] to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.

Example C: A cleaning company rotates its staff to different floors on a monthly basis. One crew

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

There are several modifications or adjustments that are not considered forms of reasonable accommodation.[(12)] An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation,[(13)] is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards -- whether qualitative or quantitative[(14)] -- that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.[(15)]

Undue Hardship

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer.[(16)] "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.[(17)] An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The

ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil

Rights Act of 1964 for religious accommodation.[18]

REQUESTING REASONABLE ACCOMMODATION

1. How must an individual request a reasonable accommodation?

   When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."[19]

   Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

   Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.

   Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

   Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

   While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of "disability,"[20] a prerequisite for the individual to be entitled to a reasonable accommodation.

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

   Yes, a family member, friend, health professional, or other representative may request a

reasonable accommodation on behalf of an individual with a disability.[(21)] Of course, the individual with a disability may refuse to accept an accommodation that is not needed.

Example A: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. This discussion constitutes a request for reasonable accommodation.

Example B: An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.

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

   No. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication.[(22)] An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. (See Question 6).

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

   An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer. Rather, an individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.[(23)] As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

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

   The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.[(24)] The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is

needed.[25]

The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.[26]

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

   Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations.[27] The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

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

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

   In requesting documentation, employers should specify what types of information they are

seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.[(28)]

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

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

Example B: A marketing employee has a severe learning disability. He attends numerous meetings to plan marketing strategies. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his supervisor about his disability and requests a laptop computer to use in the meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. The employer also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.[(29)]

Example C: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. The supervisor can ask the spouse to send in documentation from the employee's treating physician that confirms that the hospitalization was related to the multiple sclerosis and provides information on how long an absence may be required from work.[(30)]

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation.[(31)] On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.[(32)]

7. May an employer require an individual to go to a health care professional of the employer's (rather

than the employee's) choice for purposes of documenting need for accommodation and disability?

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.[(33)]

Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.[(34)] If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

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

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

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

   Example B: One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter

explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.

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

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

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

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.[(35)] Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[(36)]

Example A: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding.

However, he has no difficulty understanding oral communication. The employee requests that the

employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

Example B: An attorney with a severe vision disability requests that her employer provide someone to read printed materials that she needs to review daily. The attorney explains that a reader enables her to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly, the employer instead provides the attorney with a device that allows her to magnify print so that she can read it herself. The attorney can read print using this device, but with such great difficulty it significantly slows down her ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the attorney with an equal opportunity to attain the same level of performance as her colleagues. Without an equal opportunity to attain the same level of performance, this attorney is denied an equal opportunity to compete for promotions. In this instance, failure to provide the reader, absent undue hardship, would violate the ADA.

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

    An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible.[(37)] Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.[(38)]

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

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

employee can perform his/her job as effectively as possible while waiting for the equipment.

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

    No. An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.[(39)]

REASONABLE ACCOMMODATION AND JOB APPLICANTS

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

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

    During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type. [(40)]

    After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.[(41)]

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

Yes. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job. (42)

Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels the interview and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

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

REASONABLE ACCOMMODATION RELATED TO THE BENEFITS AND PRIVILEGES OF EMPLOYMENT (43)

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs

(EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).[(44)] If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

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

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

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

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

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

    Yes. Employers must provide reasonable accommodation (e.g., sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio- cassette) that will provide employees with disabilities with an equal opportunity to participate in employer-

    sponsored training, absent undue hardship. This obligation extends to in-house training, as well

as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

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

Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA)[(45)] have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

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

Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

TYPES OF REASONABLE ACCOMMODATIONS RELATED TO JOB PERFORMANCE[(46)]

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

Job Restructuring

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.[(47)]

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

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

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

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

Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability.[(48)] An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.[(49)] For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

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

17. May an employer apply a "no-fault" leave policy, under which employees are automatically

terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.[(50)]

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

    Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.[(51)]

    If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.[(52)]

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

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

    No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law.[(53)] Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.[(54)]

    Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is

automatically terminated. The employer terminates the salesperson because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

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

Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.(55)

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

    Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave.(56) An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.(57) Accordingly, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

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

    Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

21. How should an employer handle leave for an employee covered by both the ADA and the Family

and Medical Leave Act (FMLA)?[58]

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.[59]

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

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

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one.[60] An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.[61]

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the

employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment,[(62)] but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Modified or Part-Time Schedule

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

Yes.[(63)] A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.[(64)]

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

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule.[(65)] Employers should carefully assess whether modifying the hours could significantly disrupt their operations -- that is, cause undue hardship -- or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested. [(66)]

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. -

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

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

23. How should an employer handle requests for modified or part-time schedules for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[(67)]

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

    Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship).[(68)] An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non- disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

    Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12-month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours.[(69)] An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.[(70)]

    Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA.

Modified Workplace Policies

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

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations,[(71)] absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

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

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability- related medical problems, barring undue hardship.[(72)] Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.[(73)]

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.[(74)]

Reassignment [(75)]

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.[(76)] This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with

or without reasonable accommodation, unless the employer can show that it would be an undue

hardship.[(77)]

An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.[(78)] The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.[(79)] The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.

Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.[(80)] However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.[(81)] A position is considered

vacant even if an employer has posted a notice or announcement seeking applications for that

position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.[(82)]

Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

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

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc.[(83)] If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.

25. Is a probationary employee entitled to reassignment?

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

The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has never adequately

performed the essential functions, with or without reasonable accommodation, then s/he is not

entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

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

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

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

    Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.[(84)]

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

    No. This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc.[(85)] Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship.[(86)]If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

28. Does an employer have to notify an employee with a disability about vacant positions, or is it the

employee's responsibility to learn what jobs are vacant?

The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.[(87)] In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.[(88)]

An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks.[(89)]When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

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

    No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[(90)]

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

    No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.[(91)]

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

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

    However, if there are "special circumstances" that "undermine the employees' expectations of

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

OTHER REASONABLE ACCOMMODATION ISSUES [(97)]

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

    The duty to provide reasonable accommodation is an ongoing one.[(98)] Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

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

33. Does an employer have to change a person's supervisor as a form of reasonable accommodation?

    No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory

methods be altered as a form of reasonable accommodation.[(99)] Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

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

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

    An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.[(100)] Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader).[(101)] For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

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

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

36. Must an employer provide a reasonable accommodation for an employee with a disability who

violated a conduct rule that is job- related for the position in question and consistent with business necessity?

An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination.[(102)] Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.[(103)] Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.[(104)]

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

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

    No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.[(105)]

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

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

No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.[(106)]

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

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

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

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

    Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.[(107)]

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

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

    Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.[(108)]

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

without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

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

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

    An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.[(110)]

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

    No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.[(111)]

    An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An

    employer may be able to make this point effectively by reassuring the employee asking the

question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute's confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA's confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

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

UNDUE HARDSHIP ISSUES [(112)]

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.[(113)] A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.[(114)]

The ADA's legislative history indicates that Congress wanted employers to consider all possible

sources of outside funding when assessing whether a particular accommodation would be too costly.[(115)] Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation.[(116)] In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

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

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability.[(117)] Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees's ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.[(118)]

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

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

    No. If the result of modifying one employee's work hours (or granting leave) is to prevent other

employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

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

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

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

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

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

In certain situations, an employee may be able to provide only an approximate date of return.[(119)] Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of

return. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.[(120)]

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

Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

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

    No. A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship.[(121)] Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).

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

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

modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his work space easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

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

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners.(122) Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability.(123) In addition, other ADA provisions may require the property owner to make the modifications.(124)

BURDENS OF PROOF

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

The Supreme Court's burden-shifting framework does not affect the interactive process triggered by

an individual's request for accommodation.[(127)] An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.

INSTRUCTIONS FOR INVESTIGATORS

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

- Is the Charging Party "otherwise qualified" (i.e., is the Charging Party qualified for the job except that, because of disability, s/he needs a reasonable accommodation to perform the position's essential functions)?
- Did the Charging Party, or a representative, request a reasonable accommodation (i.e., did the Charging Party let the employer know that s/he needed an adjustment or change at work for a reason related to a medical condition)? [see Questions 1-4]
    - Did the Respondent request documentation of the Charging Party's disability and/or functional limitations? If yes, was the documentation provided? Did the Respondent have a legitimate reason for requesting documentation? [see Questions 6-8]
    - What specific type of reasonable accommodation, if any, did the Charging Party request?
    - Was there a nexus between the reasonable accommodation requested and the functional limitations resulting from the Charging Party's disability? [see Question 6]
    - Was the need for reasonable accommodation related to the use of medication, side effects from treatment, or symptoms related to a disability? [see Questions 36-38]
- For what purpose did the Charging Party request a reasonable accommodation:
    - for the application process? [see Questions 12-13]
    - in connection with aspects of job performance? [see Questions 16-24, 32-33]
    - in order to enjoy the benefits and privileges of employment? [see Questions 14-15]
- Should the Respondent have initiated the interactive process, or provided a reasonable accommodation, even if the Charging Party did not ask for an accommodation? [see Questions 11, 39]
- What did the Respondent do in response to the Charging Party's request for reasonable accommodation (i.e., did the Respondent engage in an interactive process with the Charging Party and if so, describe both the Respondent's and the Charging Party's actions/statements during this process)? [see Questions 5-11]
- If the Charging Party asked the Respondent for a particular reasonable accommodation, and the Respondent provided a different accommodation, why did the Respondent provide a different reasonable accommodation than the one requested by the Charging Party? Why does the Respondent believe that the reasonable accommodation it provided was effective in eliminating

the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity? Why does the Charging Party believe that the reasonable accommodation provided by the Respondent was ineffective? [see Question 9]

- What type of accommodation could the Respondent have provided that would have been "reasonable" and effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity?
- Does the charge involve allegations concerning reasonable accommodation and violations of any conduct rules? [see Questions 34-35]
- If the Charging Party alleges that the Respondent failed to provide a reassignment as a reasonable accommodation [see generally Questions 25-30 and accompanying text]:
    - did the Respondent and the Charging Party first discuss other forms of reasonable accommodation that would enable the Charging Party to remain in his/her current position before discussing reassignment?
    - did the Respondent have any vacant positions? [see Question 27]
    - did the Respondent notify the Charging Party about possible vacant positions? [see Question 28]
    - was the Charging Party qualified for a vacant position?
    - if there was more than one vacant position, did the Respondent place the Charging Party in the one that was most closely equivalent to the Charging Party's original position?
    - if the reassignment would conflict with a seniority system, are there "special circumstances" that would make it "reasonable" to reassign the Charging Party? [see Question 31]
- If the Respondent is claiming undue hardship [see generally Questions 42-46 and accompanying text]:
    - what evidence has the Respondent produced showing that providing a specific reasonable accommodation would entail significant difficulty or expense?
    - if a modified schedule or leave is the reasonable accommodation, is undue hardship based on the impact on the ability of other employees to do their jobs? [see Question 42]
    - if leave is the reasonable accommodation, is undue hardship based on the amount of leave requested? [see Question 43]
    - if there are "special circumstances" that would make it "reasonable" to reassign the Charging Party, despite the apparent conflict with a seniority system, would it nonetheless be an undue hardship to make the reassignment? [see Question 31]
    - is undue hardship based on the fact that providing the reasonable accommodation requires changes to property owned by an entity other than the Respondent? [see Question 46]
    - if the Respondent claims that a particular reasonable accommodation would result in undue hardship, is there another reasonable accommodation that Respondent could have provided that would not have resulted in undue hardship?

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

APPENDIX
RESOURCES FOR LOCATING REASONABLE ACCOMMODATIONS

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

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

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

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

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

U.S. Department of Labor

(To obtain information on the Family and Medical Leave Act)
To request written materials:
1-800-959-3652 (Voice)
1-800-326-2577 (TT)
To ask questions: (202) 219-8412 (Voice)

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

(202) 622-6060 (Voice)

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

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

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

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

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

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

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

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on

technology-related services for individuals with disabilities. Services may include:

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

INDEX

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

Interactive process between employer and individual with a disability to determine reasonable accommodation

Landlord/Tenant and reasonable accommodation

Last chance agreements and reasonable accommodation (See also "Firm choice")

Marginal functions and reasonable accommodation

Medical treatment and reasonable accommodation

Employer monitoring of medical treatment

Failure to obtain medical treatment

Leave

Side effects of medical treatment and need for reasonable accommodation

Medication and reasonable accommodation

Employer monitoring of medication

Failure to use medication

Side effects of medication and need for reasonable accommodation

Personal use items and reasonable accommodation

Production standards and reasonable accommodation

Public accommodation and employer; who provides reasonable accommodation

"Reasonable accommodation" (definition of)

Reasonable accommodation (effectiveness of)

Reasonable accommodation (how many must employer provide)

Reasonable accommodation (types of)

Access to equipment and computer technology

Changing tests and training materials

Job restructuring

Leave

Alternatives to leave

Approximate versus fixed date of return

Family and Medical Leave Act (FMLA)

Holding open an employee's position

"No-fault" leave policies

Penalizing employees who take leave

Marginal functions (modifying how they are performed; elimination or substitution of)

Modified or part-time schedule

Family and Medical Leave Act (FMLA)

Modifying method of performing job function

Modifying workplace policies

Readers

Reassignment

Employee must be qualified for vacant position

Equivalent position

Interactive process between employer and employee

Relationship between reassignment and general transfer policies

Salary for new position

Seniority systems and reassignment

Vacant position

When must reassignment be offered

Who is entitled to reassignment
Sign language interpreters

Supervisory methods (changing)

Working at home

Reasonable accommodation (who is entitled to receive)

Rehabilitation Act of 1973; Relationship with the ADA

Relationship and association with a person with a disability

Requests for reasonable accommodation

Choosing between two or more reasonable accommodations

Documentation on the need for reasonable accommodation

How to request reasonable accommodation

Interactive process between employer and individual with a disability

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

When should individual with disability request reasonable accommodation

Who may request reasonable accommodation

Right of individual with a disability to refuse reasonable accommodation

Role of health care providers in reasonable accommodation process

Seniority systems and reassignment

State or local antidiscrimination laws; Relationship with the ADA

Supervisors and reasonable accommodation

Undue hardship

Cost

Cost-benefit analysis

Definition of

Disruption to operations
Factors to assess

Landlord/Tenant

Leave

Work environment and reasonable accommodation

Footnotes

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

The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

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

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

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

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

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

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

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

For more information concerning requests for a reasonable accommodation, see Questions 1-4, infra.

For a discussion of the limited circumstance under which an employer would be required to ask an individual with a disability whether s/he needed a reasonable accommodation, see Question 40, infra.

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

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

9. Id.

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

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

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

12. In US Airways, Inc. v. Barnett, the Supreme Court held that it was unreasonable, absent "special circumstances," for an employer to provide a reassignment that conflicts with the terms of a seniority system. 535 U.S., 122 S. Ct. 1516, 1524-25 (2002). For a further discussion of this issue, see Question 31, infra.

13. "[W]ith or without reasonable accommodation" includes, if necessary, reassignment to a vacant position. Thus, if an employee is no longer qualified because of a disability to continue in his/her present position, an employer must reassign him/her as a reasonable accommodation. See the section on "Reassignment," infra pp. 37-38 and n.77.

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

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

16. See 42 U.S.C. § 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C.

§ 12111(10) (1994) (defining "undue hardship" based on factors assessing cost and difficulty).

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

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

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

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

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

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

21. Cf. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996); Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146 (D. Or. 1994). But see Miller v. Nat'l Casualty Co., 61 F.3d 627, 630, 4 AD Cas. (BNA) 1089, 1091 (8th Cir. 1995) (employer had no duty to

investigate reasonable accommodation despite the fact that the employee's sister notified the

employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

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

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

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

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

Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. § 1981a(a)(3) (1994).

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

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

27. 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [hereinafter Preemployment Questions and Medical Examinations]; EEOC Enforcement

Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [hereinafter ADA and Psychiatric Disabilities]. Although the latter Enforcement Guidance focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.

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

28. Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from. See Question 42 and note 111, infra.

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

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

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

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

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

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

35. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86, 6 AD Cas. (BNA) 1834, 1839 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800, 5 AD Cas. (BNA) 924, 926-27 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

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

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

1998).

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

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

40. 42 U.S.C. § 12112(d)(2)(A) (1994); 29 C.F.R. § 1630.13(a) (1997). For a thorough discussion of these requirements, see Preemployment Questions and Medical Examinations, supra note 27, at 6-8, 8 FEP Manual (BNA) 405:7193-94.

41. 42 U.S.C. § 12112(d)(3) (1994); 29 C.F.R. § 1630.14(b) (1997); see also Preemployment Questions and Medical Examinations, supra note 27, at 20, 8 FEP Manual (BNA) 405:7201.

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

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

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

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

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

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

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

47. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13, 4 AD Cas. (BNA) 1234, 1236-37 (8th Cir. 1995).

48. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

An employee who needs leave, or a part-time or modified schedule, as a reasonable accommodation

also may be entitled to leave under the Family and Medical Leave Act. See Questions 21 and 23, infra.

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

50. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002). See also Question 24, infra. While undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).

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

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

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

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

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

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

57. See Question 9, supra.

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

59. Employers should remember that many employees eligible for FMLA leave will not be entitled to

leave as a reasonable accommodation under the ADA, either because they do not meet the ADA's definition of disability or, if they do have an ADA disability, the need for leave is unrelated to that disability.

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

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

62. 29 C.F.R. § 825.702(c)(4) (1997).

63. 42 U.S.C. §12111 (9) (B) (1994); see Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998) (a modified schedule is a form of reasonable accommodation).

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

65. Certain courts have characterized attendance as an "essential function." See, e.g., Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 438 (D.C. Cir. 1994); Jackson v. Department of Veterans Admin., 22 F.3d 277, 278-79, 3 AD Cas. (BNA) 483, 484 (11th Cir. 1994). Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1) (1997) (emphasis added). As the regulations make clear, essential functions are duties to be performed. 29 C.F.R. § 1630.2(n)(2) (1997). See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 602, 8 AD Cas. (BNA) 692, 701 (7th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782-83, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

On the other hand, attendance is relevant to job performance and employers need not grant all requests for a modified schedule. To the contrary, if the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship.

66. Employers covered under the Family and Medical Leave Act (FMLA) should determine whether any denial of leave or a modified schedule is also permissible under that law. See 29 C.F.R. § 825.203 (1997).

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

68. See infra pp. 37-45 for more information on reassignment, including under what circumstances an employer and employee may voluntarily agree that a transfer is preferable to having the employee remain in his/her current position.

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

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

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

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

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

74. But cf. Miller v. Nat'l Casualty Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090 (8th Cir. 1995) (court refuses to find that employee's sister had requested reasonable accommodation despite the fact that the sister informed the employer that the employee was having a medical crisis necessitating emergency hospitalization).

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

76. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114, 4 AD Cas. (BNA) 1234, 1238 (8th Cir. 1995); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1187, 5 AD Cas. (BNA) 1326, 1338 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 498, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

Reassignment is available only to employees, not to applicants. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

77. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104, 4 AD Cas. (BNA) 1297, 1305 (S.D. Ga. 1995).

Some courts have found that an employee who is unable to perform the essential functions of his/her current position is unqualified to receive a reassignment. See, e.g., Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 345, 5 AD Cas. (BNA) 1340, 1342 (7th Cir. 1996); Pangalos v. Prudential Ins. Co. of Am., 5 AD Cas. (BNA) 1825, 1826 (E.D. Pa. 1996). These decisions, however, nullify Congress' inclusion of reassignment in the ADA. An employee requires a reassignment only if s/he is unable to continue performing the essential functions of his/her current position, with or without reasonable accommodation. Thus, an employer must provide reassignment either when reasonable accommodation in an employee's current job would cause undue hardship or when it would not be possible. See Aka v. Washington Hosp. Ctr.,156 F.3d 1284, 1300-01, 8 AD Cas. (BNA) 1093, 1107-08 (D.C. Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 28, 8 FEP Manual (BNA) 405:7476; Workers' Compensation and the ADA, supra note 52, at 17-18, 8 FEP Manual (BNA) 405:7399-7400.

78. 29 C.F.R. § 1630.2(m) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(m), 1630.2(o)(1997). See Stone v.

Mount Vernon, 118 F.3d 92, 100-01, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997).

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

80. See 29 C.F.R. pt. 1630 app. §1630.2(o) (1997); Senate Report, supra note 6, at 31; House Education and Labor Report, supra note 6, at 63.

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

82. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see also White v. York Int'l Corp., 45 F.3d 357, 362, 3 AD Cas. (BNA) 1746, 1750 (10th Cir. 1995).

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

84. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521, 1524 (2002); see also Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998); United States v. Denver, 943 F. Supp. 1304, 1312, 6 AD Cas. (BNA) 245, 252 (D. Colo. 1996). See also Question 24, supra.

85. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); see Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695, 8 AD Cas. (BNA) 875, 883 (7th Cir. 1998); see generally Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677-78, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998).

86. See Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1472 (7th Cir. 1996); see generally United States v. Denver, 943 F. Supp. 1304, 1311-13, 6 AD Cas. (BNA) 245, 251-52 (D. Colo. 1996).

Some courts have limited the obligation to provide a reassignment to positions within the same department or facility in which the employee currently works, except when the employer's standard practice is to provide inter-department or inter-facility transfers for all employees. See, e.g., Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398, 4 AD Cas.(BNA) 1, 4-5 (E.D. Tex. 1995). However, the ADA requires modification of workplace policies, such as transfer policies, as a form of reasonable accommodation. See Question 24, supra. Therefore, policies limiting transfers cannot be a per se bar to reassigning someone outside his/her department or facility. \ Furthermore, the ADA requires employers to provide reasonable accommodations, including reassignment, regardless of whether such accommodations are routinely granted to non-disabled employees. See Question 26, supra.

87. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695-96, 697-98, 8 AD Cas. (BNA) 875, 883, 884 (7th Cir. 1998) (employer cannot mislead disabled employees who need reassignment about full range of vacant positions; nor can it post vacant positions for such a short period of time that

disabled employees on medical leave have no realistic chance to learn about them); Mengine v.

Runyon, 114 F.3d 415, 420, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (an employer has a duty to make reasonable efforts to assist an employee in identifying a vacancy because an employee will not have the ability or resources to identify a vacant position absent participation by the employer); Woodman v. Runyon, 132 F.3d 1330, 1344, 7 AD Cas. (BNA) 1189, 1199 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions).

88. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive); Mengine v. Runyon, 114 F.3d 415, 419-20, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing).

89. If it will take several weeks to determine whether an appropriate vacant position exists, the employer and employee should discuss the employee's status during that period. There are different possibilities depending on the circumstances, but they may include: use of accumulated paid leave, use of unpaid leave, or a temporary assignment to a light duty position. Employers also may choose to take actions that go beyond the ADA's requirements, such as eliminating an essential function of the employee's current position, to enable an employee to continue working while a reassignment is sought.

90. 42 U.S.C. § 12111(9)(b) (1994); 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Senate Report, supra note 6, at 31 ("If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker."). See Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to "compete"); cf. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998) (the court, in interpreting a collective bargaining agreement provision authorizing reassignment of disabled employees, states that "[a]n employee who is allowed to compete for jobs precisely like any other applicant has not been "reassigned"); United States v. Denver, 943 F. Supp. 1304, 1310-11, 6 AD Cas. (BNA) 245, 250 (D. Colo. 1996) (the ADA requires employers to move beyond traditional analysis and consider reassignment as a method of enabling a disabled worker to do a job).

Some courts have suggested that reassignment means simply an opportunity to compete for a vacant position. See, e.g., Daugherty v. City of El Paso, 56 F.3d 695, 700, 4 AD Cas. (BNA) 993, 997 (5th Cir.

1995). Such an interpretation nullifies the clear statutory language stating that reassignment is a form

of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position.

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

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

93. Id.

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

95. Id.

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

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

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

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

100. See 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997) (modifications or adjustments to the manner or circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to perform the essential functions).

101. Courts have differed regarding whether "work-at-home" can be a reasonable accommodation. Compare Langon v. Department of Health and Human Servs., 959 F.2d 1053, 1060, 2 AD Cas. (BNA) 152, 159 (D.C. Cir. 1992); Anzalone v. Allstate Insurance Co., 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 437-38 (D.D.C. 1994), with Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 545, 3 AD Cas. (BNA) 1636, 1640 (7th Cir. 1995). Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position. See, e.g., Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), aff'd, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227-28, 3 AD Cas. (BNA) 449,

457-58 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

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

103. See Siefken v. Arlington Heights, 65 F.3d 664, 666, 4 AD Cas. (BNA) 1441, 1442 (7th Cir. 1995). Therefore, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur. For more information on conduct standards, including when they are job-related and consistent with business necessity, see ADA and Psychiatric Disabilities, supra note 27, at 29-32, 8 FEP Manual (BNA) 405:7476-78.

An employer does not have to offer a "firm choice" or a "last chance agreement" to an employee who performs poorly or who has engaged in misconduct because of alcoholism. "Firm choice" or "last chance agreements" involve excusing past performance or conduct problems resulting from alcoholism in exchange for an employee's receiving substance abuse treatment and refraining from further use of alcohol. Violation of such an agreement generally warrants termination. Since the ADA does not require employers to excuse poor performance or violation of conduct standards that are job-related and consistent with business necessity, an employer has no obligation to provide "firm choice" or a "last chance agreement" as a reasonable accommodation. See Johnson v. Babbitt, EEOC Docket No. 03940100 (March 28, 1996). However, an employer may choose to offer an employee a "firm choice" or a "last chance agreement."

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

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

106. While from an employer's perspective it may appear that an employee is "failing" to use medication or follow a certain treatment, such questions can be complex. There are many reasons why a person would choose to forgo treatment, including expense and serious side effects.

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

108. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also House Judiciary Report, supra note 6, at 39; House Education and Labor Report, supra note 6, at 65; Senate Report, supra note 6, at 34.

See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1659 (5th Cir. 1996); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538, 5 AD Cas. (BNA) 141, 147 (N.D. Ala. 1995); Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1080, 5 AD Cas. (BNA) 1295, 1300 (S.D. Ga. 1995), aff'd, 87 F.3d 1331, 6 AD Cas. (BNA) 1152 (11th Cir. 1996). But see Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3

AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) (employer had obligation to provide reasonable

accommodation because it knew of the employee's alcohol problem and had reason to believe that an accommodation would permit the employee to perform the job).

An employer may not assert that it never received a request for reasonable accommodation, as a defense to a claim of failure to provide reasonable accommodation, if it actively discouraged an individual from making such a request.

For more information about an individual requesting reasonable accommodation, see Questions 1-4, supra.

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

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

111. 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1997). The limited exceptions to the ADA confidentiality requirements are:
(1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; and (3) government officials investigating compliance with the ADA must be given relevant information on request. In addition, the Commission has interpreted the ADA to allow employers to disclose medical information in the following circumstances: (1) in accordance with state workers' compensation laws, employers may disclose information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers; and (2) employers are permitted to use medical information for insurance purposes. See 29 C.F.R. pt. 1630 app. §1630.14(b) (1997); Preemployment Questions and Medical Examinations, supra note 27, at 23, 8 FEP Manual (BNA) 405:7201; Workers' Compensation and the ADA, supra note 52, at 7, 8 FEP Manual (BNA) 405:7394.

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

113. See 29 C.F.R. pt. 1630 app. §1630.15(d) (1996); see also Stone v. Mount Vernon, 118 F.3d 92, 101, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997) (an employer who has not hired any persons with disabilities cannot claim undue hardship based on speculation that if it were to hire several people with disabilities it may not have sufficient staff to perform certain tasks); Bryant v. Better Business Bureau of Greater Maryland, 923 F. Supp. 720, 735, 5 AD Cas. (BNA) 625, 634 (D. Md. 1996).

114. See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997); TAM, supra note 49, at 3.9, 8 FEP Manual (BNA) 405:7005-07.

115. See Senate Report, supra note 6, at 36; House Education and Labor Report, supra note 6, at 69.

See also 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

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

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

118. Failure to transfer marginal functions because of its negative impact on the morale of other employees also could constitute disparate treatment when similar morale problems do not stop an employer from reassigning tasks in other situations.

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

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

121. The ADA's definition of undue hardship does not include any consideration of a cost-benefit analysis. See 42 U.S.C. § 12111(10) (1994); see also House Education and Labor Report, supra note 6, at 69 ("[T]he committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship.").

Furthermore, the House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee's annual salary. See 136 Cong. Rec. H2475 (1990), see also House Judiciary Report, supra note 6, at 41; 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

Despite the statutory language and legislative history, some courts have applied a cost-benefit analysis. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995).

122. See 42 U.S.C. § 12112(b)(2) (1994); 29 C.F.R. § 1630.6 (1997) (prohibiting an employer from participating in a contractual relationship that has the effect of subjecting qualified applicants or employees with disabilities to discrimination).

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

124. For example, under Title III of the ADA a private entity that owns a building in which goods and services are offered to the public has an obligation, subject to certain limitations, to remove architectural barriers so that people with disabilities have equal access to these goods and services. 42 U.S.C.

§ 12182(b)(2)(A)(iv) (1994). Thus, the requested modification may be something that the property

owner should have done to comply with Title III.

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

126. Id.

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

Applying Performance and Conduct Standards to Employees with Disabilities

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The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

TABLE OF CONTENTS

I. INTRODUCTION

A core function for any supervisor is managing employee performance. Performance management, if done effectively, can help avoid discrimination, in addition to furthering an employer's business objectives. "Performance management systems that involve explicit performance expectations, clear performance standards, accurate measures, and reliable performance feedback, and the consistent application of these standards [to all employees], help to reduce the chances of discriminatory ratings."[1] Additionally, employees work most effectively when they clearly understand what is expected of them and know that their performance will be measured against a standard that is fair and applied even-handedly. The same principles apply to workplace rules concerning employee conduct.

Title I of the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act, which prohibit

employment discrimination against qualified individuals with disabilities, generally do not impinge on the right of employers to define jobs and to evaluate their employees according to consistently applied standards governing performance and conduct. Under both laws, employees with disabilities must meet qualification standards that are job-related and consistent with business necessity and must be able to perform the "essential functions" of the position, with or without reasonable accommodation.

Although, an employee's disability typically has no bearing on performance or conduct, sometimes an individual's disability may contribute to performance or conduct problems. When this is the case, a simple reasonable accommodation often may be all that is needed to eliminate the problem. However, EEOC continues to receive questions from both employers and employees about issues such as what steps are appropriate where a disability is causing - or seems to be causing - a performance or conduct problem, when a request for accommodation should be made, and when an employer can properly raise the issue of an employee's disability as part of a discussion about performance or conduct problems. Even when the disability is not causing the performance or conduct problem, some employers still have questions about what action they can take in light of concerns about potential ADA violations.

This publication discusses relevant ADA requirements, provides practical guidance, and offers examples to demonstrate the responsibilities of both employees and employers when performance and conduct issues arise. It also discusses the role of reasonable accommodation in preventing or addressing performance or conduct problems, including the relationship between reasonable accommodation and disciplinary action and the circumstances in which an accommodation may or may not have to be granted.[2] Many of the examples in this document are based on actual cases or on specific scenarios presented to EEOC, and many of the points of "practical guidance" respond to questions received from both employers and individuals with disabilities.

II. BASIC LEGAL REQUIREMENTS

Title I of the ADA covers private, state, and local government employers with 15 or more employees; Section 501 of the Rehabilitation Act of 1973 covers federal agencies. The statutes contain identical anti-discrimination provisions.[3]

The ADA prohibits discrimination against applicants and employees who meet the statute's definition of a "qualified individual with a disability."[4] The ADA defines a **"disability"** in three ways:

- A physical or mental impairment that substantially limits one or more of the major life activities of an individual
- A record of such an impairment
- Being regarded as having such an impairment.[5]

A **"qualified"** individual with a disability can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation.[6]

Job-related requirements, also known as **"qualification standards,"** may include the following:

- Possessing specific training
- Possessing specific licenses or certificates
- Possessing certain physical or mental abilities (e.g., meeting vision, hearing, or lifting requirements; showing an ability to run or climb; exercising good judgment)
- Meeting health or safety requirements
- Demonstrating certain attributes such as the ability to work with other people or to work under pressure.[7]

Most jobs require that employees perform both "essential functions" and "marginal functions." The **"essential functions"** are the most important job duties, the critical elements that must be performed to achieve the objectives of the job. Removal of an essential function would fundamentally change a job. Marginal functions are those tasks or assignments that are tangential and not as important.[8]

If an applicant or employee cannot meet a specific qualification standard because of a disability, the ADA requires that the employer demonstrate the importance of the standard by showing that it is "job-related and consistent with business necessity."[9] This requirement ensures that the qualification standard is a legitimate measure of an individual's ability to perform an essential function of the specific position the individual holds or desires.[10] If an employer cannot show that a particular standard is "job-related and consistent with business necessity," the employer cannot use the standard to take an adverse action against an individual with a disability.

Employers may have to provide a **"reasonable accommodation"** to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of her position.[11] A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities. An employee generally has to request accommodation, but does not have to use the term "reasonable accommodation," or even "accommodation," to put the employer on notice. Rather, an employee only has to say that she requires the employer to provide her with an adjustment or change at work due to a medical condition.[12]An employer never has to provide an accommodation that would cause undue hardship, meaning significant difficulty or expense, which includes removing an essential function of the job.[13]

III. APPLICATION OF ADA LEGAL REQUIREMENTS TO PERFORMANCE AND CONDUCT STANDARDS

Employers typically establish job-related requirements, the specific tasks or assignments that an employee must perform, and methods to evaluate performance. Evaluation criteria might take into account how well an employee is performing both essential and marginal functions and whether the employee is meeting basic job requirements (e.g., working well with others or serving customers in a professional manner). Employers might also enforce conduct standards (e.g., rules prohibiting destruction of company property or the use of

company computers to access pornography). Certain performance and conduct standards will apply to all employees working for a company, organization, or government agency; others might only apply to certain offices or jobs within an entity.

A. Performance standards

1. May an employer apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that it applies to employees without disabilities?

Yes. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job.[14] Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation.[15] However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard.

- *Practical Guidance: It is advisable for employers to give clear guidance to an employee with a disability (as well as all other employees) regarding the quantity and quality of work that must be produced and the timetables for producing it.*

Example 1: A federal agency requires all of its investigators to complete 30 investigations per year in addition to other responsibilities. Jody's disability is worsening, causing her increased difficulty in completing 30 investigations while also conducting training and writing articles for a newsletter. Jody tells her supervisor about her disability and requests that she be allowed to eliminate the marginal functions of her job so that she can focus on performing investigations. After determining that conducting trainings and writing articles are marginal functions for Jody and that no undue hardship exists, the agency reassigns Jody's marginal functions as a reasonable accommodation.

Example 2: Robert is a sales associate for a pharmaceutical company. His territory covers a 3-state region and he must travel to each state three times a year. Due to staff cutbacks, the company is increasing the number of states for each salesperson from three to five. Robert explains to his manager that due to his disability he cannot handle the extra two states and the increased traveling, and he asks that he be allowed to have responsibility only for his original three states. The company may refuse this request for accommodation because it conflicts with the new production standard. However, the company should explore with Robert whether there is any reasonable accommodation that could enable him to service five states, and if not, whether reassignment is possible.

Example 3: A computer programmer with a known disability has missed deadlines for projects, necessitating that other employees finish his work. Further, the employee has not kept abreast of changes in the database package, causing him to misinterpret as system problems changes that he should have known about. The employee is placed on a Performance Improvement Plan, but his performance does not improve and he is terminated. At no time does the employee request a reasonable

accommodation (i.e., inform the employer that he requires an adjustment or change as a result of a medical condition). The termination is justified as long as the employer holds the employee to the same performance standards as other programmers.[16]

2. May an employer use the same evaluation criteria for employees with disabilities as for employees without disabilities?

Yes. An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.[17]

- *Practical Guidance: An accurate assessment of the employee's performance may, in some cases, alert the employee that his disability is contributing to the problem. This may lead the employee to request reasonable accommodation to address the problem and improve performance, which can benefit both the employee and the employer.*[18]

Example 4: Last year Nicole received an "above average" review at her annual performance evaluation. During the current year Nicole had to deal with a number of medical issues concerning her disability. As a result, she was unable to devote the same level of time and effort to her job as she did during the prior year. She did not request reasonable accommodation (i.e., inform the employer that she requires an adjustment or change as a result of a medical condition). The quantity and quality of Nicole's work were not as high and she received an "average" rating. The supervisor does not have to raise Nicole's rating even though the decline in performance was related to her disability.[19]

3. May a supervisor require that an employee with a disability perform a job in the same manner as a non-disabled employee?

Not necessarily. In many instances, an essential function can be performed in different ways (including with reasonable accommodation). An employee who must use an alternative method of performance because of a disability must be evaluated accordingly.[20] However, an employer is not required to allow use of an alternate method that would impose an undue hardship.

Example 5: One of Rhoda's essential functions is providing training. Because she is deaf and, as a result, has difficulty speaking, Rhoda uses a sign language interpreter to voice for her. Generally, Rhoda's supervisor evaluates his employees on the use of their voices - whether they speak with a monotone or use their voices to show interest and enthusiasm. Rhoda's presentation cannot be measured in this way. However, there are alternative ways to measure how she conveys her message, including body language, facial expression, and the words she uses.

Example 6: Daniel works as a millwright, and an essential function of his job is repairing and maintaining equipment. Most of the equipment is accessible only by climbing ladders and steps. Due to a recent

disability, Daniel no longer can climb and must work only at ground level. The location of the equipment

does not allow alternative means to elevate Daniel (e.g., using a cherry picker). With no reasonable accommodation possible, Daniel cannot repair the equipment (an essential function). Daniel is not "qualified" to remain in this position and the employer should explore whether it can reassign him as a reasonable accommodation.[21]

4. If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?

Yes. The rating reflects the employee's performance regardless of what role, if any, disability may have played. [See Example 4.]

- *Practical Guidance: If an employee states that her disability is the cause of the performance problem, the employer could follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance. If the employee does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level.*[22]

5. Must an employee with a disability ask for a reasonable accommodation at a certain time?

No. The ADA does not compel employees to ask for accommodations at a certain time.[23] Employees may ask for reasonable accommodation before or after being told of performance problems. Sometimes, an employee may not know or be willing to acknowledge that there is a problem requiring accommodation until the employer points out deficiencies in performance.

- *Practical Guidance: Ideally, employees will request reasonable accommodation before performance problems arise, or at least before they become too serious.*[24] *Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance.*[25]

Example 7: Nasser, an employee at a nonprofit organization, recognizes soon after he begins working that he is having difficulty following conversations at meetings because of his deteriorating hearing. Nasser's hearing aid helps him when talking directly to one person, but not when he is in a large room with many people participating in a discussion. Nasser believes that he could follow the group discussions if the employer provided a portable assistive listening device. He tells his supervisor that a simple assistive listening system would include an FM transmitter and microphone that could be placed at the center of a conference table and an FM receiver and headset that he would wear. The system would amplify speakers' voices over the headset without affecting the way other meeting participants would hear the conversation. The employer provides the reasonable accommodation and Nasser now performs all of his job duties successfully.

Example 8: A county government employee does not disclose her chronic fatigue syndrome, even when she begins having performance problems that she believes are disability-related. Her supervisor counsels her about the performance problems, but they persist. The supervisor warns that if her work does not show improvement within the next month, she will receive a written warning. At this point, the employee discloses her disability and asks for reasonable accommodation.

The supervisor should discuss the request and how the proposed accommodation will help improve the employee's performance. The supervisor also may ask questions or seek medical documentation that the employee has a disability. The supervisor does not need to rescind his oral warning or his requirement that the employee's performance must improve. However, delaying the one-month period to evaluate the employee's performance pending a decision on her request for reasonable accommodation will enable the employer to assess the employee's performance accurately.

Example 9: An employee with a small advertising firm has a learning disability. Because the employee had a bad experience at a prior job when he requested accommodation, he decides not to disclose his disability or ask for any accommodations during the application process or once he begins working. Performance problems soon arise, and the employee's supervisor brings them to the employee's attention. He tries to solve the problems on his own, but cannot. The firm follows its policy on counseling and disciplining employees who are failing to meet minimum requirements, but these efforts are unsuccessful. When the supervisor meets with the employee to terminate his employment, the employee asks for a reasonable accommodation.

The employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request. Once an employer makes an employee aware of performance problems, the employee must request any accommodations needed to rectify them. This employee waited too long to request reasonable accommodation.[26]

6. What should an employer do if an employee requests an accommodation for the first time in response to counseling or a low performance rating?

When an employee requests a reasonable accommodation in response to the employer's discussion or evaluation of the person's performance, the employer may proceed with the discussion or evaluation but also should begin the "interactive reasonable accommodation process" by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it.[27] Employers cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment for the performance problem. If a reasonable accommodation is needed to assist an employee in addressing a performance problem, and the employer refuses to provide one, absent undue hardship, the employer has violated the ADA.

The employer may seek appropriate medical documentation to learn if the condition meets the ADA's

definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem.[28] The employer may also suggest possible accommodations.[29]

The employee may need reasonable accommodation, for example, to enable him to meet a production standard or to perform an essential function. Where a lower performance rating results from an inability to perform a marginal function because of the disability, the appropriate accommodation would be to remove the marginal function (and perhaps substitute one that the employee can perform).

- *Practical Guidance: Employers find the "interactive process" helpful in clarifying what accommodation an employee is seeking and how it would help to correct a performance problem. The topics for discussion will vary depending on what information an employer requires to respond to a request for reasonable accommodation, but failing to raise questions may leave an employer at a disadvantage in making an informed decision. Furthermore, an employer might learn that alternative accommodations may be effective in meeting the employee's needs.*

When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

- tolerate or excuse the poor performance;
- withhold disciplinary action (including termination) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance.[30]

Example 10: Odessa does not disclose her learning disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels Odessa about them. At this point, Odessa discloses her disability and asks for a reasonable accommodation. The supervisor denies the request immediately, explaining, "You should not have waited until problems developed to tell me about your disability." Odessa's delay in requesting an accommodation does not justify the employer's refusal to provide one. If a reasonable accommodation will help improve the employee's performance (without posing an undue hardship), the accommodation must be provided.[31]

Example 11: A federal employee is put on a 60-day Performance Improvement Plan (PIP). In response, the employee requests a reasonable accommodation. The supervisor postpones the start of the PIP and immediately discusses the request with the employee, enlisting the agency's Disability Program Manager (DPM) in the interactive process. The supervisor and DPM determine that a reasonable accommodation might help address the employee's performance problems. The supervisor arranges for the reasonable accommodation and the 60-day PIP commences.

The employer did not have to cancel the PIP because reasonable accommodation never requires excusing poor performance or its consequences. However, the fact that the employee did not ask for an

accommodation until being placed on a PIP does not relieve the agency of its obligation to provide

reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.[32]

The temporary postponement of the PIP to process the request for a reasonable accommodation ensures that, if a reasonable accommodation is needed, the employee will have an equal opportunity to improve her performance.[33] If the employer determines that the employee is not entitled to a reasonable accommodation (e.g., the employee does not have a "disability"), the employee should be so informed and the PIP should begin.

Requests for reasonable accommodation should be handled expeditiously, in particular because unnecessary delays in determining or providing an effective accommodation may violate the ADA.[34] In this Example the supervisor recognized the need to address the request promptly so as not to unnecessarily delay the commencement of the PIP.[35]

- *Practical Guidance: An employer may need to determine what happens to an employee while it is handling a request for accommodation. For example, an employer might require an employee to perform only those functions of the job for which accommodation is not needed while processing the request. In other situations, it may be appropriate for an employee to take leave*.

7. May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?

No. An employer may not withdraw a reasonable accommodation as punishment for the unsatisfactory performance rating. Simply withdrawing the telework arrangement or a modified schedule is no different than discontinuing an employee's use of a sign language interpreter or assistive technology as reasonable accommodations.

Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation is not working. The employer can proceed with the unsatisfactory rating but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation. If the reasonable accommodation is not assisting the employee in improving his performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted.[36]

B. Conduct standards

8. May an employer discipline an employee with a disability for violating a conduct standard?

Yes. If an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees. In most instances, an employee's disability will not be relevant to any conduct violations.

Example 12: A blind employee has frequent disputes with her supervisor. She makes personal phone calls on company time, despite being told to stop. She routinely walks away from the job to smoke a cigarette despite warnings that she can do so only on breaks. She taunts the supervisor and disobeys his instructions regarding safe use of equipment. The employee's actions are unrelated to her disability and the employer may discipline her for insubordination.[37]

Example 13: Coworkers frequently taunt an employee with cerebral palsy because of his speech impediment, but the supervisor neither knows nor has reason to know about the taunting. Instead of reporting the coworkers' behavior to his supervisor or human resources department, the employee goes into the offices of his coworkers and destroys some of their property. The employer may discipline the employee for his inappropriate response. (Because management is now aware of the coworkers' actions, it must promptly investigate to determine whether they constitute harassment. If so, the employer must take appropriate action to prevent future harassment.)

9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard.[38] The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.[39]

The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule.[40] Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property.[41] Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers.[42] Employers also may:

- prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work);[43]
- prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (e.g., pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work;
- require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts);[44] and
- prohibit drinking or illegal use of drugs in the workplace. [See Question 26.]

Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be especially critical when the violation concerns "disruptive" behavior which, unlike prohibitions on stealing or violence, is more ambiguous

concerning exactly what type of conduct is viewed as unacceptable.[45] The following examples illustrate how different results may follow from application of these factors in specific contexts.

Example 14: Steve, a new bank teller, barks, shouts, utters nonsensical phrases, and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve and he explains that he has Tourette Syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics sufficiently during the job interview, he cannot control them throughout the work day; nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers[46] and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.[47]

Example 15: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics which do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

Example 16: Assume that Steve has all the severe tics mentioned in Example 14, but he now works in a noisy environment, does not come into contact with customers, and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers. Steve's condition would not necessarily make him unqualified for a job in this environment.

Example 17: A telephone company employee's job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees.[48] The employer first warns the employee

to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the

reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example 18: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself.

Questions 10 - 15 assume that the conduct rule at issue is job-related and consistent with business necessity.

10. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?

If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.[49]

If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct, or if the employee thinks there is an accommodation that could help her avoid future misconduct.[50] If an accommodation is requested, the employer should begin an "interactive process" to determine whether one is needed to correct a conduct problem, and, if so, what accommodation would be effective.[51] The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting the employee's conduct, and what accommodations may address the problem.

Employers cannot refuse to discuss the request or fail to provide reasonable accommodation as a punishment

for the conduct problem. If a reasonable accommodation is needed to assist an employee with a disability in controlling his behavior and thereby preventing another conduct violation, and the employer refuses to provide one that would not cause undue hardship, then the employer has violated the ADA.

Example 19: Tom, a program director, has successfully controlled most symptoms of his bipolar disorder for a long period, but lately he has had a recurrence of certain symptoms. In the past couple of weeks, he has sometimes talked uncontrollably and his judgment has seemed erratic, leading him to propose projects and deadlines that are unrealistic. At a staff meeting, he becomes angry and disparaging towards a colleague who disagrees with him. Tom's supervisor tells him after the meeting that his behavior was inappropriate. Tom agrees and reveals for the first time that he has bipolar disorder. He explains that he believes he is experiencing a recurrence of symptoms and says that he will contact his doctor immediately to discuss medical options. The next day Tom provides documentation from his doctor explaining the need to put him on different medication, and stating that it should take no more than six to eight weeks for the medication to eliminate the symptoms. The doctor believes Tom can still continue working, but that it would be helpful for the next couple of months if Tom had more discussions with his supervisor about projects and deadlines so that he could receive feedback to ensure that his goals are realistic. Tom also requests that his supervisor provide clear instructions in writing about work assignments as well as intermediate timetables to help him keep on track. The supervisor responds that Tom must treat his colleagues with respect and agrees to provide for up to two months all of the reasonable accommodations Tom has requested because they would assist him to continue performing his job without causing an undue hardship.

- *Practical Guidance: Ideally, employees will request reasonable accommodation before conduct problems arise, or at least before they become too serious.*[52] *Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including termination) warranted by misconduct. Employees should not assume that an employer knows that an accommodation is needed to address a conduct issue merely because the employer knows about the employee's disability. Nor does an employer's knowledge of an employee's disability require the employer to ask if the misbehavior is disability-related.*

Example 20: An employee informs her supervisor that she has been diagnosed with bipolar disorder. A few months later, the supervisor asks to meet with the employee concerning her work on a recent assignment. At the meeting, the supervisor explains that the employee's work has been generally good, but he provides some constructive criticism. The employee becomes angry, yells at the supervisor, and curses him when the supervisor tells her she cannot leave the meeting until he has finished discussing her work. The company terminates the employee, the same punishment given to any employee who is insubordinate. The employee protests her termination, telling the supervisor that her outburst was a result of her bipolar disorder which makes it hard for her to control her temper when she is feeling extreme stress. She says she was trying to get away from the supervisor when she felt she was losing control, but he ordered her not to leave the room. The employee apologizes and requests that the termination be rescinded and that in the future she be allowed to leave the premises if she feels that the

stress may cause her to engage in inappropriate behavior. The employer may leave the termination in place without violating the ADA because the employee's request for reasonable accommodation came after her insubordinate conduct.

11. May an employer only discipline an employee whose misconduct results from a disability for conduct prohibited in an employee handbook or similar document?

No. An employer may enforce conduct rules that are not found in workplace policies, employee handbooks, or similar documents so long as they are: (1) job-related and consistent with business necessity, and (2) applied consistently to all employees and not just to a person with a disability. Many times, the proscribed conduct is well understood by both the employer and employees as being unacceptable without being formally written, such as a prohibition on insubordination.

Example 21: Mary's disability has caused her to yell at and insult her supervisor and coworkers. There is no formal policy addressing such conduct, nor need there be. Prohibiting an employee from acting belligerently towards a supervisor or coworkers is job-related and consistent with business necessity, and thus Mary's supervisor may discipline her as long as the same discipline would be imposed on a non-disabled employee for the same conduct.

Sometimes, an employee's conduct may not be directly addressed by a conduct rule but nonetheless clearly violates a behavior norm that is job-related and consistent with business necessity.

Example 22: Jane has Down syndrome and is employed as a bagger at a grocery store. Jane is very friendly and likes to hug customers as they leave. Although she means well, management finds this behavior is unacceptable. Jane's manager talks to her and also contacts the job coach who helped Jane learn to do her job. The manager explains the unacceptable behavior and as a reasonable accommodation has the job coach return to work with Jane for a few days until she learns that she cannot hug the customers.

It is job-related and consistent with business necessity to require that Jane refrain from hugging customers. Although the grocery store does not have a rule specifically prohibiting physical contact with customers, refraining from such conduct is an inherent part of treating customers with appropriate respect and courtesy.[53]

Example 23: Jenny has cerebral palsy which causes her hands to shake. The supervisor observes Jenny spilling some of her drink on the counter in the office kitchen, and notices that she fails to clean it up. The supervisor has observed non-disabled employees leaving a mess, but has never disciplined them for this behavior. Nevertheless, the supervisor tells Jenny she can no longer use the kitchen because of her failure to clean up the spill. Although Jenny's disability did not prevent her from cleaning up, singling Jenny out for punishment could be a violation of the ADA.

On the other hand, the supervisor could have prohibited Jenny from using the kitchen if he had previously announced that employees would be required to clean up after themselves or risk being denied access to the kitchen.

- *Practical Guidance: Whether rules are written or not, employers should be careful that all conduct rules are applied consistently and should not single out an employee with a disability for harsher treatment. In addition, because ad hoc rules are just that, ad hoc, an employer may have more difficulty demonstrating that they are job-related and consistent with business necessity.*

12. May an employer require an employee to receive or change treatment for a disability to comply with a conduct standard?

No. Decisions about medication and treatment often involve many considerations beyond the employer's expertise.[54]

- *Practical Guidance: Regardless of whether employers believe they are trying to help employees who have medical conditions, employers should focus instead on addressing unacceptable workplace conduct. Employer comments about the disability and its treatment could lead to potential ADA claims (e.g., the employer "regarded" the employee as having a disability or the employer engaged in disparate treatment).*

Although employers should not intervene in medical decisions, they should be prepared to discuss providing a reasonable accommodation that will enable an employee to correct a conduct problem. The ADA requires an employer to provide reasonable accommodation regardless of what effect medication or other medical treatment may have on an employee's ability to perform the job. However, if an employee does not take medication or receive treatment and, as a result, cannot perform the essential functions of the position or poses a direct threat, even with a reasonable accommodation, she is unqualified.[55] Similarly, if an employee does not take medication or receive treatment and, as a result, cannot meet a conduct standard, even with a reasonable accommodation, the employer may take disciplinary action.

Example 24: An employee with a psychiatric disability takes medication, but one side effect is that the employee sometimes becomes restless. The employee's restlessness leads him to become easily distracted by nearby colleagues which, in turn, causes him to interrupt his coworkers. The supervisor counsels the employee about his disruptiveness and lack of focus. The employee tells the supervisor about his disability and the side effect of the medication he takes, and asks to be moved to a quieter work space to lessen the distractions. He also says that it would be helpful if his supervisor gave him more structured assignments with more deadlines to focus his attention.

The supervisor consults with the HR director, telling her that he thinks there is a special medication that could control the restlessness. The HR director appropriately rejects the supervisor's suggestion and recommends that the supervisor begin providing more structured assignments while she requests medical documentation from the employee confirming the side effect. Once confirmed, the HR director

finds a vacant cubicle in a quiet part of the office which, together with the more structured assignments,

resolves the issue.

C. Questions pertaining to both performance and conduct issues

13. Should an employer mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so?

Generally, it is inappropriate for the employer to focus discussion about a performance or conduct problem on an employee's disability. The point of the employer's comments should be a clear explanation of the employee's performance deficiencies or misconduct and what he expects the employee to do to improve. Moreover, emphasizing the disability risks distracting from the focus on performance or conduct, and in some cases could result in a claim under the ADA that the employer "regarded" (or treated) the individual as having a disability.

- *Practical Guidance: It is generally preferable that the employee initiate any discussion on the role of the disability. Ideally, employers should discuss problems before they become too serious in order to give the employee an opportunity as soon as possible to address the employer's concerns.*
- *Practical Guidance: An employee who is on notice about a performance or conduct problem and who believes the disability is contributing to the problem should evaluate whether a reasonable accommodation would be helpful. An employee should not assume that an employer knows about a disability based on certain behaviors or symptoms.*[56] *Nor should an employee expect an employer to raise the issue of the possible need for reasonable accommodation, even when a disability is known or obvious.*[57]

14. When discussing performance or conduct problems with an employee who has a known disability, may an employer ask if the employee needs a reasonable accommodation?

Yes. An employer may ask an employee with a known disability who is having performance or conduct problems if he needs a reasonable accommodation.[58] Alternatively, an employer may prefer to ask if some step(s) can be taken to enable the employee to improve his performance or conduct without mentioning accommodation or the employee's disability.

- *Practical Guidance: In order to have a productive discussion about whether reasonable accommodation might be needed, it may be helpful if the employer first is clear with the employee about the performance or conduct issue and what the employee needs to do to improve.*

Example 25: A supervisor knows that an employee has failing eyesight due to macular degeneration. The employee does not want to acknowledge his vision problem, even though the supervisor points out mounting errors that seem connected to the deteriorating vision. The supervisor enjoys working with the employee and knows he is capable of good work, but is uncertain how to handle this situation.

The supervisor may ask the employee if there is anything she can do to assist him. Because the

supervisor knows about the deteriorating eyesight, she may (but is not required to) ask if the employee

needs a reasonable accommodation, such as magnifying equipment, software that reads material from a computer screen, or large print. However, the supervisor cannot force the employee to accept an accommodation. If the employee refuses to discuss a reasonable accommodation, the supervisor may continue to address the performance problem in the same manner that she would with any other employee.

15. Does an employer have to provide a reasonable accommodation to an employee with a disability who needs one to discuss a performance or conduct problem?

Yes. An employer might have to provide a reasonable accommodation to enable an employee with a disability to understand the exact nature of any performance or conduct problem and to have a meaningful discussion with the employer about it.[59]

Example 26: A supervisor knows that a deaf employee who has previously requested reasonable accommodation cannot lip read. Nonetheless, the supervisor approaches the employee and begins verbally discussing mistakes she has been making. The supervisor has violated the ADA by not providing an effective reasonable accommodation to have a meaningful discussion with the employee.[60] Possible accommodations include a written exchange (e.g., e-mails) if the mistakes are simple ones to address and the discussion is likely to be short and straightforward, or a sign language interpreter if the discussion is likely to be lengthy and complex.

Similarly, an employer may need to provide reasonable accommodation to enable an employee with a disability to participate in a performance review. Even if there are no performance problems, the employee is entitled to the same opportunity as a non-disabled employee to discuss his performance.

Example 27: A blind employee asks for her performance review in Braille. Her supervisor would prefer to read the review aloud instead. All other employees get a written copy of their review. The supervisor's suggestion is not an effective accommodation because it would not permit the blind employee to read the performance review when she wants like other employees. The employer must provide a reasonable accommodation (absent undue hardship) that allows the employee to read the review, and this may include a Braille copy or a version in another format that the employee is capable of reading on her own (e.g., an electronic version).

An employer also may need to provide a reasonable accommodation to enable an employee with a disability to participate in an investigation into misconduct, whether as the subject of the investigation or a witness, to ensure the employee understands what is happening and can provide meaningful input.

Example 28: A deaf employee at a federal agency is involved in an altercation with a coworker. Because of the uncertainty about each employee's role in the altercation, agency officials initiate an investigation but deny the employee's request for a sign language interpreter when they come to interview him and instead rely on an exchange of notes. Although there were some answers the employee gave that the

officials would have followed up on if the communication was oral, they did not do so because of the difficulty of exchanging handwritten notes. Thus, the accommodation is not effective because it hampers the ability of the parties to communicate fully with each other. Effective communication is especially critical given the seriousness of the situation and the potentially high stakes (disciplinary action may be imposed on this employee or the coworker). The agency should have postponed the interview until it could get an interpreter.[61]

D. Seeking medical information when there are performance or conduct problems

Some employers want to ask for medical information in response to an employee's performance or conduct problem because they believe it might help them to understand why the problem exists and what might be an appropriate response.

16. May an employer require an employee who is having performance or conduct problems to provide medical information or undergo a medical examination?

Sometimes. The ADA permits an employer to request medical information or order a medical examination when it is job-related and consistent with business necessity.[62] Generally, this means that the employer has a reasonable belief, based on objective evidence, that an employee is unable to perform an essential function or will pose a "direct threat" because of a medical condition.[63] The scope and manner of any inquiries or medical examinations must be limited to information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat.[64]

An employer must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination. In limited circumstances, the nature of an employee's performance problems or unacceptable conduct may provide objective evidence that leads an employer to a reasonable belief that a medical condition may be the cause.[65]

Example 29: An employee with no history of performance or conduct problems suddenly develops both. Over the course of several weeks, her work becomes sloppy and she repeatedly misses deadlines. She becomes withdrawn and surly, and in meetings she is distracted and becomes belligerent when asked a question. When her supervisor starts asking her about her behavior, she responds with answers that make no sense.

The sudden, marked change in performance and conduct, the nonsensical answers, and the belligerent behavior all reasonably suggest that a medical condition may be the cause of the employee's performance and conduct problems. This employer may ask the employee medical questions (e.g., are you ill, have you seen a doctor, is there a medical reason for the sudden, serious change in your behavior). The employer also may, as appropriate, require the employee

(1) to go to an Employee Assistance Program (EAP);

(2) to produce medical documentation that she is fit to continue working (including the ability to meet minimum performance requirements and exhibit appropriate behavior); and/or

(3) to undergo an appropriate medical examination related to the performance and conduct issues.

The employer also may take a number of actions while it awaits medical documentation on whether she is able to continue performing her job, including placing the employee on leave.

Not all performance problems or misconduct will justify an employer's request for medical information or a medical examination. An employer cannot require a medical examination solely because an employee's behavior is annoying, inefficient, or otherwise unacceptable. [66] In fact, there may be other reasons that an employee experiences performance or conduct problems that are unrelated to any medical condition, such as insufficient knowledge, conflict with a supervisor or coworker, lack of motivation or skills, a poor attitude, or personal problems (such as a divorce or other family problems).

Example 30: A supervisor finds an employee asleep at his desk. She wants to send the employee for a medical examination. However, there could be many reasons the employee is asleep. The employee may work a second job, stay up late at night, or have family problems that are causing him to lose sleep. Because there is insufficient evidence to focus on a medical cause for this behavior, requiring the employee to produce medical documentation or to undergo a medical examination would not be justified. However, if the employee when asked to explain his behavior reveals that the cause is a medical problem (e.g., sleep apnea), then the employer would have sufficient objective evidence to justify requesting additional medical information or a medical examination.

Example 31: An employee with Parkinson's disease has constant run-ins with his supervisor, including ignoring instructions, taking extra breaks, and using disrespectful language. Although the employer may discipline the employee for these acts of insubordination, no evidence suggests that this behavior stems from his Parkinson's disease. Therefore, the employer may not ask the employee for medical information or order him to have a medical examination.

17. Must an employer who has a sufficient basis for requesting medical information or requiring a medical examination take such steps instead of imposing discipline for poor performance or conduct?

No. The ADA permits but does not require an employer to seek medical information. An employer may choose to focus solely on the performance or conduct problems and take appropriate steps to address them.[67]

- *Practical Guidance: Even when the ADA permits an employer to seek medical information or require a medical examination, it still may be difficult to determine if that is an appropriate course of action. It is advisable for employers to determine whether simply addressing the problem without such information will be effective.*

E. Attendance issues

Employers generally have attendance requirements. Many employers recognize that employees need time off

and therefore provide paid leave in the form of vacation or annual leave, personal days, and sick days. Some employers also offer opportunities to use advance or unpaid leave, as well as leave donated by coworkers. Certain laws may require employers to extend leave, such as the ADA (as a reasonable accommodation) and the Family and Medical Leave Act.[68]

18. Must employees with disabilities be granted the same access to an employer's existing leave program as all other employees?

Yes. Employees with disabilities are entitled to whatever forms of leave the employer generally provides to its employees. This means that when an employee with a disability seeks leave under an employer's regular leave policies, she must meet any eligibility requirements for the leave that are imposed on all employees (e.g., only employees who have completed a probation program can be granted advance leave). Similarly, employers must provide employees with disabilities with equal access to programs granting flexible work schedules and modified schedules.[69]

> Example 32: An employee requests a nine-month leave of absence because of a disability. The employer has a policy of granting unpaid medical leave for one year but it refuses this employee's request and terminates her instead. If the employer's policy is to grant employees up to one year of medical leave, with no other conditions, denying this benefit because an employee has a disability would violate the ADA.[70]

If an employee with a disability needs leave or a modified schedule beyond that provided for under an employer's benefits program, the employer may have to grant the request as a reasonable accommodation if there is no undue hardship.

19. Does the ADA require employers to modify attendance policies as a reasonable accommodation, absent undue hardship?

Yes. If requested, employers may have to modify attendance policies as a reasonable accommodation, absent undue hardship.[71] Modifications may include allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times (e.g., allowing an employee to work from 10 a.m. to 6 p.m. rather than the usual 9 a.m. to 5 p.m. schedule required of all other employees), and providing periodic breaks.[72]

20. Does the ADA require that employers exempt an employee with a disability from time and attendance requirements?

Although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance. Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice. [73]The chronic, frequent, and unpredictable

nature of such absences may put a strain on the employer's operations for a variety of reasons, such as the

following:

- an inability to ensure a sufficient number of employees to accomplish the work required;
- a failure to meet work goals or to serve customers/clients adequately;
- a need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them;[74]
- incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

Under these or similar circumstances, an employee who is chronically, frequently, and unpredictably absent may not be able to perform one or more essential functions of the job, or the employer may be able to demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.[75]

Example 33: An employee with asthma who is ineligible for FMLA leave works on an assembly line shift that begins at 7 a.m. Recently, his illness has worsened and his doctor has been unable to control the employee's increasing breathing difficulties. As a result of these difficulties, the employee has taken 12 days of leave during the past two months, usually in one- or two-day increments. The severe symptoms generally occur at night, thus requiring the employee to call in sick early the next morning. The lack of notice puts a strain on the employer because the assembly line cannot function well without all line employees present and there is no time to plan for a replacement. The employer seeks medical documentation from the employee's doctor about his absences and the doctor's assessment of whether the employee will continue to have a frequent need for intermittent leave. The doctor responds that various treatments have not controlled the asthmatic symptoms, there is no way to predict when the more serious symptoms will suddenly flare up, and he does not expect any change in this situation for the foreseeable future. Given the employee's job and the consequences of being unable to plan for his absences, the employer determines that he cannot keep the employee on this shift. Assuming no position is available for reassignment, the employer does not have to retain the employee.

- *Practical Guidance: It is best if an employee requests accommodation once he is aware that he will be violating an attendance policy or requiring intermittent leave due to a disability. Otherwise, an employer is entitled to continue holding the employee accountable for such absences without any obligation to consider if there is a reasonable accommodation that might address the problem. Moreover, prompt requests for accommodation may enable an employer to better plan for schedule modifications or absences, thus permitting an employee to get the accommodation.*

Example 34: An office worker with epilepsy who is ineligible for FMLA leave has two seizures at work in a three-month period. In both instances, the after-effects of the seizure required the individual to leave work for the remainder of the day, although she was able to return to work on the following day. To determine whether the seizures will continue and their impact on attendance and job performance, the employer requests documentation from the employee's doctor. The doctor responds that the employee may experience similar seizures once every two to four months, that there is no way to predict exactly

when a seizure will occur, and that the employee will need to take the rest of the day off when one does occur. The doctor sees no reason why the employee would need more than a day's leave for each seizure. Although the employee's need for leave is unpredictable, the employee will require only one day of leave every few months (or approximately six time a year). The employer determines that it is appropriate to grant the employee the reasonable accommodation of intermittent leave, as needed, because there will be no undue hardship and this accommodation will permit the employee to recover from a seizure.

Example 35: An employee works as an event coordinator. She has exhausted her FMLA leave due to a disability and now requests additional intermittent leave as a reasonable accommodation. The employee can never predict when the leave will be needed or exactly how much leave she will need on each occasion, but she always needs from one to three days of leave at a time. The employer initially agrees to her request and the employee takes 14 days of leave over the next two months. Documentation from the employee's doctor shows that the employee will continue to need similar amounts of intermittent leave for at least the next six months. Event planning requires staff to meet strict deadlines and the employee's sudden absences create significant problems. Given the employee's prognosis of requiring unpredictable intermittent leave, the employer cannot plan work around these absences. The employer has already had to move coworkers around to cover the employee's absences and delay certain work. The on-going, frequent, and unpredictable nature of the absences makes additional leave an undue hardship, and thus the employer is not required to provide it as a reasonable accommodation. If the employer cannot reassign the employee to a vacant position that can accommodate her need for intermittent leave, it is not required to retain her.

Example 36: An employee with multiple sclerosis works as a bookkeeper for a small medical practice that is not covered under the FMLA but is covered under the ADA. He requests intermittent leave as a reasonable accommodation. The employee has already taken five days of sick leave for the disability when he makes the request (a two-day and a three-day leave of absence). Documentation from the employee's doctor shows that the employee will continue to need intermittent leave for at least several months. The doctor cannot predict when or how much leave will be needed, but based on the employee's treatment and the current situation, the doctor believes that each leave of absence would be from one to three days. The employer determines that no undue hardship exists at this time and grants the employee intermittent leave for the disability consistent with the doctor's letter. The employer explains that it will reassess the accommodation in six months or sooner if the employee's use of leave begins to have a negative impact on its operations. During the next six months, the employee takes 12 days of medical leave. While the employee's unpredictable absences cause some problems, the employer has managed to adjust to the situation without burdening other employees or falling behind in the workload, the employee has made up work where he could, and the employee has always notified his supervisor immediately when he realizes he needs to take leave. Because there is no undue hardship at this time, the employer agrees to continue the reasonable accommodation of intermittent leave under the same conditions as before.

21. Do employers have to grant indefinite leave as a reasonable accommodation to employees with

disabilities?

No. Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations.[76] Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return some time between March 1 and April 1). If the approximate date of return or the estimated time period turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration.

Example 37: An employer's policy allows employees one year of medical leave but then requires either that they return (with or without reasonable accommodation, if appropriate) or be terminated. An employee with a disability who has been on medical leave for almost one year informs her employer that she will need a total of 13 months of leave for treatment of her disability and then she will be able to return to work. She provides detailed medical documentation in support of her request. This request is not for indefinite leave because the employee provides a specific date on which she can return; the employer must provide the additional month of leave as a reasonable accommodation unless it would cause an undue hardship. The employer may consider the impact on its operations caused by the initial 12-month absence, along with other undue hardship factors. [77] The mere fact that granting the requested accommodation requires the employer to modify its leave policy for this employee does not constitute undue hardship.[78]

Example 38: The employer has the same leave policy described in Example 37. An employee with a disability has been on medical leave for one year when he informs his employer that he will never be able to return to his old job due to his disability, and he is unable to provide information on whether and when he could return to another job that he could perform. The employer may terminate this worker because the ADA does not require the employer to provide indefinite leave.[79]

Example 39: An employer grants 12 weeks of medical leave at the request of an employee with a disability. At the end of this period, the employee submits a note from his doctor requesting six additional weeks, which the employer grants. At the conclusion of this period, the employee submits a new note seeking another six weeks of leave, which would bring the employee's total leave to 24 weeks. The employer is concerned about the requests for extensions and whether they signal a pattern. Although the employer has been able to cope with the extended absence to date, it foresees a more serious impact on its operations if the employee requires more than a few additional weeks of leave. The employer requests information from the employee's doctor about the two extensions, including the reason why the doctor's earlier predictions on return turned out to be wrong, a clear description of the employee's current condition, and the basis for the doctor's conclusion that only another six weeks of leave are required. The doctor explains that there have been complications and that the employee is not

responding to treatment as expected. The doctor states that the current request for an additional six weeks may not be sufficient and that more leave, maybe up to several months, may be needed. The doctor states that the employee's current condition does not permit a clear answer as to when he will be able to return to work. This information supports a conclusion that the employee's request has become one for indefinite leave. This poses an undue hardship and therefore the employer may deny the request.

22. Does an employer have to grant a reasonable accommodation to an employee with a disability who waited until after attendance problems developed to request it?

An employer may impose disciplinary action, consistent with its policies as applied to other employees, for attendance problems that occurred prior to a request for reasonable accommodation. However, if the employee's infraction does not merit termination but some lesser disciplinary action (e.g., a warning), and the employee then requests reasonable accommodation, the employer must consider the request and determine if it can provide a reasonable accommodation without causing undue hardship.

Example 40: An employee with diabetes is given a written warning for excessive absenteeism. After receiving the warning, the employee notifies his employer that his absences were related to his diabetes which is not well controlled. The employee asks that the employer withdraw the written warning and provide him with leave when needed due to complications from his diabetes. The employee's doctor has changed his treatment and states that he expects the employee's diabetes to be well controlled within the next one to two months. The doctor also states that there might still be a need for leave during this transitional period, but expects the employee would be out of work no more than three or four days.

The employer does not have to withdraw the written warning, but it must grant the requested accommodation unless it would pose an undue hardship.

Example 41: A bank manager's starting time is 8 a.m., but due to the serious side effects of medication she takes for her disability she cannot get to work until 9 a.m. The manager's late arrival results in a verbal warning, prompting her to request that she be allowed to arrive at 9 a.m. because of the side effects of medication she takes for her disability. The manager's modified arrival time would not affect customer service or the ability of other employees to do their jobs, and she has no duties that require her to be at the bank before 9 a.m. The bank denies this request for reasonable accommodation, saying that as a manager she must set a good example for other employees about the importance of punctuality. Because the manager's later arrival time would not affect the manager's performance or the operation of the bank, denial of this request for reasonable accommodation is a violation of the ADA.[80]

F. Dress codes

Employers may require employees to wear certain articles of clothing to protect themselves, coworkers, or the public (e.g., construction workers are required to wear certain head gear to prevent injury; health care workers wear gloves to prevent transmission of disease from or to patients). Sometimes employers impose dress

codes to make employees easily identifiable to customers and clients, or to promote a certain image (e.g., a movie theater requires its staff to wear a uniform; a store requires all sales associates to dress in black). A dress code also may prohibit employees from wearing certain items either as a form of protection or to promote a certain image (e.g., prohibitions on wearing jewelry or baseball caps, or requirements that workers wear business attire).[81]

23. May an employer require that an employee with a disability follow the dress code imposed on all workers in the same job?

An employer may require an employee with a disability to observe a dress code imposed on other employees in the same job. For example, a professional office may require its employees to wear appropriate business attire because the nature of the jobs could bring them into contact with clients, customers, and the public.

Where an employee's disability makes it difficult for him to comply fully with a dress code, an employer may be able to provide a reasonable accommodation.

> Example 42: An employer requires all of its employees to wear a uniform provided by the employer. An employee with quadriplegia cannot wear this uniform because he cannot use zippers and buttons and because the shape of the uniform causes discomfort when he sits in a wheelchair. The employee tells the employer about these difficulties and informs the employer about manufacturers that specialize in making clothes for persons with disabilities. The individual shows the employer a catalogue and together they are able to choose items that approximate the uniform, thus meeting the needs of both the employer and the individual. As a reasonable accommodation, the employer provides the employee with the specified uniform.

> Example 43: An employee is undergoing radiation therapy for cancer which has caused sores to develop. The employee cannot wear her usual uniform because it is causing severe irritation as it constantly rubs against the sores. The employee seeks an exemption from the uniform requirement until the radiation treatment ends and the sores have disappeared or are less irritating. The employer agrees, and working with the employee, decides on acceptable clothes that the employee can wear as a reasonable accommodation that meet the medical needs of the employee, easily identify the individual as an employee, and enable the individual to present a professional appearance.

> Example 44: A professional office requires that its employees wear business dress at all times. Due to diabetes, Carlos has developed foot ulcers making it very painful to wear dress shoes. Also, dress shoes make the ulcers worse. Carlos asks to wear sneakers instead. The supervisor is concerned about Carlos's appearance when meeting with clients. These meetings usually occur once a week and last about an hour or two. Carlos and his doctor agree that Carlos can probably manage to wear dress shoes for this limited time. Carlos also tells his supervisor that he will purchase black leather sneakers to wear at all other times. The supervisor permits Carlos to wear black sneakers except when he meets with clients.

If the employee cannot meet the dress code because of a disability, the employer may still require compliance

if the dress code is job-related and consistent with business necessity. An employer also may require that an employee with a disability meet dress standards required by federal law. If an individual with a disability cannot comply with a dress code that meets the "business necessity" standard or is mandated by federal law, even with a reasonable accommodation, he will not be considered "qualified."

Example 45: An employer, pursuant to an OSHA regulation, requires employees to wear steel-toed boots. An employee has severe burns on his feet and legs that prevent him from wearing these types of boots, no accommodation is possible, and so he asks for an exemption. The ADA does not prevent employers from complying with other federal laws, including the Occupational Safety and Health Act which requires employees working in certain jobs, industries, or positions to wear particular items of clothing or protective gear. Under these circumstances, the employer may insist that the employee wear steel-toed boots, and because the employee cannot comply with this rule he is not "qualified."

G. Alcoholism and illegal use of drugs

24. Does the ADA protect employees with substance abuse problems?

The ADA may protect a "qualified" alcoholic who can meet the definition of "disability." The ADA does not protect an individual who currently engages in the illegal use of drugs,[82] but may protect a recovered drug addict who is no longer engaging in the illegal use of drugs, who can meet the other requirements of the definition of "disability,"[83] and who is "qualified." As explained in the following questions, the ADA has specific provisions stating that individuals who are alcoholics or who are currently engaging in the illegal use of drugs may be held to the same performance and conduct standards as all other employees.

25. May an employer require an employee who is an alcoholic or who illegally uses drugs to meet the same standards of performance and conduct applied to other employees?

Yes. The ADA specifically provides that employers may require an employee who is an alcoholic or who engages in the illegal use of drugs to meet the same standards of performance and behavior as other employees.[84] This means that poor job performance or unsatisfactory behavior - such as absenteeism, tardiness, insubordination, or on-the-job accidents - related to an employee's alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

Example 46: A federal police officer is involved in an accident on agency property for which he is charged with driving under the influence of alcohol (DUI). Approximately one month later, the employee receives a termination notice stating that his conduct makes it inappropriate for him to continue in his job. The employee states that this incident made him realize he is an alcoholic and that he is obtaining treatment, and he seeks to remain in his job. The employer may proceed with the termination.[85]

Example 47: An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor's actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers.

26. May an employer discipline an employee who violates a workplace policy that prohibits the use of alcohol or the illegal use of drugs in the workplace?

Yes. The ADA specifically permits employers to prohibit the use of alcohol or the illegal use of drugs in the workplace.[86] Consequently, an employee who violates such policies, even if the conduct stems from alcoholism or drug addiction, may face the same discipline as any other employee. The ADA also permits employers to require that employees not be under the influence of alcohol or the illegal use of drugs in the workplace.

Employers may comply with other federal laws and regulations concerning the use of drugs and alcohol, including: (1) the Drug-Free Workplace Act of 1988; (2) regulations applicable to particular types of employment, such as law enforcement positions; (3) regulations of the Department of Transportation for airline employees, interstate motor carrier drivers and railroad engineers; and (4) the regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission.[87]

27. May an employer suggest that an employee who has engaged in misconduct due to alcoholism or the illegal use of drugs go to its Employee Assistance Program (EAP) in lieu of discipline?

Yes. The employer may discipline the employee, suggest that the employee seek help from the EAP, or do both. An employer will always be entitled to discipline an employee for poor performance or misconduct that result from alcoholism or drug addiction. But, an employer may choose instead to refer an employee to an EAP or to make such a referral in addition to imposing discipline. However, the ADA does not require employers to establish employee assistance programs or to provide employees with an opportunity for rehabilitation in lieu of discipline.

28. What should an employer do if an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline for unacceptable performance or conduct?

The employer may impose the same discipline that it would for any other employee who fails to meet its performance standard or who violates a uniformly-applied conduct rule. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for accommodation.

An employee whose poor performance or conduct is attributable to the **current illegal use of drugs** is not covered under the ADA.[88] Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it deems appropriate, although nothing in the

ADA would limit an employer's ability to offer leave or other assistance that may enable the employee to

receive treatment.

By contrast, an employee whose poor performance or conduct is attributable to **alcoholism** may be entitled to a reasonable accommodation, separate from any disciplinary action the employer chooses to impose and assuming the discipline for the infraction is not termination. If the employee only mentions the alcoholism but makes no request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed to correct the problem. This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program.

> Example 48: An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee's drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, absent undue hardship, the employer must grant the employee's request to take leave for the next month to enter a rehabilitation program.

29. Must an employer provide a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct resulting from alcoholism or drug addiction?

An employer may choose, but is not required by the ADA, to offer a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct that results from alcoholism or drug addiction. Generally, under a "firm choice" or "last chance agreement" an employer agrees not to terminate the employee in exchange for an employee's agreement to receive substance abuse treatment, refrain from further use of alcohol or drugs, and avoid further workplace problems. A violation of such an agreement usually warrants termination because the employee failed to meet the conditions for continued employment.[89]

H. Confidentiality issues arising from granting reasonable accommodation to avoid performance or conduct problems

30. May an employer tell a coworker that an employee is receiving a reasonable accommodation?

No. The ADA's confidentiality provisions do not permit employers to tell coworkers that an employee with a disability is receiving a reasonable accommodation.

- *Practical Guidance: It is imperative that managers be trained about how to respond to such questions*

because it is reasonable to assume they may be asked questions by an employee's coworkers where the accommodation involves modification of a work schedule or dress code, or any other change in the workplace that a coworker may perceive as holding the employee with a disability to a different performance or conduct standard. Employers already keep many types of information confidential despite inquiries from their workers, such as personnel decisions like the reason an employee left a job or was transferred. This situation should be treated in similar fashion. An employer could respond that she does not discuss one employee's situation with another in order to protect the privacy of all employees, but she could assure the coworker that the employee is meeting the employer's work requirements.

I. Legal enforcement

Private Sector/State and Local Governments

An individual who believes that his employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a "charge of discrimination" with the EEOC. The charge must be filed by mail or in person with a local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge.[90]

The EEOC will notify the employer of the charge and will ask for a response and supporting information. Before a formal investigation, the EEOC may select the charge for its mediation program. Participation in mediation is free, voluntary, and confidential. Mediation may provide the parties with a quicker resolution of the case.

For a detailed description of the charge process, please refer to the EEOC website at https://www.eeoc.gov/employees/filing-charge-discrimination.

Federal Government

An individual who believes that his employment rights have been violated on the basis of disability and wants to make a claim against a federal agency must file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the alleged discriminatory action. The individual may choose to participate in either counseling or in Alternative Dispute Resolution (ADR) if the agency offers this alternative. Ordinarily, counseling must be completed within 30 days and ADR within 90 days.

At the end of counseling, or if ADR is unsuccessful, the individual may file a complaint with the agency. The agency must conduct an investigation unless the complaint is dismissed. If a complaint contains one or more issues that must be appealed to the Merit Systems Protection Board (MSPB), the complaint is processed under the MSPB's procedures. For all other EEO complaints, once the agency finishes its investigation the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.

For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at https://www.eeoc.gov/fact-sheet/filing-charge.

Footnotes

[1] Michele J. Gelfand & Lisa H. Nishii, *Discrimination in Organizations: An Organizational-Level Systems Perspective*, in Discrimination at Work: The Psychological and Organizational Bases 89, 101 (Robert L. Dipboye & Adrienne Colella eds., 2004).

[2] All reasonable accommodation examples used in this document assume that the employee meets the ADA definition of "disability."

[3] 42 U.S.C. §§ 12101 - 12117 (2000); 29 C.F.R. §§ 1630.1 - 1630.16 (2007); 29 U.S.C. § 791(g) (2000);29 C.F.R. § 1614.203(b) (2007). Pursuant to Title II of the ADA, state and local government agencies with fewer than 15 employees must follow the same employment discrimination rules as found under Title I. 28 C.F.R. § 35.140(b) (2) (2007).

This publication will use the term "ADA" to refer to both the Americans with Disabilities Act and section 501 of the Rehabilitation Act. This fact sheet provides only a brief review of the ADA's statutory framework as it is relevant to performance and conduct standards. More information on the ADA and the Rehabilitation Act is available at EEOC's website, www.eeoc.gov.

[4] 42 U.S.C. § 12112(a) (2000); 29 C.F.R. § 1630.4 (2007).

[5] 42 U.S.C. § 12102(2) (2000); 29 C.F.R. § 1630.2(g) (2007). The ADA Amendments Act of 2008, signed into law on September 25, retains the three-part definition of disability but makes several significant changes to it with the intent that "disability" be construed broadly. Among the most significant changes are: (1) "substantially limits" no longer will be defined to mean either "significantly restricted" or "severely restricted," (2) major life activities now include "major bodily functions" such as normal cell growth, (3) the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses, cannot be considered in assessing whether an individual has a disability, (4) impairments that are episodic or in remission may be disabilities if they are substantially limiting when active, and (5) an individual will meet the "regarded as" prong of the definition if she can show that an employment decision (e.g., hiring, promotion, termination, discipline) was made because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits or is perceived to limit a major life activity. The new definition of "regarded as" does not cover an impairment that is the basis of an employment decision if it is transitory (meaning that it will last six months or less) and minor.

[6] 42 U.S.C. § 12111(8) (2000); 29 C.F.R. § 1630.2(m) (2007).

[7] See EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at II (2.3) and IV (4.4), (1992), available at www.adainformation.org/Employment.aspx [hereinafter TAM].

[8] Additional information on how to determine the essential and marginal functions of a position, and their significance in determining if an individual with a disability is "qualified," can be found in 29 C.F.R. pt. 1630 app. § 1630.2(m)-(n) (2007). See also TAM, supra note 7, at II (2.3(a)).

[9] 42 U.S.C. §§ 12112(b)(6), 12113(a) (2000); 29 C.F.R. §§ 1630.10 and 1630.15(b)(1) (2007).

[10] See TAM, supra note 7, at IV (4.3).

[11] 42 U.S.C. § 12112(b)(5)(A) (2000); 29 C.F.R. § 1630.9(a) (2007); 29 C.F.R. pt. 1630 app. §§ 1630.9, 1630.10, 1630.15(b) and (c) (2007). The ADA Amendments Act of 2008 explicitly states that individuals who are covered only under the "regarded as" definition of "disability" would not be entitled to reasonable accommodation.

Reasonable accommodation may be required for several reasons, such as providing an applicant with a disability with an equal opportunity to compete for a job or to allow an employee with a disability equal access to a benefit or privilege of employment. This publication focuses on the reasonable accommodation obligation only as it applies to performance and conduct issues.

Examples of different types of reasonable accommodations can be found in, EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, (rev. Oct. 17, 2002), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [hereinafter Reasonable Accommodation]. In addition, the EEOC has published documents on various disabilities that address accommodations commonly used by individuals with these medical conditions, including persons with psychiatric disabilities, cancer, diabetes, blindness, deafness, intellectual disability (mental retardation), and epilepsy. The EEOC also has published documents on telework as a reasonable accommodation and accommodations commonly provided in certain types of jobs (e.g., attorney positions, the food service industry, and health care jobs). All of these documents can be found at EEOC's website, www.eeoc.gov.

[12] See Reasonable Accommodation, supra note 11, at Question 1.

[13] 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (2000); 29 C.F.R. §§ 1630.2(p), 1630.9(a) (2007); 29 C.F.R. pt. 1630 app. - 1630.2(o) (2007) (employer is not required to reallocate essential functions); see also Reasonable Accommodation, supra note 11, in General Principles.

[14] See 29 C.F.R. pt. 1630 app. - 1630.2(n) (2007) ("the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards"). See also TAM, supra note 7, at VII (7.7) ("An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions").

[15] 29 C.F.R. pt. 1630 app. - 1630.2(n) (2007); see also Reasonable Accommodation, supra note 11, in General Principles.

[16] See Yindee v. CCH Inc. 458 F.3d 599, 602 (7th Cir. 2006) (employee with disability terminated because of the reduction in the quantity and quality of her output as well as her failure to demonstrate the problem-solving skills required for her job); see also Leffel v. Valley Fin. Servs., 113 F.3d 787, 789, 795 (7th Cir.), cert. denied 522 U.S. 968 (1997) (employer lawfully terminated employee with multiple sclerosis for several performance problems, including failure to submit reports on a timely basis and failure to return phone calls). Cf. Libel v. Adventure Lands of Am., Inc., 482 F.3d 1028, 1034 (8th Cir. 2007) (affirming summary judgment for employer who terminated a sales and catering manager with multiple sclerosis because she often made mistakes, including failing to request menus in a timely fashion, selling more rooms than available, giving away rooms for free, and not charging the correct amount).
In Example 3, the employer could have asked the employee if he needed a reasonable accommodation to

address the performance problems, but the employer was not obligated to do so. An employee with a disability generally has the responsibility to ask for a reasonable accommodation. See infra Question 14 and n.53 and accompanying text.

[17]See TAM, supra note 7, at VII (7.7) ("An employer should not give employees with disabilities "special treatment." They should not be evaluated on a lower standard . . . than any other employee. This is not equal employment opportunity.")

[18]Cf. Question 26 in EEOC, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities [hereinafter Psychiatric Disabilities] (modifications in how supervisors provide guidance and feedback may assist employees in improving job performance).

[19] An employer cannot penalize an employee for work missed while the employee took a significant amount of leave as a reasonable accommodation. See Reasonable Accommodation, supra note 11, at Question 19, Example A. An employer that accurately evaluates the quality and quantity of work produced by an employee when present is not penalizing the employee for work missed while taking leave as a reasonable accommodation. An employer may wish to consider postponing a performance evaluation or providing an interim one when a significant amount of leave affects overall productivity.

[20]See TAM, supra note 7, at VII (7.7) ("A disabled employee who needs an accommodation . . . in order to perform a job function should not be evaluated on his/her ability to perform the function without the accommodation"); cf. "Discrimination in Organizations," supra note 1, at 102 ("[P]erformance norms should permit some latitude for expressing individuality and should not be arbitrarily based on a singular cultural perspective. Utilizing outcome-based performance measures rather than process-based performance measures may help minimize discrimination . . .") (cites omitted).

[21]See Jay v. Intermet Wagner, Inc., 233 F.3d 1014, 1017 (7th Cir. 2000).

[22]See Reasonable Accommodation, supra note 11, at Question 41.

[23]See id. at Question 4.

[24]See id. at n. 103.

[25]See Hill v. Kansas City Area Transp. Auth., 181 F.3d 891, 894 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination); Contreras v. Barnhart, EEOC Appeal No. 01A10514 (February 22, 2002) (decision rejects employee's claim that employer should have known that a reasonable accommodation was not working and provided another one, rather than disciplining employee for poor performance, where employee failed to request a new accommodation and two of her doctors had indicated that the employer should continue providing the existing accommodation); cf. Fenney v. Dakota Minn. & E.R.R. Co., 327 F.3d 707, 717 (8th Cir. 2003) (employee took demotion to avoid risk of discharge for chronic tardiness after repeated requests for reasonable accommodation related to work schedule were summarily denied).

[26]See Reasonable Accommodation, supra note 11, at Questions 35-36.

[27]See id. at Questions 5 and 36.

[28]See id. at Questions 5-8.

[29] See id. at Question 9.

[30]See TAM, supra note 7, at VII (7.7).

[31] Cf. id. ("An employer may not discipline or terminate an employee with a disability if the employer has refused to provide a requested reasonable accommodation that did not constitute an undue hardship and the reason for the unsatisfactory performance was the lack of accommodation.") In this Example, the employer may proceed with counseling Odessa, but if a reasonable accommodation could have been provided that would help Odessa resolve the performance problem (without causing undue hardship), any subsequent disciplinary action by the employer for the same problem would violate the ADA.

[32]Cf. Traylor v. Horinko, EEOC Appeal No. 01A14117 (November 6, 2003) (employee failed to request reasonable accommodation for a disability with respect to any aspect of the PIP and instead waited until after he had failed the PIP and received notice of termination).

[33]See TAM, supra note 7, at VII (7.7) ("A disabled employee who needs an accommodation . . . in order to perform a job function should not be evaluated on his/her ability to perform the function without the accommodation").

[34] See Reasonable Accommodation, supra note 11, at Question 10.

[35] See id.

Federal agencies should follow their internal reasonable accommodation procedures that outline how to handle a request for reasonable accommodation and the time frames for doing so. A PIP should generally be considered a situation requiring expedited handling of a request. See Question 13 in EEOC, Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation (July 26, 2000) available at https://www.eeoc.gov/laws/guidance/policy-guidance-executive-order-13164-establishing-procedures-facilitate-provision.

[36]See Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128, 1138 (9th Cir. 2001) (after employer and employee recognized that reasonable accommodation was not working, employer refused to engage in interactive process to consider whether another accommodation might be effective). Cf. Cutrera v. Board of Supervisors of La. State Univ., 429 F.3d 108, 113 (5th Cir. 2005) (employee's initial inability to propose a reasonable accommodation does not permit an employer to subvert the interactive process by terminating the employee before an accommodation can be proposed or considered).

[37] See Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 863 (7th Cir. 2005); see also Degnan v. U.S. Postal Service, EEOC Appeal No. 01A53689 (March 23, 2006).

[38]See 42 U.S.C. § 12112(b)(6) (2000); 29 C.F.R. §§ 1630.10, .15(c) (2007); see also Psychiatric Disabilities, supra

note 18, at Question 30; Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1086 (10th Cir. 1997).

[39]See Reasonable Accommodation, supra note 11, at Question 35. See also, Macy v. Hopkins Co. Sch. Bd. of Educ., 484 F.3d 357, 366 (6th Cir. 2007) (ADA permits an employer to fire an employee for conduct that results from a disability if that conduct disqualifies the employee from his or her job); Gambini v. Total Renal Care, Inc., d/b/a DaVita, Inc., 486 F.3d 1087, 1095 (9th Cir. 2007) (instructing jury that conduct resulting from a disability is part of the disability, and not a separate basis for termination, does not grant an employee absolute protection from adverse employment actions based on disability-related conduct because employers may show business necessity or direct threat to justify their disciplinary actions); Sista v. CDC IXIS N. Am. Inc., 445 F.3d 161, 172 (2d Cir. 2006) (citing to the EEOC's Enforcement Guidance on the ADA and Psychiatric Disabilities, the court stated that the ADA does not "require that employers countenance dangerous misconduct, even if [it] is the result of a disability"); Calef v. Gillette Co., 322 F.3d 75, 87 (1st Cir. 2003) (ADA does not require that employer retain an employee whose disability causes unacceptable behavior - verbal and physical threats and altercations - that threatens the safety of others); Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (ADA does not insulate emotional or violent outbursts blamed on an impairment); Siefken v. Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) (termination appropriate for police officer who failed to control his diabetes, resulting in his driving erratically at high speed); cf. Mincer v. Alvarez, EEOC Petition No. 03990021 (May 25, 2000) (although medical evidence clearly established that employee's depression and anxiety did not cause insubordinate behavior, agency could have disciplined employee for this behavior even if a nexus had been established because the ADA permits employers to hold an employee with a disability to the same conduct standards as other employees as long as those standards are job-related and consistent with business necessity).

[40]See 42 U.S.C. § 12112(b)(6) (2000); 29 C.F.R. §§ 1630.10, .15(c) (2007); see also Reasonable Accommodation, supra note 11, at Question 35 and Psychiatric Disabilities, supra note 18, at Question 30.

[41] See Psychiatric Disabilities, supra note 18, at Question 30; see also, e.g., Macy v. Hopkins Co. Sch. Bd. of Educ., 484 F.3d 357, 366 (6th Cir. 2007) (school board had legitimate, nondiscriminatory reason to terminate teacher with a head injury who threatened to kill a group of boys).

[42]See Bing v. Danzig, EEOC Petition No. 03990061 (February 1, 2000) ("[A] standard of employee work place conduct that bars insubordination by employees . . . is by definition job-related and consistent with business necessity."); Mincer v. Alvarez, EEOC Petition No. 03990021 (May 25, 2000) (employee's removal for insubordination is job-related and consistent with business necessity). See also Ray v. The Kroger Co., 264 F. Supp.2d 1221, 1229 & n.4 (S.D. Ga. 2003) (upholding termination of grocery clerk who had uncontrollable outbursts of profanity, vulgar language, and racial slurs as a result of Tourette Syndrome because such conduct impermissible in front of customers); and Buchsbaum v. Univ. Physicians Plan, 55 F.App'x 40, 45 (3d Cir. 2002) (unpublished) (no pretext where deaf employee's transfer and subsequent termination are justified by his unacceptable behavior that included inappropriate comments to patients). Cf. Crandall v. Paralyzed Veterans of Am., 146 F.3d 894, 895 (D.C. Cir. 1998) (information specialist's unacceptable behavior included abusing library employees of a trade association resulting in the library threatening to bar all of PVA's workers from using its facility); and Mammone v. President & Fellows of Harvard Coll., 847 N.E.2d 276 (Mass. 2006)

(applying state disability law, upheld termination of museum receptionist with bipolar disorder for numerous

unprofessional disturbances in front of visitors).

[43]See, e.g., Calef , supra note 39, at 86 (it is job-related and consistent with business necessity for a manager to be able to handle stressful situations without making others in the workplace feel threatened by verbal and physical threats and altercations); Grevas v. Village of Oak Park, 235 F.Supp.2d 868, 872 (N.D. Ill. 2002) (employee with depression terminated, in part, because of inability to get along with coworkers as evidenced by refusing to establish effective working relationships, making unfounded allegations against coworkers, and making abusive and/or inappropriate comments). Cf. Psychiatric Disabilities, supra note 18, at Question 30 (example of a coworker courtesy rule that is not job-related and consistent with business necessity as applied to a warehouse worker who does not have regular contact with coworkers and who, because of a psychiatric disability, refuses to engage in casual conversation with coworkers and instead walks away when spoken to or gives a curt response).

[44]See Hammel, supra note 37, at 863.

[45] Cf. Den Hartog, supra note 38, at 1087 (permitting "employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled").

[46] Cf. Taylor v. Food World, Inc., 133 F.3d 1419, 1424 (11th Cir. 1998) (grocery clerk position inherently requires an ability to do the job without offending customers but summary judgment inappropriate because factual issue exists as to whether employee with autism could meet this requirement with or without reasonable accommodation); Ray, supra note 42, at 1229 & n.4 (the ADA does not require an employer to maintain indefinitely an employee who, because of Tourette Syndrome, uncontrollably subjects the employer's customers repeatedly to curse words and racial slurs).

[47]See Reasonable Accommodation, supra note 11, at Question 25.

[48]See Darcangelo v. Verizon Maryland, Inc., 189 F.App'x 217, 218 (4th Cir. 2006) (unpublished).

[49] See Reasonable Accommodation, supra note 11, at Question 36. See also Buie v. Quad/Graphics, Inc., 366 F.3d 496 (7th Cir. 2004) (eleventh-hour declaration of disability does not insulate an unruly employee from the consequences of his misdeeds); Conneen v. MBNA Am. Bank N.A., 334 F.3d 318, 331-33 (3d Cir. 2003) (despite repeated warnings about tardiness and the threat of termination, employee failed to request a modified schedule until after she was terminated); and Hill, supra note 25, at 894 (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

[50]See Reasonable Accommodation, supra note 11, at Question 41.

[51] See id. at Question 5.

[52]See id. at n.103.

[53] See id. at Question 40; Psychiatric Disabilities, supra note 18, at Question 27.

[54] Cf. Reasonable Accommodation, supra note 11, at Question 37.

[55] See id. at Question 38.

[56]See Crandall, supra note 42, at 898 (court rejected employee's claim that his rude behavior was so extreme as to put his employer on notice of a disability because a layperson cannot be expected to infer the existence of a psychiatric disorder given the general prevalence of rudeness).

[57]See Reasonable Accommodation, supra note 11, at Questions 1-3, 40. See also Estades-Negroni v. Associates Corp. of N. Am., 377 F.3d 58, 64 (1st Cir. 2004) (employee's request for a reduced workload and an assistant before being diagnosed with depression did not constitute a request for reasonable accommodation); Russell v. TG Mo. Corp., 340 F.3d 735, 742 (8th Cir. 2003) (employer's knowledge that employee has bipolar disorder insufficient to support claim that employer should have known that employee's request to leave work immediately because she was "not feeling well" was related to her disability and therefore employee could be charged with an unexcused absence); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998) (employer had no obligation to speculate on an employee's need for additional leave as a reasonable accommodation despite knowing the employee had a serious injury and wished to return to work eventually; employee never requested that her leave be extended when employer-provided leave ran out); Crandall, supra note 42, at 898 (court rejected employee's claim that his rude behavior was so extreme as to put his employer on notice of a disability because a layperson cannot be expected to infer the existence of a psychiatric disorder given general prevalence of rudeness). Cf. Wells v. Mutual of Enumclaw, 244 F.App'x 790, 791-92 (9th Cir. 2007) (unpublished) (employer had no duty to provide reasonable accommodation to employee who had angry outbursts due to Alzheimer's Disease and related dementia because employee never requested accommodation and employer's knowledge of disability did not mean it knew or had reason to know the disability might be preventing employee from requesting accommodation).

[58]See 29 C.F.R. pt. 1630 app. § 1630.9 (2007); see also Reasonable Accommodation, supra note 11, at Question 41.

[59]See TAM, supra note 7, at VII (7.7) ("An employer must provide an employee with a disability with reasonable accommodation necessary to enable the employee to participate in the evaluation process"); see also Reasonable Accommodation, supra note 11, at Question 14.

[60] See Degnan, supra note 37. Although the EEOC found a failure to provide reasonable accommodation, the decision stated that this violation did not justify Degnan's physical and verbal rampage in response to the agency's failure to provide accommodation.

[61] Cf. Atkins v. Apfel, EEOC Appeal No. 02970004 (July 24, 2000) (agency failed to provide an effective reasonable accommodation and called into question the validity of its disciplinary actions when it denied request for an outside interpreter and instead insisted that the deaf employee being investigated for insubordination communicate through a staff interpreter, despite the fact that the agency knew the two individuals had an acrimonious relationship, the interpreter clearly had a stake in the outcome of at least two of the disciplinary matters, and the interpreter's competence was at issue).

[62] 42 U.S.C. § 12112(d)(4)(A) (2000); 29 C.F.R. § 1630.14(c) (2007). See Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999).

[63]See Question 5 in EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of

Employees Under the Americans with Disabilities Act (ADA) (July 26, 2000), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees [hereinafter Medical Examinations].

[64] All medical information obtained by an employer must remain confidential. This means an employer cannot commingle medical information with other personnel information, and can share medical information only in limited circumstances with supervisors, managers, first aid and safety personel, and government officials investigating compliance with the ADA. 42 U.S.C. §§ 12112(d)(3)(B), (4)(C) (2000); 29 C.F.R. § 1630.14(b)(1) (2007). See also n.10 and accompanying text in Medical Examinations, supra note 63.

[65]See Williams v. Motorola, Inc., 303 F.3d 1284, 1291 (11th Cir. 2002) (employee's recent belligerent behavior, threats, and acts of insubordination were sufficient to justify requiring a medical examination); Sullivan, supra note 62, at 812 (employee's misconduct and insubordination gave the employer reason to seek further information about his medical fitness to continue teaching, particularly where prior to requesting the examination the employer sought input from a psychologist who suggested that an examination was in order); Ward v. Merck & Co., 226 F.App'x 131, 138-40 (3d Cir. 2007) (unpublished) (employer's request that employee undergo a psychiatric examination was job-related and consistent with business necessity where his behavior and job performance deteriorated after he returned from medical leave for treatment of a psychiatric illness).

[66]See Sullivan, supra note 62, at 811; cf. Clark v. Potter, EEOC Appeal No. 01992682 (November 20, 2001) (while employer may have had grounds to discipline an employee who created a "toxic" work environment over a period of several years by taking notes on coworkers, providing supervisor with steady stream of (mostly baseless) complaints about coworkers, and showing an unwillingness to cease these actions, employer did not have a legal basis to order a psychiatric examination because no evidence indicated that employee had a medical condition that was causing him to perform poorly or posing a direct threat).

[67]See Sista, supra note 39, at 173 (employer not obligated to pursue alternative diagnosis of employee's condition and its failure to do so confirms that its decision to fire employee did not depend on any perception of his mental state).

[68] 29 C.F.R. pt. 1630 app. - 1630.2(o) (2007) (leave as a reasonable accommodation under the ADA); 29 C.F.R. § 825.1 (2007) (medical leave required under the Family and Medical Leave Act of 1993).

[69]Cf. Ward v. Massachusetts Health Research Inst., Inc., 209 F.3d 29, 35 (1st Cir. 2000) (while a fixed work schedule may be an essential function of most positions it was not so here because evidence showed that the employer had a flexible arrival policy permitting employees to arrive at work anytime between 7 and 9 a.m. as long as they worked a total of 7.5 hours each day and the employer failed to show that the plaintiff's job required him to arrive at a specific time each day).

[70]Cf. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (for summary judgment purposes, employer failed to show undue hardship in granting additional leave to employee who had been on medical leave for seven months and employer's policy permitted such leave for up to one year).

[71]See Reasonable Accommodation, supra note 11, at Questions 17, 22; cf. Holly v. Clairson Indus., L.L.C., 492

F.3d 1247, 1258, 1260 (11th Cir. 2007) (because an employer cannot avoid its reasonable accommodation obligation by designating all functions as essential a factual issue existed as to whether the company's strict punctuality policy could be modified as a reasonable accommodation for an employee with paraplegia whose job did not require strict punctuality and who always made up the time); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (uninterrupted attendance not deemed an "essential function" because that would relieve an employer from having to provide unpaid leave as a reasonable accommodation).

[72]See 42 U.S.C. § 12111(9)(B) (2000); see also Reasonable Accommodation, supra note 11, at Question 22.

[73] See, e.g., Brenneman v. MedCentral Health Sys., 366 F.3d 412, 420 (6th Cir. 2004), cert. denied, 543 U.S. 1146 (2005) (pharmacist with diabetes absent at least 109 times over a 5-year period was unqualified because of excessive absenteeism); Conneen, supra note 49, at 331 (termination for excessive tardiness lawful where employee, who once was given a modified schedule as a reasonable accommodation, failed to request resumption of this accommodation when she again began arriving late due to morning sedation and instead gave her employer reasons unrelated to her disability for the late arrival); Amadio v. Ford Motor Co., 238 F.3d 919, 928 (7th Cir. 2001) (employer is not required to give an open-ended schedule to allow an employee to come and go as he pleases); Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1101 (8th Cir. 1999) (employee with numerous absences unable to meet essential function of regular and reliable attendance); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (an employee is not qualified if he has prolonged, frequent, and unpredictable absences); Quinn v. Veneman, EEOC Appeal No. 01A34982 (December 21, 2004) (termination of employee with depression for repeated unexcused late arrivals was lawful where employee failed to provide medical documentation justifying any change in attendance requirements and evidence showed supervisor met with employee at least 20 times over a two-year period to discuss attendance problems); Lopez v. Potter, EEOC Appeal No. 01996955 (January 16, 2002) (employer did not have to excuse employee's persistent tardiness due to alcoholism and thus its use of progressive discipline, culminating in termination, was lawful).

[74]See, e.g., Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 850 (8th Cir. 2002) (reassigning an absent employee's duties to coworkers resulted in the coworkers being unable to perform their own duties).

[75] See, e.g. Rask v. Fresenius Med. Care N. Am., 509 F.3d 466, 470 (8th Cir. 2007) (dialysis technician who admitted that she could not come to work on a regular and reliable basis was not qualified); Brenneman v. MedCentral Health Sys., 366 F.3d 412, 420 (6th Cir. 2004), cert. denied, 543 U.S. 1146 (2005) ("excessive absenteeism" over several years rendered employee unqualified); Haschmann v. Time Warner Entertainment Co. L.P., 151 F.3d 591, 602 (7th Cir. 1998) ("it is not the absence itself but rather the excessive frequency of an employee's absences in relation to the employee's job responsibilities" that may determine if she is qualified); and Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (an employee is not qualified if she has prolonged, frequent, and unpredictable absences).

[76] While the EEOC and a minority of courts have focused on extended or indefinite leave as a matter of undue hardship, almost all circuit courts have instead held that indefinite leave is not a reasonable accommodation. Compare Reasonable Accommodation, supra note 11, at Question 44 (if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave) and Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648-50 (1st Cir. 2000) (plaintiff's request for a two-month extension of leave

after 15 months of medical leave could be denied only if employer showed undue hardship) with Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003) (employer's granting of leave over the years showed that employee's disability was not improving and thus his repeated requests had become an unreasonable request for indefinite leave and a confirmation that he could not currently, or in the near future, be expected to perform his essential functions); Pickens v. Soo Line R.R., 264 F.3d 773, 777-78 (8th Cir. 2001) (request for leave was not reasonable where employee took leave 29 times in a 10-month period and sought to be allowed to work when he wanted); Walsh v. United Parcel Serv., 201 F.3d 718, 727 (6th Cir. 2000) (where an employer has provided substantial leave - here 18 months of paid and unpaid leave - a request for additional leave of a significant duration with no clear prospect for returning to work is not a reasonable accommodation); Walton v. Mental Health Assoc. of Southeastern Pennsylvania, 168 F.3d 661, 671 (3d Cir. 1999) (while unpaid leave can be a reasonable accommodation, an employer is not required to provide repeated extensions of such leave); and Corder v. Lucent Tech., Inc., 162 F.3d 924, 928 (7th Cir. 1998) (employer does not need to provide indefinite leave as a reasonable accommodation for employee who has frequent, unpredictable absences, especially where employer has provide extended leave over a long period of time and other reasonable accommodations to give the employee every opportunity to perform her job).

[77]See Reasonable Accommodation, supra note 11, at Question 21, Example A.

[78] See id., supra note 11, at Question 17.

[79] See Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999).

[80]Compare Conneen, supra note 49, at 329 (employer cannot merely state that punctuality is important where no evidence demonstrates this proposition, such as tardiness affected quality of employee's performance or bank operations were harmed by her late arrival); with Earl v. Mervyns, Inc. 207 F.3d 1361, 1366 (11th Cir. 2000) (employer's handbook emphasized the importance of punctuality, it instituted a comprehensive system of warnings and reprimands for violation of the policy, and in this particular case, employee's job required that she report punctually at a certain time because she prepared the store before the arrival of customers and no other employees were assigned to do those duties).

[81] This publication does not address the extent to which an employer may need to modify dress and grooming standards to comply with Title VII of the Civil Rights Act of 1964 (e.g., to avoid discrimination on the basis of race or as a reasonable accommodation for an employee's religion).

[82] 42 U.S.C. § 12114(a) (2000) ("the term §qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the entity acts on the basis of such use"); see also 42 U.S.C. § 12210(a) (2000) ("the term §individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use"). The ADA contains several other exclusions from the definition of "disability" (e.g., kleptomania, compulsive gambling, and sexual disorders such as voyeurism and pedophilia). See 42 U.S.C. § 12211.

[83] 42 U.S.C. § 12210(b) (2000); see also EEOC, Compliance Manual Section on Definition of the Term Disability, Sec. 902.6 (March 14, 1995), available at www.eeoc.gov/policy/docs/902cm.html.

[84] 42 U.S.C. § 12114 (c)(4) (2000). The ADA definitions of "disability" may include a person who is an alcoholic

or recovering alcoholic, as well as a person who: (1) is a recovered drug addict, (2) has ceased engaging in the illegal use of drugs, and (3) is either participating in a supervised rehabilitation program or has been rehabilitated successfully. See 42 U.S.C. §12210(b) (2000). Regardless of coverage under the ADA, an individual's alcoholism or drug addiction cannot be used to shield the employee from the consequences of poor performance or conduct that result from these conditions.

[85]Hernandez v. England, EEOC Appeal No. 01A41079 (March 30, 2004); see also Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 672 (7th Cir. 2000) (upholding termination of physician for treating patients while under the influence of alcohol); Maddox v. Univ. of Tenn., 62 F.3d 843, 848 (6th Cir. 1995) (upholding employee's termination because although alcoholism may have compelled employee to drink, it did not force him to drive or engage in other inappropriate conduct).

[86] 42 U.S.C. § 12114(c)(1) (2000).

[87] 42 U.S.C. § 12114 (c)(3) and (5) (2000).

[88]See note 82, supra.

[89]See Johnson v. Babbitt, EEOC Docket No. 03940100 (March 28, 1996); and n.103 in Reasonable Accommodation, supra note 11. See also Longen v. Waterous Co., 347 F.3d 685, 689 (8th Cir. 2003) (a last chance agreement is valid where an employee receives something of value - e.g., employer does not terminate him for misconduct - in exchange for the employee's voluntary agreement to refrain from using alcohol or drugs); Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1181 (6th Cir. 1997) (pursuant to terms of a last chance agreement, employee fired after he failed a test for alcohol use).

[90] Many states and localities have disability anti-discrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Individuals may file a charge with either the EEOC or a FEPA. If a charge filed with a FEPA is also covered under the ADA, the FEPA will "dual file" the charge with the EEOC but usually will retain the charge for investigation. If an ADA charge filed with the EEOC is also covered by a state or local disability discrimination law, the EEOC will "dual file" the charge with the FEPA but usually will retain the charge for investigation.

Use of Codeine, Oxycodone, and Other Opioids: Information for Employees

This guidance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

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Use of Codeine, Oxycodone, and Other Opioids: Information for Employees

Issue Date:

08-05-2020

General Topics:

Disability, Drug Use, Reasonable Accommodations

Summary:

The document for Employees explains the ADA nondiscrimination and reasonable accommodation provisions that may apply to those who are not engaged in the current illegal use of drugs and are qualified for employment.

Citation:

ADA

Document Applicant:

Employees

Previous Revision:

No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

If you are using opioids, are addicted to opioids, or were addicted to opioids in the past, but are not currently using drugs illegally, you should know that under the Americans with Disabilities Act (ADA) you may have the right to get reasonable accommodations and other protections that can help you keep your job.[1]

"Opioids" include prescription drugs such as codeine, morphine, oxycodone (OxyContin®, Percodan®, Percocet®), hydrocodone (Vicodin®, Lortab®, Lorcet®), and meperidine (Demerol®), as well as illegal drugs like heroin. They also include buprenorphine (Suboxone® or Subutex®) and methadone, which can be prescribed to treat opioid addiction in a Medication Assisted Treatment ("MAT") program.

The following questions and answers from the Equal Employment Opportunity Commission (EEOC) briefly explain these rights. This information is not new policy; rather, this document applies principles already established in the ADA's statutory and regulatory provisions as well as previously-issued guidance. **The contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This guidance is intended only to provide clarity to the public regarding existing requirements under the law.** You may also have additional rights under other laws not discussed here, such as the Family and Medical Leave Act (FMLA) and state or local laws.[2]

Disqualification from a Job

1. Could I be automatically disqualified for a job because I use opioids, or because I used opioids in the past?

The ADA allows employers to fire you and take other employment actions against you based on illegal use of opioids, even if you do not have performance or safety problems.[3] Also, employers are allowed to disqualify you if another federal law requires them to do it.[4]

But if you aren't disqualified by federal law and your opioid use is legal, an employer cannot automatically disqualify you because of opioid use *without considering if there is a way for you to do the job safely and effectively* **(see Questions 4–13)**.[5]

2. What if I am in a MAT program for opioid addiction that requires me to take opioid medication?

If you are taking an opioid medication as directed in a MAT program, then you have a valid prescription and your use of the medication is legal. Under the ADA, you cannot be denied a job or fired from a job because you are in a MAT program unless you cannot do the job safely and effectively, or you are disqualified under another federal law.

3. What if a drug test comes back positive because I am lawfully using opioid medication?

An employer should give anyone subject to drug testing an opportunity to provide information about lawful drug use that may cause a drug test result that shows opioid use. An employer may do this by asking before the test is administered whether you take medication that could cause a positive result, or it may ask all people who test positive for an explanation.

Performance and Safety

4. What if my employer thinks that my opioid use, history of opioid use, or treatment for opioid addiction could interfere with safe and effective job performance?

If you aren't using opioids illegally and aren't disqualified for the job by federal law the employer may have to give you a reasonable accommodation before firing you or rejecting your job application based on opioid use. If the employer has let you know about its concern, then you need to ask for a reasonable accommodation if you want one. (See Question 9, below.)

A reasonable accommodation is some type of change in the way things are normally done at work, such as a different break or work schedule (e.g., scheduling work around treatment), a change in shift assignment, or a temporary transfer to another position. These are just examples; employees may ask for, and employers may suggest, other modifications or changes.

However, an employer never has to lower production or performance standards, eliminate essential functions (fundamental duties) of a job, pay for work that is not performed, or excuse illegal drug use on the job as a reasonable accommodation.[6]

5. Could I get a reasonable accommodation because I take prescription opioids to treat pain?

You may be able to get a reasonable accommodation if the medical condition that is causing pain qualifies as a "disability" under the ADA. A medical condition does not need to be permanent or stop you from working to be an ADA "disability."[7] Many conditions that cause pain significant enough for a doctor to prescribe opioids will qualify.

You may also qualify for a reasonable accommodation if the opioid medication you are taking interferes with your everyday functioning.

It is your responsibility to ask for a reasonable accommodation if you want one. (See Question 9, below).

6. Could I get a reasonable accommodation because of an addiction to opioids?

Yes, opioid addiction (sometimes called "opioid use disorder" or "OUD") is itself a diagnosable medical condition that can be an ADA disability. You may be able to get a reasonable accommodation for OUD. But an employer may deny you an accommodation if you are using opioids illegally, even if you have an OUD.

7. What if I have recovered from an opioid addiction, but still need a reasonable accommodation to help me avoid relapse?

You can get reasonable accommodations that you need because of a disability that you had in the past.[8] You might be able to get an altered schedule, for example, if you need it to attend a support group meeting or therapy session that will help you avoid relapse.

8. Could I get reasonable accommodations for a medical condition related to opioid addiction?

Yes, if the condition is a disability. Medical conditions that are often associated with opioid addiction, such as major depression and post-traumatic stress disorder (PTSD), may be disabilities. For more information on mental health conditions and the ADA, see *Depression, PTSD, & Other Mental Health Conditions in The Workplace: Your Legal Rights* at https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights, and *The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work* at https://www.eeoc.gov/laws/guidance/mental-health-providers-role-clients-request-reasonable-accommodation-work.

9. What should I do if I need a reasonable accommodation?

Ask for one. Tell a supervisor, HR manager, or other appropriate person that you need a change at work because of a medical condition. Check to see whether your employer has procedures for requesting reasonable accommodations. Following these procedures may make the process go faster, although employers can't deny you a reasonable accommodation just because you did not follow specific procedures.

You are allowed to make a request at any time. You don't need to have a particular accommodation in mind, but you can ask for something specific if you know what it is. You can also have someone else ask for you, such as a doctor or counselor, although your employer will still probably want to discuss the accommodation directly with you as soon as possible.

Because an employer does not have to excuse poor job performance, even if it was caused by a medical condition or treatment for a medical condition, it is generally better to ask for a reasonable accommodation before problems occur or become worse. (Many people choose to wait to after they receive a job offer, however, because it may be hard to prove illegal discrimination that takes place before a job offer.)

10. What will happen after I ask for a reasonable accommodation?

Your employer might ask you to put your request in writing or to fill out a form, and to generally describe how your work is affected by your disability. Your employer may also ask you to submit a letter from a health care provider that shows your ADA disability (see Questions 6–9 above), and that explains why you need a reasonable accommodation because of it. You can help your health care provider by showing him or her a copy of the EEOC publication *How to Help Current and Former Patients Who Have Used Opioids Stay Employed*

at https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids.

Your employer cannot legally fire you, or refuse to hire or promote you, simply because you asked for a reasonable accommodation or because you need one.[9]

11. If I need a reasonable accommodation because of an ADA disability, does the employer have to give it to me?

If a reasonable accommodation would allow you to perform the job safely and effectively, and does not involve significant difficulty or expense, the employer must give you one.[10] If more than one accommodation would work, the employer can choose which one to give you. The employer is not allowed to charge you for the accommodation.

12. What if I think I can do the job safely (with a reasonable accommodation, if one is necessary), but the employer disagrees?

Assuming you aren't disqualified by federal law or using opioids illegally, the employer must have objective evidence that you can't do the job or pose a significant safety risk, even with a reasonable accommodation. To remove you from the job for safety reasons, the evidence must show that you pose a significant risk of substantial harm—you can't be removed because of remote or speculative risks.[11] To make sure that it has enough objective evidence about what you can safely and effectively do, the employer might ask you to undergo a medical evaluation.[12]

13. What if I really can't do the job safely or reliably right now, but I may be able to do it safely again in the future?

Your employer might still be required to hold your job while you take leave for treatment or recovery. If you need leave because of an ADA disability (see Questions 6–9), you should be allowed to use sick and accrued leave like anyone else, unless you are using opioids illegally. You should also check your employer's leave policy to see whether it provides leave for substance abuse treatment.

Even if you have no employer-provided leave available, you still may be able to get unpaid leave. If you have worked at least 1,250 hours during the past 12 months and your employer has 50 or more employees, you may be entitled to unpaid leave under the FMLA. The FMLA is enforced by the United States Department of Labor. More information about this law can be found at www.dol.gov/whd/fmla. You might also be entitled to unpaid leave as a reasonable accommodation if you need the time off because of a disability, are not using drugs illegally, and are expected to recover the ability to do your job.

If you are permanently unable to do your regular job, you may ask your employer to reassign you to a job that you can do as a reasonable accommodation, if one is available. For more information on reasonable accommodations in employment, including reassignment, see *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, available https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

Protect Your Rights

14. What should I do if I think my rights have been violated?

The Equal Employment Opportunity Commission (EEOC) can help you decide what to do next. If you decide to file a charge of discrimination with the EEOC, it conducts an investigation. Because you must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. It is illegal for your employer to retaliate against you for contacting the EEOC or filing a charge.

For general information, visit the Equal Employment Opportunity's (EEOC's) website (https://www.eeoc.gov), or call the EEOC at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or on our sign language access line at 1-844-234-5122 (ASL Video Phone).

For more information about filing a charge, visit https://www.eeoc.gov/how-file-charge-employment-discrimination. If you would like to begin the process of filing a charge, go to our Online Public Portal at https://publicportal.eeoc.gov, contact us at one of the above phone numbers, or visit your local EEOC office (see https://www.eeoc.gov/field-office for contact information).

[1] 42 U.S.C. § 12112, et seq.; 29 C.F.R. §§ 1630.1 – 1630.16. The various facets of nondiscrimination, reasonable accommodation, and other protections under Title I of the ADA are addressed in different sections of the statute and regulations. *See, e.g.,* 29 C.F.R. § 1630.2(g) –(k) (current disability and record of a past disability) and 1630.9 (reasonable accommodation generally); *see also* 42 U.S.C. § 12114 (exclusions relating to current illegal use of drugs).

[2] The FMLA, 29 U.S.C. § 2601, et seq., is enforced by the U.S. Department of Labor (DOL). More information about the FMLA is available in the DOL FMLA regulations at 29 C.F.R. part 825, and on DOL's website at www.dol.gov.

[3] 42 U.S.C. § 12114, 12210; 29 C.F.R. § 1630.3, 1630.16(b) and (c).

[4] 29 C.F.R. § 1630.16(e).

[5] 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r), 1630.15(2).

[6] 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b); see also 1630.2(m) and (n).

[7] 42 U.S.C. § 12102; 29 C.F.R. 1630.2(g)-(k).

[8] 29 C.F.R. § 1630.2(k)(3).

[9] 42 U.S.C § 12203; 29 C.F.R § 1630.12.

[10] 42 U.S.C. § 12112(b)(5); 29 C.F.R. §§ 1630.2(o) and (p), and 1630.9. For more information about reasonable accommodation, see the EEOC publication *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

[11] 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r).

[12] 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14.

Marijuana in the Workplace

By Mark T. Broth

Under both federal and New Hampshire law, the possession, distribution, or use of marijuana is a criminal act. New Hampshire law makes a limited exception for those persons who qualify to use "medical marijuana." Federal law contains no such exception. Technically, those persons permitted by the State to use marijuana for medical purposes are still subject to arrest and prosecution under federal law.

During the Obama administration, the United States Attorney General announced that federal dollars would not be expended to prosecute marijuana-related crimes in states which have legalized marijuana for medical or recreational use. At this point, it is unclear whether the Trump administration will continue this policy, or whether the federal government will seek to prosecute persons involved in those states that allow marijuana use, cultivation, and possession.

The fact that marijuana remains illegal in New Hampshire has had little impact on usage. According to statistics published by the Partnership for a Drug Free New Hampshire, 30.1% of New Hampshire residents ages 18-25 have used marijuana within the past 30 days. This is the fifth highest rate of usage in that age bracket among all states, and far exceeds the national average of 19.6%. A recent CBS report ranked New Hampshire fourth, behind only Alaska, Vermont, and Colorado, in the percentage of adults (14.8%) who use marijuana. With both Maine and Massachusetts having passed laws that will legalize recreational marijuana within the next several years, and the decriminalization of small amounts in Vermont, the availability of marijuana within New Hampshire is almost certain to increase.

What does this mean for New Hampshire employers? For many years, employers have attempted to maintain drug free workplaces. In the private sector, the primary tool for weeding out drug use has been pre-employment drug testing. Accurate tests have been available for many years that can identify the presence of the active chemicals in controlled substances. However, a basic problem with marijuana testing is that it is not time specific. While certain drugs are only detectable in a urine sample for a brief period of time, an individual may test positive for marijuana many weeks after they have last used. Standard drug tests cannot distinguish between those employees who use marijuana before or during work hours, and those employees who engage in "responsible use" outside of working hours, in a manner consistent with responsible use of alcohol.

Even if marijuana testing was more accurate, can New Hampshire employers afford to disqualify a significant percentage of potential job applicants solely on the basis of marijuana use? At 2.6%, New Hampshire has one of the lowest unemployment rates in the nation. With the "baby boomer" population reaching retirement age, a decline in migration from other states, low rates of retention of recent college graduates within the State, the low rate of foreign immigration, and among the lowest birth rates in the US, New Hampshire is heading for what Polecon Research described in 2016 as a "perfect storm" of labor shortages.

Unlike private sector employers, public employers cannot relocate their operations to states with greater workforce availability. This means that public employers will either need to pay more to attract and retain out of state talent or make do with the available in-State workforce. Which brings us back to marijuana. Clearly, there are some occupations (law enforcement, EMS, CDL license holders, etc.) where criminal drug use cannot be tolerated. But for many other public sector workforce occupations, and for many jobs in the private sector economy, blanket disqualification of marijuana users from the workforce may no longer be practical.

Even if a public employer wanted to exclude all marijuana users from the workforce, constitutional considerations limit the ability to drug test employees who are not engaged in law enforcement, commercial driving, and certain other safety sensitive functions. Employers may need to consider redefining the "drug free" workplace as one that does not exclude those who use marijuana but focuses instead on the concept of responsible use. Like alcohol use, marijuana use is a learned behavior. Employers may need to consider shifting their focus from exclusion to enforcement of reasonable use standards: no use, possession, or intoxication during work hours; and no off-duty use that would directly interfere with the performance of job duties (such as loss of license).

Mark Broth is a member of DrummondWoodsum's Labor and Employment Group. His practice focuses on the representation of private and public employers in all aspects of the employer-employee relationship. This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Drummond Woodsum & MacMahon, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that the reader should rely on it as such.

As the Budding Cannabis Industry Expands in New England, Businesses Need to Evaluate Their Appetite for the Risks Associated with Cannabis-Related Businesses

By Nathan Fennessy and Sara Moppin

It has now been a year since recreational cannabis sales began in Massachusetts. Maine expects recreational sales to commence in spring 2020. And New Hampshire's small medical-cannabis market continues to expand. As a result, businesses of all kinds are increasingly coming into contact with cannabis-related businesses ("CRBs") — whether they know it or not. Businesses, particularly financial institutions, need to consider implementing policies to define their risk tolerances with respect to CRBs and setup due diligence programs to systematically address the potential risks associated with CRBs.

It is still illegal under federal law to possess or distribute marijuana (but not hemp).

The Controlled Substance Act of 1970 lists marijuana as a Schedule I drug and makes it illegal under federal law to possess or distribute marijuana. As a result, the federal government has the power to seize personal and real property used in the cultivation, manufacture, sale and distribution of marijuana, even if such activities are legal under state law.

There is some movement afoot at the federal level to reconsider whether certain cannabis products are appropriately listed as Schedule I drugs. In December 2018, Congress passed and the president signed into law the Hemp Farming Act as part of the Farm Bill. This law removed certain hemp-derived products from Schedule I provided that hemp is produced in compliance with USDA guidelines and has a THC content of 0.3 percent or less.

Federal agencies have provided some guidance regarding their enforcement priorities.

Medical marijuana is now legal in 34 states and 11 states have legalized recreational marijuana. But financial transactions involving proceeds generated by marijuana-related conduct can still form the basis for federal prosecution under money laundering statutes and the Bank Secrecy Act. Given the increasing divergence between federal and state law, federal agencies have attempted to provide some comfort to CRBs operating legally pursuant to state law (and those doing business with them) that federal agencies will not infringe on their activities provided they observe certain practices.

The first effort to provide guidance was a memorandum issued by the U.S. Department of Justice (DOJ) in 2013, which became known as the "Cole Memo." The Cole Memo (actually multiple memoranda) set forth the DOJ's enforcement priorities with respect to marijuana. While the Cole Memo provided some level of certainty to financial institutions dealing with CRBs, in January 2018, former U.S. Attorney General Jeff Sessions rescinded the Cole Memo and directed all United States Attorneys to use "previously established prosecutorial principles" in determining whether to pursue marijuana enforcement.

The principles set forth in the Cole Memo, however, continue to be applicable to financial institutions as they were incorporated into the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") guidance that was issued in February 2014 ("FinCEN Guidance"). The FinCEN Guidance advises financial institutions that they need to conduct an internal assessment to evaluate the risks associated with working with CRBs and its "capacity to manage those risks effectively." The Guidance identifies customer due diligence as a "critical aspect of making this assessment" and then provides a number of best practices for performing this type of due diligence.

The Rohrabacher Amendment and SAFE Banking Act.

While most of the action in Washington has been at the agency level, Congress has attempted to provide some level of comfort to CRBs and those working with them that they will not be subject to federal prosecution.

Since 2014 (for the 2015 fiscal year), the Rohrabacher Amendment has been adopted as part of the budget resolution fund-

BUSINESSES *continued on page 23*

ing the federal government. The amendment prohibits DOJ from using any of the funds appropriated by Congress to prevent states with medical marijuana "from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." It was last renewed in February of 2019 as part of the spending bill signed by President Trump, and will need to be renewed for the fiscal year 2020 budget. Importantly, the Rohrabacher Amendment applies solely to medical marijuana, and does not apply to recreational use in those states that have legalized it.

This year the Secure and Fair Enforcement (SAFE) Banking Act passed out of the House with overwhelming bipartisan support 321-103. This bill prevents federal banking regulators from punishing banks for working with CRBs that are obeying state laws. The bill also protects ancillary businesses working with businesses in the legal cannabis industry from being charged with money laundering and other financial crimes. The bill still faces an uphill battle in the Senate where the Chairman of the Senate Banking Committee, Sen. Mike Crapo (R-ID), has expressed reservations about the bill.

With all this uncertainty at the federal level, what are businesses doing?

Given the continued uncertainty at the federal level, financial institutions and other businesses providing services to CRBs have begun implementing their own internal policies to systematically address the potential risks associated with CRBs. This starts with any business receiving compensation from or participating in any way in the growth, manufacture, distribution, dispensing, transportation, or sale of cannabis.

CRBs are then split into two categories: direct CRBs and indirect CRBs. A direct CRB is a business that is involved in the "seed to sale process" (e.g. growers, dispensaries). An indirect CRB is a business that accepts marijuana proceeds as payment for their products/services (e.g. the electrician installing wiring for lamps at growing facility).

Businesses then need to evaluate their appetite for risk in systematic way. Perhaps they are comfortable doing business with an indirect CRB like a landlord collecting rental payments from recreational cannabis dispensary. They may be less comfortable with processing the payroll for the same recreational cannabis dispensary. But these decisions should be reflected in a policy that can then be applied systematically as new opportunities arise. And customer due diligence — initially and on a regular basis —will be required to mitigate the risks involved.

Nathan Fennessy is a Director and Sara Moppin is Of Counsel at Preti Flaherty. They regularly advise clients on cannabis-related issues and contribute to the firm's Cannabis Law and Policy Report Blog: https://cannabislawandpolicyupdate.blogspot.com/.

Learn more at the NHBA CLE program, "Clearing the Haze," on February 13. See details on page 37 and register at https://nhbar.inreachce.com.

The statute defines a "non-compete agreement" as an agreement that restricts such a low-wage employee from performing work for another employer for a specified period of time; working in a specified geographic area; or working for another employer that is similar to the work done by the employee for the employer who is a party to the non-compete agreement. This definition is broad in its scope, providing alternative definitions, capturing a breadth of agreements however varied they may be in their drafting.

With the varied limitations that have been enacted regarding the use of restrictive covenants, attorneys should consider counseling their business clients on reviewing on-boarding procedures in implementing non-compete agreements, reviewing the organization's use of separation packages with exiting employees and consider revising multi-state agreements to ensure they are in compliance with jurisdictions for which they may be used.

A member of Donahue, Tucker & Ciandella, PLLC, Attorney Douglas Mansfield's practice focus on corporate/business and employment law. Additionally, Attorney Mansfield's practice includes data privacy issues.

indicated, a new prevailing wage [illegible] to be obtained and new advertising will need to be completed for the new location.

Due to the myriad of immigration compliance requirements that may impact a client and the client's ability to retain key foreign employees, business attorneys should take care to remember immigration compliance in their business transactions.

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172 N.H. 13
Supreme Court of New Hampshire.

APPEAL OF Andrew PANAGGIO (New Hampshire Compensation Appeals Board)

No. 2017-0469
|
Argued: June 14, 2018
|
Opinion Issued: March 7, 2019

Synopsis

Background: Workers' compensation claimant appealed decision of New Hampshire Department of Labor concluding that workers' compensation insurance carrier's denial of his request for reimbursement for the cost of therapeutic cannabis was reasonable. The New Hampshire Compensation Appeals Board upheld the carrier's refusal to reimburse worker. Worker appealed.

Holdings: The Supreme Court, Bassett, J., held that:

[1] insurance carrier was not prohibited from reimbursing claimant for the cost of purchasing medical marijuana by state statute, and

[2] the board failed to sufficiently articulate law that supported its legal conclusion that insurance carrier was unable to reimburse claimant based on the fact that possession of marijuana was illegal under federal law.

Reversed in part, vacated in part, and remanded.

West Headnotes (14)

[1] Workers' Compensation In general; questions of law or fact
Workers' Compensation Sufficiency of Evidence in Support

The appellate court will not disturb a New Hampshire Compensation Appeals Board's decision absent an error of law, or unless, by a clear preponderance of the evidence, the court finds it to be unjust or unreasonable. N.H. Rev. Stat. Ann. § 541:13.

1 Cases that cite this headnote

[2] Workers' Compensation Presumptions and burden of showing error

The appealing party has the burden of demonstrating that a New Hampshire Compensation Appeals Board's decision was erroneous. N.H. Rev. Stat. Ann. § 541:13.

1 Cases that cite this headnote

[3] Workers' Compensation Conclusiveness of administrative findings in general

The appellate court reviews the New Hampshire Compensation Appeals Board's factual findings deferentially. N.H. Rev. Stat. Ann. § 541:13.

[4] Workers' Compensation In general; questions of law or fact

The appellate court reviews the New Hampshire Compensation Appeals Board's statutory interpretation de novo. N.H. Rev. Stat. Ann. § 541:13.

[5] Workers' Compensation Extent of Right

Workers' compensation insurance carrier was not prohibited from reimbursing claimant for the cost of purchasing medical marijuana by

provision of therapeutic cannabis statute addressing reimbursement claims; Compensation Appeals Board found that claimant's use of medical marijuana was reasonable, medically necessary, and causally related to his work injury, and the therapeutic cannabis statute did not disturb carrier's preexisting duty under workers' compensation statute. N.H. Rev. Stat. Ann. §§ 126-X:3(III)(a), 281-A:23(I).

[6] **Statutes**🔑Judicial construction; role, authority, and duty of courts

On questions of statutory interpretation, the Supreme Court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.

[7] **Statutes**🔑Language
Statutes🔑Plain Language; Plain, Ordinary, or Common Meaning

In interpreting a statute, the court first examines the language of the statute and ascribes the plain and ordinary meanings to the words used.

[8] **Statutes**🔑Construction as written
Statutes🔑Absent terms; silence; omissions

The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.

[9] **Workers' Compensation**🔑Liberal or strict construction in general

Courts construe the workers' compensation statute liberally to give the broadest reasonable effect to its remedial purpose.

[10] **Workers' Compensation**🔑Construction in favor of employee or beneficiary

When construing the workers' compensation statute, the court resolves all reasonable doubts in favor of the injured worker.

[11] **Health**🔑Medication
Health🔑Benefits or Services Covered
Insurance🔑Drugs and Medicines
Workers' Compensation🔑Extent of Right

Although statute addressing limitations on the therapeutic use of cannabis does not create a right to reimbursement for the cost of medical marijuana nor require any of the listed entities to participate in the therapeutic cannabis program, neither does it bar any of those entities from providing reimbursement. N.H. Rev. Stat. Ann. § 126-X:3(III)(a).

[12] **Health**🔑Medication
Health🔑Benefits or Services Covered
Insurance🔑Drugs and Medicines
Workers' Compensation🔑Extent of Right

Although statute addressing limitations on reimbursement for therapeutic use of cannabis does not newly create an affirmative statutory obligation for any enumerated entity to reimburse any patient for money spent on therapeutic cannabis, neither does it disturb preexisting, separate statutory obligations to provide for reimbursement. N.H. Rev. Stat. Ann.

§ 126-X:3(III)(a).

[13] Workers' Compensation Hearing, findings, and original and supplemental awards

Compensation Appeals Board failed to sufficiently articulate law that supported its legal conclusion that workers' compensation insurance carrier was unable to reimburse claimant for cost of therapeutic cannabis based on the fact that possession of marijuana was illegal under federal law; board's order did not indicate that it relied on provisions of federal Controlled Substance Act in making its decision, did not analyze whether carrier's compliance with an order to reimburse claimant obtained in accordance with state law would violate any federal statute, and did not cite legal authority for its conclusion that reimbursement would expose the insurance carrier to criminal prosecution. 18 U.S.C.A. § 2(a); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; N.H. Rev. Stat. Ann. §§ 126-X:3(III), 541-A:35.

[14] Workers' Compensation Opinion or reasons

The standard of review of a Compensation Appeals Board's decision presupposes that the board has made findings that provide an adequate record of its reasoning sufficient for a reviewing court to render meaningful review. N.H. Rev. Stat. Ann. § 541-A:35.

****1100** Compensation Appeals Board

Attorneys and Law Firms

Shaheen & Gordon, P.A., of Manchester (Jared P. O'Connor, Nashua, on the brief and orally), for the petitioner.

Tentindo, Kendall, Canniff & Keefe LLP, of Boston, Massachusetts (Robert S. Martin on the brief and orally), for the respondent.

Opinion

BASSETT, J.

***14** The petitioner, Andrew Panaggio, appeals a decision of the New Hampshire Compensation Appeals Board (board). The board denied his request for reimbursement from the respondent, CNA Insurance Company (insurance carrier), for the cost incurred for therapeutic cannabis authorized pursuant to RSA chapter 126-X, to treat his work-related injury.[1] We reverse in part, vacate in part, and remand.

****1101** The record supports the following facts. Panaggio suffered a work-related injury to his lower back in 1991. A permanent impairment award was approved in 1996, and in 1997 he received a lump-sum settlement. Panaggio continues to suffer ongoing pain as a result of his injury and has experienced negative side effects from taking prescribed opiates. In 2016, the New Hampshire Department of Health and Human Services determined that Panaggio qualified as a patient in the therapeutic cannabis program, and issued him a New Hampshire cannabis registry identification card. See RSA 126-X:4 (Supp. 2018). Panaggio purchased medical marijuana and submitted his receipt to the workers' compensation insurance carrier for reimbursement. The carrier denied payment on the ground that "medical marijuana is not reasonable/necessary or causally related" to his injury.

Panaggio challenged the insurance carrier's denial before the New Hampshire Department of Labor. The hearing officer found that Panaggio had "failed to satisfy his burden of proof that the outstanding medical treatment is reasonable, related or made necessary by the work injury." Therefore, the officer concluded that "reimbursement and payment of expense associated with the medicinal marijuana cannabis is not reasonable."

Panaggio appealed the hearing officer's decision to the board. Following a hearing, the board rejected the insurance carrier's position that Panaggio's use of medical marijuana is not medically reasonable or necessary. The board credited Panaggio's testimony that "cannabis is palliative and has the added benefit of reducing his need for opiates," and unanimously found that Panaggio's "use is reasonable and medically

necessary." Nonetheless, a majority of the board upheld the carrier's refusal to reimburse Panaggio, concluding that "the carrier is not able to provide medical marijuana" because such reimbursement is "not legal under state or federal law."

***15** The board observed that "possession of marijuana is still a federal crime," and that the registry identification card issued by the State explains that RSA chapter 126-X "does not exempt a person from federal criminal penalties for the possession of cannabis." (Quotation omitted.) Relying upon the statutory language that "[n]othing in this chapter shall be construed to require ... [a]ny health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis," RSA 126-X:3, III(a), the board determined that RSA 126-X:3, III(a) (2015) bars Panaggio's request for reimbursement, finding that the clear purpose of the statute is "to protect such providers from being subject to criminal prosecution under federal law." Although noting that workers' compensation insurance carriers are not expressly identified in the statute, the board concluded that, because such carriers "provide payments for medical treatment just as health insurers do," subsection 3, III(a), applies to them as well.

One member of the three-member board dissented. He disagreed with the majority's conclusion that because "marijuana is still illegal under federal law ... [,] requiring the [carrier] to provide reimbursement would make the [carrier] complicit in this legal violation," noting that the insurance carrier "cites no specific section of the Federal Controlled Substances Act that reimbursement to the claimant would violate." In addition, he disagreed with the majority's interpretation of RSA 126-X:3, III, reasoning that it was not supported by a "simple reading of the law's language" and "[i]f the legislature had wanted to include workers' compensation [insurers], ****1102** these insurers could have been listed." Panaggio unsuccessfully moved for reconsideration, and this appeal followed.

[1] [2] [3] [4]On appeal, Panaggio argues that the board erred in its interpretation of RSA 126-X:3, III, and when it based its decision in part on the fact that possession of marijuana is illegal under federal law. We will not disturb the board's decision absent an error of law, or unless, by a clear preponderance of the evidence, we find it to be unjust or unreasonable. Appeal of Phillips, 169 N.H. 177, 180, 144 A.3d 882 (2016); see RSA 541:13 (2007). The appealing party has the burden of demonstrating that the board's decision was erroneous. See Appeal of Fay, 150 N.H. 321, 324, 837 A.2d 329 (2003). All findings of the board upon questions of fact properly before it are deemed to be prima facie lawful and reasonable. See RSA 541:13. Thus, we review the board's factual findings deferentially. See Appeal of N.H. Dep't of Corrections, 162 N.H. 750, 753, 34 A.3d 1210 (2011). We review its statutory interpretation de novo. Id.

[5]We first address Panaggio's argument that the board's interpretation of RSA 126-X:3, III(a) was erroneous. He asserts that "[a]bsent crystal clear instruction from the New Hampshire Legislature to do otherwise, the Board was ... required to order the insurer to pay" pursuant to the ***16** obligation imposed by the workers' compensation statute. See RSA 281-A:23, I (2010) (providing that an injured employee is entitled to have his or her employer's insurance carrier furnish "reasonable medical ... care ... for such period as the nature of the injury may require"). The insurance carrier does not challenge the board's finding that Panaggio's use of medical marijuana is reasonable and medically necessary. Rather, the carrier argues that "[t]he clear purpose of" RSA 126-X:3, III(a) "is to prevent any reimbursement of medical marijuana by any entity that would be subject under contract or law to pay." According to the carrier, "the plain and unambiguous language of the statute creates ... an explicit prohibition to require an insurer to pay a claim for reimbursement."

[6] [7] [8] [9] [10]On questions of statutory interpretation, we are the final arbiters of the intent of the legislature as expressed in the words of a statute considered as a whole. Appeal of Phillips, 169 N.H. at 180, 144 A.3d 882. We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. In addition, we construe the workers' compensation statute liberally to give the broadest reasonable effect to its remedial purpose. Appeal of Gamas, 158 N.H. 646, 648, 972 A.2d 1025 (2009). Thus, when construing the statute, we resolve all reasonable doubts in favor of the injured worker. Id.

[11]RSA 126-X:3, III states that "[n]othing in this chapter shall be construed to require ... [a]ny health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis." RSA 126-X:3, III(a) (emphasis added). Although the statute does not create a right to reimbursement for the cost of medical marijuana nor require any of the listed entities to participate in the therapeutic cannabis program, neither does it bar any of those entities from providing reimbursement. Importantly, the statute provides that "[a] qualifying patient shall not

be ... denied any right or privilege for the therapeutic use of cannabis in accordance with this chapter." RSA 126-X:2, I (2015). To read RSA 126-X:3, III as barring reimbursement to an ****1103** employee with a workplace injury for his reasonable and necessary medical care is to ignore this plain statutory language. Pursuant to the Workers' Compensation Law, an employer's insurance carrier "shall furnish or cause to be furnished to an injured employee reasonable medical ... care ... for such period as the nature of the injury may require." RSA 281-A:23, I. Thus, the effect of denying reimbursement to Panaggio under these circumstances is to deny him his right to medical care deemed reasonable under the Workers' Compensation Law.

***17** We note that statutes in other jurisdictions expressly prohibit workers' compensation insurance carriers from reimbursing claimants for the cost of medical marijuana. See, e.g., Fla. Stat. § 381.986(15) (2017) (providing in Florida's Medical Use of Marijuana statute that "[m]arijuana ... is not reimbursable under" Florida's Workers' Compensation Law); Mich. Comp. Laws § 418.315a (2014) (providing in the Michigan Worker's Disability Compensation Act that "[n]otwithstanding" the requirement that an employer "shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical ... treatment," an employer "is not required to reimburse or cause to be reimbursed charges for medical marihuana treatment"). Had the legislature intended to bar patients in the therapeutic cannabis program from receiving reimbursement under RSA 281-A:23, I, it easily could have done so, and we will not add language that the legislature did not see fit to include. See Appeal of Phillips, 169 N.H. at 180, 144 A.3d 882.

[12]Reading the language in RSA 126-X:3 in the context of the statutory scheme as a whole, we agree with Panaggio that, although RSA 126-X:3, III(a) "does not newly create an affirmative statutory obligation for any enumerated entity to reimburse any patient for money spent on therapeutic cannabis," neither does it "disturb preexisting, separate statutory obligations to provide for reimbursement." Accordingly, because the board found that Panaggio's use of medical marijuana is reasonable, medically necessary, and causally related to his work injury, we hold that the board erred when it determined that the insurance carrier is prohibited from reimbursing Panaggio for the cost of purchasing medical marijuana.

[13]Next, Panaggio asserts that the board erred by basing its decision, in part, on the fact that possession of marijuana is illegal under federal law. After rejecting the insurance carrier's argument that Panaggio's use of medical marijuana is not medically reasonable or necessary, the board concluded that "the carrier is not able to provide medical marijuana," observing that "possession of marijuana is still a federal crime." In its order, the board referenced information that the State provides to patients who qualify for the therapeutic cannabis program. The information includes statements that RSA chapter 126-X "does not exempt a person from federal criminal penalties for the possession of cannabis," and that federal law "does not allow for the medical or therapeutic use of cannabis." The board also noted that Attorney General Sessions had "announced that [the current] administration would resume prosecuting more stridently criminals involved in the drug trade whether they were violent offenders or not."

Panaggio argues that the board, having noted only that Panaggio's possession and use of medical marijuana is a federal crime, "did not explain ***18** why it necessarily follows that the carrier may not separately be ordered to comply with its own independent state law obligation to reimburse claimants for related medical treatment." He further argues that the "existence ****1104** of the Controlled Substances Act does not undo the Workers' Compensation Law's requirement to reimburse" because an order to reimburse will not make the insurance carrier "possess, manufacture or distribute" a controlled substance, and "[r]eimbursement of the cost of therapeutic cannabis to a patient otherwise qualified under New Hampshire law to possess it is not an offense identified in the Controlled Substances Act." See 21 U.S.C. § 841(a)(1) (2012).

On appeal, the insurance carrier asserts that if it "is ordered to reimburse the employee for the payment of medical marijuana, it would be in express violation" of federal laws that prohibit a person from knowingly possessing a controlled substance, see 21 U.S.C. § 841(a)(1), from attempting or conspiring to commit a violation of federal law related to controlled substances, see 21 U.S.C. § 846 (2012), and from aiding and abetting an offense against the United States, see 18 U.S.C. § 2(a) (2012). However, the board's order does not indicate that it relied upon any of these statutory provisions in reaching its decision. Nor did the board analyze whether the insurance carrier's compliance with an order to reimburse Panaggio for medical marijuana obtained in accordance with state law would violate any federal statute. For example, the board did not address whether, under those circumstances, the government would be able to prove the commission of a federal crime beyond a reasonable doubt, including proof that the carrier had the requisite criminal intent. See United States v. Watson, 669 F.2d 1374, 1379 (11th Cir. 1982) (to prove a conspiracy under

846, the government must prove that there was an agreement among the defendants to achieve an illegal purpose); United States v. Dolt, 27 F.3d 235, 238 (6th Cir. 1994) (to establish aiding and abetting, the government must prove that the defendant committed overt acts or affirmative conduct to further the offense, and intended to facilitate the commission of the crime); United States v. Rodriguez-Duran, 507 F.3d 749, 758-59 (1st Cir. 2007) (to prove aiding and abetting, "[m]ere association with the principal ... is insufficient, even with knowledge that the crime is to be committed" (quotation omitted)).

[14]Our standard of review of a board's decision presupposes that the board has made findings that provide an adequate record of its reasoning sufficient for a reviewing court to render meaningful review. See Motorsports Holdings v. Town of Tamworth, 160 N.H. 95, 107, 993 A.2d 189 (2010); see also RSA 541-A:35 (2007) (providing that "[a] final decision or order adverse to a party in a contested case shall be in writing or stated in the ***19** record" and "shall include findings of fact and conclusions of law, separately stated"). However, in concluding that the insurance carrier "is not able to provide medical marijuana," the board simply stated that "possession of marijuana is still a federal crime" and that RSA 126-X:3, III "is clearly a provision to protect [the carrier] from being subject to criminal prosecution under federal law." The board did not cite any legal authority for its conclusion, much less identify a federal statute that, under the circumstances of this case, would expose the insurance carrier to criminal prosecution; thus, we are left to speculate.[2] See ****1105** Lewis v. American General Media, 355 P.3d 850, 858 (N.M. Ct. App. 2015) (rejecting, as mere "speculation," employer's argument that reimbursing an injured employee for medical marijuana renders it criminally liable under federal law). But see Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 17 (Me. 2018) (determining that employer's act of subsidizing an employee's acquisition of medical marijuana meets the elements of aiding and abetting as defined in federal law).

Because the board's order fails to sufficiently articulate the law that supports the board's legal conclusion and fails to provide an adequate explanation of its reasoning regarding federal law, it is impossible for us to discern the basis for the board's decision sufficient for us to conduct meaningful review. See Appeal of Savage, 144 N.H. 107, 110, 737 A.2d 1109 (1999); see also Appeal of Walker, 144 N.H. 181, 184, 737 A.2d 677 (1999) (explaining that we are "unable to intelligently review [the board's] decision when it does not provide an adequate basis for its conclusions"). Accordingly, we remand to the board for a determination of these issues in the first instance.

Reversed in part; vacated in part; and remanded.

HICKS, HANTZ MARCONI, and DONOVAN, JJ., concurred.

All Citations

172 N.H. 13, 205 A.3d 1099

Footnotes

1 RSA chapter 126-X is titled "Use of Cannabis for Therapeutic Purposes." The board used the term "medical marijuana." For ease of reference, we consider the terms "cannabis" and "marijuana" to be interchangeable for purposes of this appeal.

2 We note that for at least a decade, the Department of Justice had a policy of declining to prosecute individuals whose possession and use of medical marijuana was in compliance with state law authorizing such possession and use. See David W. Ogden, Deputy Attorney General, Memorandum: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, October 19, 2009; James M. Cole, Deputy Attorney General, Memorandum: Guidance Regarding Marijuana Enforcement, August 29, 2013. Although Attorney General Sessions subsequently rescinded that policy, since 2015 the federal budget has effectively prohibited the Department of Justice from prosecuting individuals who engage in conduct permitted by state medical marijuana laws and who fully comply with such laws. See United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016).

