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Americans with Disabilities Act [1]

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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

23-Oct-1993 05:45pm

TO: Cheryl D. Mills
FROM: Michael R. Lufrano
Appointments and Scheduling
CC: Isabelle R. Tapia
CC: Thomas F. Hufford
SUBJECT: two items

Two legal questions:

1. Is it a violation of the ADA NOT to provide a sign language interpreter to interpret remarks at a public Presidential event?
2. Any word yet on how the new Hatch Act will affect our ability to use government employees to advance political events?

Please let me know.

Thanks.

THE WHITE HOUSE

WASHINGTON

May 6, 1994

MEMORANDUM FOR WHITE HOUSE PERSONNEL OFFICERS

FROM: CHERYL D. MILLS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Prohibitions on Discrimination Against Individuals
With Disabilities

President Clinton is committed to ensuring that persons with disabilities have access to equal employment opportunities in the federal government. The White House must be a model for America in its employment practices and should be particularly sensitive to the needs of persons with disabilities in all personnel actions.

Since 1973, the federal government and all recipients of federal funds have been prohibited from discriminating against individuals with disabilities in all programs and activities, including employment actions. This memorandum provides an overview of the laws that prohibit discrimination by federal employers against persons with disabilities and offers guidelines for White House employees making employment decisions.

I. Laws Preventing Discrimination Against Persons with
Disabilities

Section 504 of the Rehabilitation Act of 1973, as amended in 1974 and 1978, prohibits discrimination on the basis of disability in programs and activities that are conducted by federal agencies or recipients of federal assistance, including the Executive Office of the President.¹ The White House, like all federal employers, has an affirmative obligation to remove barriers to equal access.

¹For the purposes of these regulations, the Executive Office of the President includes the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisors, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President. 3 C.F.R. § 102.103.

Section 504 prohibits discrimination in **all employment actions** -- including recruitment, application, hiring, promotions, compensation, training, and termination. Pursuant to its own regulations, the White House shall "give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons,"² and make "reasonable accommodation" to the known limitations of the disabled applicant or employee.³

II. Employment Practices

The process of identifying whether, and to what extent, an accommodation is required to provide for a person with disabilities to work in the federal government should be flexible and involve both the federal employer and the individual applicant or employee with a disability. Accommodations are designed on a case-by-case basis to match the needs of the disabled individual with the essential functions of a particular job.

A. Interviews

When conducting interviews for positions, a federal employee may not ask if an applicant is disabled, nor may the employee ask about the nature or severity of an applicant's disability. However, it is appropriate to ask about an applicant's ability to perform the job. For example, it is inappropriate to ask: "Are you blind?" Yet, it is appropriate to ask: "Are you able to use a standard computer screen or do you need a special adaptor?"

²29 C.F.R. § 1613.703.

³An "individual with disabilities" is defined as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Physical impairment includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. Mental impairment includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Section 504 also protects HIV-infected individuals from discrimination in employment.

Generally, it is inappropriate to request a pre-employment medical examination. A federal employer may condition an offer of employment on the results of a pre-employment medical or drug screening examination only if all entering employees in that job category are subjected to such an examination.⁴ The results of any pre-employment examination must be used in a non-discriminatory manner. If an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring him or her must be job-related and consistent with business necessity. The employer also must be able to show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation for the individual's disability would impose an undue hardship.

A federal employer is expected to make every effort to hire, place, and promote persons with disabilities. Accordingly, the White House may give applicants the opportunity to indicate that they are disabled. A federal employer must make it clear, however, that provision of such information is completely voluntary and will only be used for affirmative action purposes. No applicant may be subject to any adverse consideration if he or she refuses to provide this information.

If provided, information that an applicant is disabled and/or the extent of his or her disability must be kept confidential. Federal employees involved in making the hiring decision may be notified of the applicant's disability only for affirmative action purposes.

B. Hiring

In hiring, federal employers may not use any employment test or other criterion that screens out or tends to screen out qualified persons with disabilities unless the test or criterion is shown to be job-related or the Civil Service Commission's Director of Personnel Research and Development Center has not shown that a better alternative is available. 29 C.F.R. § 1613.705(a).

When a federal employer selects employment tests to be administered to applicants or employees with disabilities that impair their sensory, manual, or speaking skills, the employer must ensure that the test accurately measures the applicant's ability to perform essential functions of the job, rather than reflecting the applicant's disabilities. 29 C.F.R. § 1613.705(b). For example, if an individual with impaired speech is applying for a job as a receptionist, the test may

⁴Medical examinations of employees are permissible in job categories in which the health of the employee is job-related (e.g., food handler, pilot, etc.).

reflect his or her speech impairment, because speaking on the phone is an essential function of a receptionist. However, if the individual is applying for a job responding to the President's written correspondence, he or she may not be tested in such a way that his or her speech impairment factors into the results, (i.e., give a written test).

C. Accommodations for Job Performance/Evaluation

If an employee with disabilities needs reasonable accommodations to allow him or her to perform the essential functions of a job, a federal employer must provide the necessary modifications to the job and/or work environment. There must be no adverse impact on the employee's job evaluations because he or she needs reasonable accommodations.

The exact form of the accommodation is flexible. For example, the federal employer and the employee might adjust the way a job is customarily performed, including restructuring the job to a part-time or modified work schedule. Alternatively, the employer and the employee might choose to modify the work environment by adapting equipment or devices, adjusting or modifying examinations, or providing readers and interpreters.

The laws do not, however, relieve a disabled employee or applicant from the obligation to perform the essential functions of the job, nor do the laws require the employer to make accommodations that cause an undue hardship. In determining whether accommodations cause an undue hardship, the factors a federal employer considers include: (1) the overall size of an agency's program including the number of employees, the number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's workforce; and (3) the nature and cost of the accommodation.

If an accommodation would cause undue hardship, federal employers must try to identify another accommodation that will not cause such a hardship. Alternatively, the employer may give the disabled individual the option of paying that portion of the cost which would constitute an undue hardship, or of personally providing the accommodation.

D. Termination

A federal employer may not terminate or layoff an employee solely on the basis of his or her disability. Occasionally, a current employee becomes unable to perform the essential functions of a job because of a disability, and no accommodation in that job is reasonable. In such instances, a federal employer may accommodate the employee by reassigning him or her to a vacant

position for which he or she is qualified, provided that there is a vacancy.

III. Conclusion

This memorandum is intended to offer preliminary guidance for White House personnel actions involving persons with disabilities; it is by no means comprehensive. It is critical that the White House take a flexible approach to accommodate people with disabilities. If you have questions or concerns, please call the Counsel's Office (x. 6-7900) for assistance.

Report to
Congress.

(b) Not later than June 30, 1974, the Secretary shall report to the Congress his findings and recommendations, including recommendations for additional legislation, with respect to the study required by this section, which report shall include recommendations with respect to allotment of Federal funds among the States and the Federal share of the cost of furnishing vocational rehabilitation services by the States.

TITLE V—MISCELLANEOUS

EFFECT ON EXISTING LAW

Repeal.
68 Stat. 652;
79 Stat. 1282;
82 Stat. 297.

Unused funds.

Savings pro-
vision.

Appropriations,
extension.

SEC. 500. (a) The Vocational Rehabilitation Act (29 U.S.C. 31 et seq.) is repealed ninety days after the date of enactment of this Act and references to such Vocational Rehabilitation Act in any other provision of law shall, ninety days after such date, be deemed to be references to the Rehabilitation Act of 1973. Unexpended appropriations for carrying out the Vocational Rehabilitation Act may be made available to carry out this Act, as directed by the President. Approved State plans for vocational rehabilitation, approved projects, and contractual arrangements authorized under the Vocational Rehabilitation Act will be recognized under comparable provisions of this Act so that there is no disruption of ongoing activities for which there is continuing authority.

(b) The authorizations of appropriations in the Vocational Rehabilitation Act are hereby extended at the level specified for the fiscal year 1972 for the fiscal year 1973.

EMPLOYMENT OF HANDICAPPED INDIVIDUALS

Interagency
Committee on
Handicapped
Employees.
Establishment.

83 Stat. 864.
5 USC 5315
note.

Committee
functions.

Federal agen-
cies, affirmative
action program
plans.

SEC. 501. (a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after the date of enactment of this Act, submit to the Civil Service Commission

and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

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

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

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

(f) (1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

SEC. 502. (a) There is established within the Federal Government the Architectural and Transportation Barriers Compliance Board (hereinafter referred to as the "Board") which shall be composed of the heads of each of the following departments or agencies (or their designees whose positions are Executive Level IV or higher):

- (1) Department of Health, Education, and Welfare;
- (2) Department of Transportation;
- (3) Department of Housing and Urban Development;
- (4) Department of Labor;

Rehabilitated individuals, employment.

Report to congressional committees.

Unpaid Federal work experience.

Federal agency cooperation.

Establishment; membership.

83 Stat. 864.
5 USC 5315
note.

- (5) Department of the Interior;
- (6) General Services Administration;
- (7) United States Postal Service; and
- (8) Veterans' Administration.

82 Stat. 718;
84 Stat. 49.
42 USC 4151.

International
Accessibility
Symbol, pro-
motion.

Reports to
President and
Congress.

Transportation
barriers.

(b) It shall be the function of the Board to: (1) insure compliance with the standards prescribed by the General Services Administration, the Department of Defense, and the Department of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968 (Public Law 90-480), as amended by the Act of March 5, 1970 (Public Law 91-205); (2) investigate and examine alternative approaches to the architectural, transportation, and attitudinal barriers confronting handicapped individuals, particularly with respect to public buildings and monuments, parks and parklands, public transportation (including air, water, and surface transportation whether interstate, foreign, intrastate, or local), and residential and institutional housing; (3) determine what measures are being taken by Federal, State, and local governments and by other public or nonprofit agencies to eliminate the barriers described in clause (2) of this subsection; (4) promote the use of the International Accessibility Symbol in all public facilities that are in compliance with the standards prescribed by the Administrator of the General Services Administration, the Secretary of Defense, and the Secretary of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968; (5) make to the President and to Congress reports which shall describe in detail the results to its investigations under clauses (2) and (3) of this subsection; and (6) make to the President and to the Congress such recommendations for legislation and administration as it deems necessary or desirable to eliminate the barriers described in clause (2) of this subsection.

(c) The Board shall also (1) (A) determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation, and (B) consider the housing needs of handicapped individuals; (2) determine what measures are being taken, especially by public and other nonprofit agencies and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems and (B) to make housing available and accessible to handicapped individuals or to meet sheltered housing needs; and (3) prepare plans and proposals for such further actions as may be necessary to the goals of adequate transportation and housing for handicapped individuals, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and comprehensive action.

5 USC 551, 701.

(d) In carrying out its functions under this section, the Board shall conduct investigations, hold public hearings, and issue such orders as it deems necessary to insure compliance with the provisions of the Acts cited in subsection (b). The provisions of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, shall apply to procedures under this section, and an order of compliance issued by the Board shall be a final order for purposes of judicial review.

(e) The Board is authorized to appoint as many hearing examiners as are necessary for proceedings required to be conducted under this section. The provisions applicable to hearing examiners appointed under section 3105 of title 5, United States Code, shall apply to hearing examiners appointed under this subsection.

80 Stat. 415.

(f) The departments or agencies specified in subsection (a) of this section shall make available to the Board such technical, administrative, or other assistance as it may require to carry out its functions under this section, and the Board may appoint such other advisers, technical experts, and consultants as it deems necessary to assist it in carrying out its functions under this section. Special advisory and technical experts and consultants appointed pursuant to this subsection shall, while performing their functions under this section, be entitled to receive compensation at rates fixed by the Secretary, but not exceeding the daily pay rate, for a person employed as a GS-18 under section 5332 of title 45, United States Code, including traveltime, and while serving away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title 5 for persons in the Government service employed intermittently.

Technical assistance.

5 USC 5332 note.

80 Stat. 499;
83 Stat. 190.

Report to Congress.

(g) The Board shall, at the end of each fiscal year, report its activities during the preceding fiscal year to the Congress. Such report shall include an assessment of the extent of compliance with the Acts cited in subsection (b) of this section, along with a description and analysis of investigations made and actions taken by the Board, and the reports and recommendations described in clauses (5) and (6) of subsection (b) of this section. The Board shall prepare two final reports of its activities under subsection (c). One such report shall be on its activities in the field of transportation barriers to handicapped individuals, and the other such report shall be on its activities in the field of the housing needs of handicapped individuals. The Board shall, prior to January 1, 1975, submit each such report, together with its recommendations, to the President and the Congress. The Board shall also prepare for such submission an interim report of its activities in each such field within 18 months after the date of enactment of this Act.

Report to the President and Congress.

(h) There are authorized to be appropriated for the purpose of carrying out the duties and functions of the Board under this section \$1,000,000 each for the fiscal years ending June 30, 1974, and June 30, 1975.

Appropriation.

EMPLOYMENT UNDER FEDERAL CONTRACTS

SEC. 503. (a) Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6). The provisions of this section shall apply to any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

Ante, p. 361.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals,

such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver authority.

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

NONDISCRIMINATION UNDER FEDERAL GRANTS

Ante, p. 361.

SEC. 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Approved September 26, 1973.

Public Law 93-113

October 1, 1973
[S. 1148]

AN ACT

To provide for the operation of programs by the ACTION Agency, to establish certain new such programs, and for other purposes.

Domestic Volunteer Service Act of 1973.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, with the following table of contents, may be cited as the "Domestic Volunteer Service Act of 1973":

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- Sec. 121. Statement of purpose.
- Sec. 122. Authority to establish and operate programs.

Public Law 95-602
95th Congress

An Act

To amend the Rehabilitation Act of 1973 to extend certain programs established in such Act, to establish a community service employment program for handicapped individuals, and to provide comprehensive services for independent living for handicapped individuals, to amend the Developmental Disabilities Services and Facilities Construction Act to revise and extend the programs under that Act, and for other purposes.

Nov. 6, 1978

[H.R. 12467]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978".

Rehabilitation,
Comprehensive
Services, and
Developmental
Disabilities
Amendments of
1978.

29 USC 701 note.

TITLE I—AMENDMENTS TO THE REHABILITATION ACT
OF 1973

VOCATIONAL REHABILITATION SERVICES; AUTHORIZATION OF APPROPRIATIONS; ALLOTMENTS

SEC. 101. (a) Section 100(b) of the Rehabilitation Act of 1973 is amended—

Federal grants.
29 USC 720.

(1) in subsection (b) (1), by adding at the end the following: "There is further authorized to be appropriated for such purpose \$808,000,000 for the fiscal year ending September 30, 1979, and the amount determined under subsection (c) for the three succeeding fiscal years but in no event shall the amount appropriated be greater than \$880,000,000 for the fiscal year ending September 30, 1980, \$945,000,000 for the fiscal year ending September 30, 1981, and \$972,000,000 for the fiscal year ending September 30, 1982.";

(2) by amending subsection (b) (2) to read as follows:

"(2) For the purpose of allotments under section 120(a) (1), there are authorized to be appropriated \$45,000,000 for the fiscal year ending September 30, 1979, \$50,000,000 for the fiscal year ending September 30, 1980, \$55,000,000 for the fiscal year ending September 30, 1981, and \$60,000,000 for the fiscal year ending September 30, 1982. There are further authorized to be appropriated for such purpose for each such year such additional sums as the Congress may determine to be necessary."; and

29 USC 740.

(3) by adding at the end the following new paragraph:

"(3) For the purpose of making grants to Indian tribes under part D of this title, there are authorized to be appropriated for the fiscal year ending September 30, 1979, and for each of the three fiscal years thereafter, in addition to any other amounts authorized to be appropriated under this section, such sums as may be necessary for such fiscal year, but not more than an amount equal to 1 percent of the amount appropriated for that fiscal year under paragraph (1) of this subsection."

Indian tribes.
Post, p. 2961.

(b) Section 100 of the Rehabilitation Act of 1973 is amended by adding at the end the following new subsection:

"(c) (1) No later than November 15 of each fiscal year (beginning with the fiscal year 1979), the Secretary of Labor shall publish in the Federal Register the percentage change in the price index published

Percentage
change in price
index,
publication in
Federal Register.

title 5, United States Code (but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay payable for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code).

"(c) The Administrator of General Services shall provide to the National Council on a reimbursable basis such administrative support services as the Council may request.

General Services
Administrator,
administrative
support.

"ADMINISTRATIVE POWERS OF NATIONAL COUNCIL

"SEC. 404. (a) The National Council may prescribe such bylaws and rules as may be necessary to carry out its duties under this title.

Bylaws and rules.
29 USC 784.

"(b) The National Council may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it deems advisable.

"(c) The National Council may appoint advisory committees to assist the National Council in carrying out its duties. The members thereof shall serve without compensation.

"(d) The National Council may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 405. There are authorized to be appropriated to carry out this title such sums as may be necessary."

29 USC 785.

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

SEC. 118. (a) (1) Section 502(a) of the Rehabilitation Act of 1973 is amended to read as follows:

"SEC. 502. (a) (1) There is established within the Federal Government the Architectural and Transportation Barriers Compliance Board (hereinafter referred to as the 'Board') which shall be composed as follows:

Establishment.
29 USC 792.

"(A) Eleven members shall be appointed by the President from among members of the general public of whom five shall be handicapped individuals.

Membership.

"(B) The remaining members shall be the heads of each of the following departments or agencies (or their designees whose positions are executive level IV or higher):

"(i) Department of Health, Education, and Welfare.

"(ii) Department of Transportation.

"(iii) Department of Housing and Urban Development.

"(iv) Department of Labor.

"(v) Department of the Interior.

"(vi) Department of Defense.

"(vii) Department of Justice.

"(viii) General Services Administration.

"(ix) Veterans' Administration.

"(x) United States Postal Service.

The President shall appoint the first Chairman of such Board who shall serve for a term of not more than two years; thereafter, the Chairman shall be elected by a vote of a majority of the Board for a term of one year.

"(2) The term of office of each appointed member of the Board shall be three years; except that (i) the members first taking office shall

Term.

serve, as designated by the President at the time of appointment, four for a term of one year, four for a term of two years, and three for a term of three years, and (ii) any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed.

"(3) If any appointed member of the Board becomes a Federal employee, such member may continue as a member of the Board for not longer than the sixty-day period beginning on the date he becomes such an employee.

"(4) No individual appointed under paragraph (1) (A) of this subsection who has served as a member of the Board may be reappointed to the Board more than once unless such individual has not served on the Board for a period of two years prior to the effective date of such individual's appointment.

Compensation.

"(5) (A) Members of the Board who are not regular full-time employees of the United States shall, while serving on the business of the Board, be entitled to receive compensation at rates fixed by the President, but not to exceed the daily rate prescribed for GS-18 under section 5332 of title 5, United States Code, including traveltime, for each day they are engaged in the performance of their duties as members of the Board; and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

"(B) Members of the Board who are employed by the Federal Government shall serve without compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section."

29 USC 792.

42 USC 4151
note.

(b) (1) Section 502(b) (1) of the Rehabilitation Act of 1973 is amended to read as follows: "(1) insure compliance with the standards prescribed pursuant to the Act of August 12, 1968, commonly known as the Architectural Barriers Act of 1968 (including the application of that Act to the United States Postal Service) including but not limited to enforcing all standards under that Act, and insuring that all waivers and modifications of standards are based upon findings of fact and are not inconsistent with the provisions of such Act and this section;"

(2) Section 502(b) (2) of the Rehabilitation Act of 1973 is amended by inserting "communication," before "and attitudinal", and by inserting "telecommunication devices," before "public buildings"; and

(3) Section 502(b) of the Rehabilitation Act of 1973 is amended by striking out "and" at the end of clause (5), by striking out the period at the end of clause (6) and inserting in lieu thereof a semicolon, and by adding at the end thereof the following new clauses: "(7) establish minimum guidelines and requirements for the standards issued pursuant to the Act of August 12, 1968, as amended, commonly known as the Architectural Barriers Act of 1968; and (8) insure that public conveyances, including rolling stock, are readily accessible to, and usable by, physically handicapped persons."

(c) (1) The first sentence of section 502(d) of the Rehabilitation Act of 1973 is amended by striking out "or contracts with", and by inserting after "organizations" "or contracts with private nonprofit or forprofit organizations".

(2) The second sentence of section 502(d) of the Rehabilitation Act of 1973 is amended by striking out "The" and inserting in lieu thereof "Except as provided in paragraph (3) of subsection (e), the".

(3) The last sentence of section 502(d) of the Rehabilitation Act of 1973 is amended by inserting "or public conveyance or rolling stock"

after "building" and by striking out "prescribed pursuant to the Act cited in subsection (b) of this section" and inserting in lieu thereof "enforced under this section".

(4) Section 502(d) of the Rehabilitation Act of 1973 is amended by adding at the end thereof the following new sentence: Pursuant to chapter 7 of title 5, United States Code, any complainant or participant in a proceeding under this subsection may obtain review of a final order issued in such proceeding. 29 USC 792.

(5) Section 502(d) of the Rehabilitation Act of 1973 is further amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraphs: 5 USC 701 *et seq.*

"(2) The executive director is authorized, at the direction of the Board— Civil action.

"(A) to bring a civil action in any appropriate United States district court to enforce, in whole or in part, any, final order of the Board under this subsection; and

"(B) to intervene, appear, and participate, or to appear as amicus curiae, in any court of the United States or in any court of a State in civil actions which related to this section or to the Architectural Barriers Act of 1968.

Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the executive director may appear for and represent the Board in any civil litigation brought under this section." 42 USC 4151 note.

"(3) The Board, in consultation and coordination with other concerned Federal departments and agencies and agencies within the Department of Health, Education, and Welfare, shall develop standards and provide appropriate technical assistance to any public or private activity, person, or entity affected by regulations prescribed pursuant to this title with respect overcoming to architectural, transportation, and communication barriers. Any funds appropriated to any such department or agency for the purpose of providing such assistance may be transferred to the Board for the purpose of carrying out this paragraph. The Board may arrange to carry out its responsibilities under this paragraph through such other departments and agencies for such periods as the Board determines is appropriate. In carrying out its technical assistance responsibilities under this paragraph, the Board shall establish a procedure to insure separation of its compliance and technical assistance responsibilities under this section." Development of standards, consultation.

(d) Section 502(e) of the Rehabilitation Act of 1973 is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraphs:

"(2) The Executive Director shall exercise general supervision over all personnel employed by the Board (other than hearing examiners and their assistants). The Executive Director shall have final authority on behalf of the Board, with respect to the investigation of alleged noncompliance in the issuance of formal complaints before the Board, and shall have such other duties as the Board may prescribe.

"(3) For the purpose of this section, an order of compliance issued by a hearing examiner shall be deemed to be an order of the Board and shall be the final order for the purpose of judicial review."

(e) Section 502 of the Rehabilitation Act of 1973 is amended by striking out subsection (h) and inserting in lieu thereof the following new subsections:

"(h) (1) Within one year following the enactment of this subsection, the Board shall submit to the President and the Congress a report Report to President and Congress.

containing an assessment of the amounts required to be expended by States and by political subdivisions thereof to provide handicapped individuals with full access to all programs and activities receiving Federal assistance.

Grants or
contracts.

"(2) The Board may make grants to, or enter into contracts with, public or private organizations to carry out its duties under subsections (b) and (c). The Board may also make grants to any designated State unit for the purpose of conducting studies to provide the cost assessments required by paragraph (1). Before including in such report the findings of any study conducted for the Board under a grant or contract to provide the Board with such cost assessments, the Board shall take all necessary steps to validate the accuracy of any such findings.

Appropriation
authorization.

"(i) There are authorized to be appropriated for the purpose of carrying out the duties and functions of the Board under this section such sums as may be necessary for each fiscal year ending before October 1, 1982, but in no event shall the amount appropriated for any one fiscal year exceed \$3,000,000."

NONDISCRIMINATION UNDER FEDERAL PROGRAMS AND ACTIVITIES

29 USC 794.

SEC. 119. Section 504 of the Rehabilitation Act of 1973 is amended—

(1) in the section heading by inserting "AND PROGRAMS" after "GRANTS"; and

(2) by striking out the period at the end thereof and inserting in lieu thereof "or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

Regulations.
Proposals, copies
to congressional
committees.

NONDISCRIMINATION PROVISIONS; INTERAGENCY COUNCIL; SECRETARIAL DUTIES

SEC. 120. (a) Title V of the Rehabilitation Act of 1973 is amended by adding at the end thereof the following new sections:

"REMEDIES AND ATTORNEYS' FEES

29 USC 794a.

"SEC. 505. (a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706 (f) through 706 (k) (42 U.S.C. 2000e-5 (f) through (k)), shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

29 USC 791.

"(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act. 42 USC 2000d.
29 USC 794.
"(b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

"SECRETARIAL RESPONSIBILITIES

"SEC. 506. (1) The Secretary may provide directly or by contract with State vocational rehabilitation agencies or experts or consultants or groups thereof, technical assistance— 29 USC 794b.

"(A) to persons operating rehabilitation facilities; and

"(B) with the concurrence of the Board established by section 502, to any public or nonprofit agency, institution, or organization; Ante, p. 2979.

for the purpose of assisting such persons or entities in removing architectural, transportation, or communication barriers. Any concurrence of the Board under this paragraph shall reflect its consideration of the cost studies carried out by States under section 502(c)(1).

"(2) Any such experts or consultants, while serving pursuant to such contracts, shall be entitled to receive compensation at rates fixed by the Secretary, but not exceeding the daily equivalent of the rate of basic pay payable for grade GS-18 of the General Schedule, under section 5332 of title 5, United States Code, including traveltime, and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently. Experts or consultants, compensation.

"(3) The Secretary, with the concurrence of the Board and the President may provide, directly or by contract, financial assistance to any public or nonprofit agency, institution, or organization for the purpose of removing architectural, transportation, and communication barriers. No assistance may be provided under this paragraph until a study demonstrating the need for such assistance has been conducted and submitted under section 502(h)(2) of this title." Ante, p. 2981.

"(4) In order to carry out this section, there are authorized to be appropriated such sums as may be necessary." Appropriation authorization.

"INTERAGENCY COORDINATING COUNCIL

"SEC. 507. There shall be established an Interagency Coordinating Council (hereinafter referred to in this section as the 'Council') composed of the Secretary of Health, Education, and Welfare, the Secretary of Labor, the Attorney General, the Chairman of the United States Civil Service Commission, the Chairman of the Equal Employment Opportunity Commission, and the Chairman of the Architectural and Transportation Barriers Compliance Board. The Council shall have the responsibility for developing and implementing agreements, policies, and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistencies among the operations, functions, and jurisdictions of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of the provisions of this title, and the regulations prescribed thereunder. On or before Establishment. Membership. 29 USC 794c.

Report to President and Congress.

July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section. Nothing in this section shall impair any responsibilities assigned by any Executive Order to any Federal department, agency, or instrumentality to act as a lead Federal agency with respect to any provisions of this title.”

APPLICATION OF OTHER LAWS

29 USC 701 note. SEC. 121. The Rehabilitation Act of 1973 is amended by inserting after section 10 the following new section:

“APPLICATION OF OTHER LAWS

29 USC 710. “SEC. 11. The provisions of the Act of December 5, 1974 (Public
42 USC 4251 Law 93-510) and of title V of the Act of October 15, 1977 (Public
note. Law 95-134) shall not apply to the administration of the provisions
48 USC 1469a. of this Act or to the administration of any program or activity under
this Act.”

MISCELLANEOUS AND TECHNICAL AMENDMENTS

29 USC 701. SEC. 122. (a) The Rehabilitation Act of 1973 is amended—
(1) by amending section 2 to read as follows:

“DECLARATION OF PURPOSE

“SEC. 2. The purpose of this Act is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living.”

29 USC 702. (2) in section 3(a) by inserting “and part A of title VI” after
“titles IV and V”, and by inserting at the end thereof the following: “Any reference in this Act to duties to be carried out by the Commissioner shall be considered to be a reference to duties to be carried out by the Secretary acting through the Commissioner. In carrying out any of his functions under this Act, the Commissioner shall be guided by general policies of the National Council on the Handicapped established under title IV of this Act.”;

Ante, p. 2977.

(3) by striking out section 3(b) and redesignating section 3(c) as 3(b);

29 USC 706. (4) in section 7(3) by striking out “and the initial equipment” and all that follows through the period and inserting in lieu thereof “and may include such additional equipment and staffing as the Commissioner considers appropriate.”;

(5) in section 7(4) (B) by inserting after “medical” comma and the word “psychiatric”;

(6) in section 7(6)—

(A) by striking out “The term” and inserting in lieu thereof: “(A) Except as otherwise provided in subparagraph (B), the term”;

“(B) by striking out “(A)” after “individual who” and inserting in lieu thereof “(i)” and by striking out “(B)” after “and” and inserting in lieu thereof “(ii)”;

(C) by striking out the last sentence and by adding at the end the following new subparagraph:

“(B) Subject to the second sentence of this subparagraph, the term ‘handicapped individual’ means, for purposes of titles IV and V of

“Handicapped individual.”
Ante, p. 2977.
29 USC 790.”

WHAT IS SECTION 504

WHAT DOES IT MEAN?

TO WHAT DOES IT APPLY?

HOW IS IT IMPLEMENTED?

WHO IS RESPONSIBLE?

AND

**ANSWERS TO OTHER QUESTIONS ABOUT
SECTION 504**

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INTRODUCTION

Q. 1. What is section 504?

A. 1. Section 504 is one of the four sections of title V of the Rehabilitation Act of 1973, as amended.

Q. 2. What is the legal citation for "section 504"?

A. 2. "Section 504" is section 504 of the Rehabilitation Act of 1973 [Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 795)], as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617, and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955).

Q. 3. What are the four sections of title V of the Rehabilitation Act of 1973, as amended, and what do they provide?

A. 3. Section 501 provides for affirmative action and, implicitly, nondiscrimination in Federal employment of handicapped persons.

Section 502 establishes the Architectural and Transportation Barriers Compliance Board and gives the Board authority to enforce the Architectural Barriers Act of 1968 in all Federally funded facilities.

Section 503 provides for affirmative action in the employment of handicapped persons by contractors having Federal contracts in excess of \$2500.

Section 504 prohibits discrimination on the basis of handicap in programs and activities that are conducted by Federal agencies or that receive Federal financial assistance.

Q. 4. What is the purpose of this booklet?

A. 4. The purpose of this booklet is to answer the most commonly asked questions concerning the implementation of section 504 of the Rehabilitation Act of 1973, as amended, in those programs and activities defined in the answer to Question 5 (below).

Q. 5. Does this booklet refer to section 504 as it applies to programs and activities that are conducted by Federal agencies or that receive Federal financial assistance?

A. 5. This booklet refers to section 504 as it applies to programs and activities that are: conducted by the Department of the Interior; operated on facilities or land owned or controlled by the Department; operated and/or

administered by the Department; or are located outside the territory of the United States but receive funds for their operation and/or maintenance from the Department.

- Q. 6. Does the Department of the Interior have any regulations implementing and enforcing section 504?
- A. 6. Yes. The regulation requiring the Department of the Interior to operate all of its programs and activities without discrimination against qualified handicapped persons may be found at 43 Code of Federal Regulations (CFR) Part 17, Subpart E. These guidelines (questions and answers) pertain only to Subpart E.

The Department of the Interior also has a regulation implementing section 504 as it applies to programs and activities which receive Federal assistance through the Department. That regulation may be found at 43 CFR Part 17, Subpart B.

GENERAL PROHIBITION AGAINST DISCRIMINATION

- Q. 7. What does section 504 mean insofar as it concerns discrimination against persons on the basis of handicap?
- A. 7. Simply stated, section 504 and the Department's regulation mean that no person shall be subjected to discrimination or excluded from participation in any Department program or activity, because of the person's handicap.

However, this does not mean that the Department may not prevent or deny a person participation in a program or activity for reasons other than handicap, as long as those reasons are legitimate and applied in a nondiscriminatory manner. For example, the Department may deny participation on a particular planning or advisory board to a person who does not have the legitimate requisite qualifications to serve on that board.

SCOPE OF APPLICATION

- Q. 8. To what programs and activities of the Department of the Interior does its regulation at Subpart E apply?
- A. 8. The Department's regulation applies to all programs and activities conducted by the Department, its component bureaus, offices, and subunits. This includes, the Office of the Secretary, Office of Territorial and International Affairs, Bureau of Indian Affairs, Bureau of Land Management, Bureau of Mines, Bureau of Reclamation, Minerals Management Service, National Park Service, Office of Surface Mining Reclamation and Enforcement, U.S. Fish and Wildlife Service, and the U.S. Geological Survey.

Q. 9. Where are the programs and activities affected by the regulation located?

A. 9. The coverage of section 504 is limited to persons in the United States. However, the United States as defined, includes the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States.

The Department's section 504 regulation also applies anywhere outside the United States where the Department or any of its components provides funds for the operation and maintenance of a specific site.

Q. 10. Can you give an example of a site outside the territory of the United States which is covered by the Department's section 504 regulation?

A. 10. Yes. Roosevelt Campobello International Park, is an international park located in Canada and owned and administered by a joint United States-Canadian Commission. It receives funds for its operation and maintenance from the Department and is thus covered by the Department's section 504 regulation.

Q. 11. Does the Department's section 504 regulation apply to all programs and activities conducted on Department-owned property, regardless of the source of funding or operator?

A. 11. Yes. The Department's section 504 regulation applies to all programs and activities conducted on Department-owned or controlled property, regardless of the source of funding or the operator of the program or activity. For example, programs and activities conducted by a concessionaire on Department-owned or controlled property are subject to the requirements of section 504. Coverage of concessionaire operated programs and activities should, as a matter of course, be included in the lease or other agreements or contracts with the concessionaire.

ADMINISTRATION

Q. 12. Who in the Department of the Interior is responsible for administration and oversight of the implementation and enforcement of section 504?

A. 12. The Departmental Director, Office for Equal Opportunity is responsible for administration and oversight of the implementation and enforcement of section 504 in the Department of the Interior.

- Q. 13. Who establishes the policy to implement section 504 in the Department of the Interior?
- A. 13. The Departmental Director, Office for Equal Opportunity drafts, prepares, and establishes policy, with consultation, as appropriate, with Department and bureau officials, to implement and enforce section 504.
- Q. 14. Who is responsible for implementing section 504 in the Department of the Interior?
- A. 14. The Department's bureaus and offices, are responsible for implementing and enforcing section 504 and the Department's regulation in those programs and activities which they conduct.
- Q. 15. Who in the Department of the Interior is responsible for conducting official communications, including requesting and receiving official guidance and policy interpretations, with the Department of Justice and the Equal Employment Opportunity Commission on all matters concerning section 504?
- A. 15. The Departmental Director, Office for Equal Opportunity has the responsibility for conducting official communications with, and requesting and receiving official guidance and policy interpretations from the Department of Justice and the Equal Employment Opportunity Commission on all matters concerning section 504.
- Q. 16. Who is responsible for disseminating policy and guidance in the Department of the Interior for the implementation and enforcement of section 504?
- A. 16. The Departmental Director, Office for Equal Opportunity is responsible for disseminating policy statements, guidance, and other relevant material concerning the implementation and enforcement of section 504, to bureaus and offices.

DEFINITIONS

- Q. 17. The Department of the Interior's regulation enforcing section 504 includes definitions of particular terms. What are they, and to what are they applicable?
- A. 17. The definitions in section 17.503 of the Department's regulation apply to the implementation and enforcement of section 504 in the Department. The definitions are as follows--
- a.) "Agency" means Department of the Interior.
- b.) "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking

skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency.

- c.) "Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's actions in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.
 - d.) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, outdoor recreation and program spaces, park sites, developed sites, rolling stock or other conveyances, or other real or personal property.
 - e.) "Handicapped person" means any person who has a physical, mental, or sensory impairment that substantially limits one or more major life activities, has a record or such an impairment, or is regarded as having such an impairment.
 - f.) "Historic preservation programs" means programs conducted by the agency that have preservation of historic properties as a primary purpose.
 - g.) "Historic properties" means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate state or local government body.
 - h.) "Substantial impairment" means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration (of significant historic features of an historic property).
- Q. 18. What types of auxiliary aides are useful for persons with impaired vision?
- A. 18. Examples of auxiliary aides useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices.

- Q. 19. What types of auxiliary aids are useful for persons with impaired hearing?
- A. 19. Examples of auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.
- Q. 20. What does "physical, mental, or sensory impairment" mean?
- A. 20. The phrase, "physical, mental, or sensory impairment" means--
- a.) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine.
 - b.) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term, "physical, mental, or sensory impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.
- Q. 21. What does the phrase "major life activities" include?
- A. 21. The phrase, "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- Q. 22. What does the phrase "has a record of such impairment" mean?
- A. 22. The phrase, "has a record of such impairment" means--
- a.) That a person has a physical, mental, or sensory impairment that does not substantially limit major life activities but is treated by the agency as having such a limitation;
 - b.) That a person has a physical, mental, or sensory impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

- c.) That a person does not have a physical, mental, or sensory impairment as defined in the answer to Question 20, but is nevertheless treated by the agency as having such an impairment.

Q. 23. Who is considered a "qualified handicapped person"?

- A. 23. a.) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.
- b.) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature.
- c.) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from that program or activity.
- d.) With respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

FINANCIAL AND ADMINISTRATIVE BURDENS

- Q. 24. Won't implementation of the Department's regulation to enforce Section 504 at programs or activities conducted, operated, maintained, or administered by the Department require modifications that result in undue financial or administrative burdens?
- A. 24. No. In most cases, making a program or activity accessible will not result in an undue financial and administrative burden.

Section 504 does not require program modifications that result in a fundamental alteration in the nature of a program.

Section 504 does not require modifications that would result in undue financial and administrative burdens.

- Q. 25. How will the determination be made whether undue financial and administrative burdens would result from a modification?
- A. 25. In determining whether financial and administrative burdens are undue, all bureau or office resources available for use in the funding and operation of the specific program or activity are to be considered.
- Q. 26. Shouldn't all of the Department's resources be considered in determining whether an action would result in undue financial and administrative burdens?
- A. 26. The Department's entire budget is an inappropriate touchstone for making a determination as to undue financial and administrative burdens. Parts of the Department's budget are earmarked for specific purposes and are simply not available for use in making particular programs or activities accessible to handicapped persons.
- Q. 27. Who has the burden of proving that compliance with the Department's regulation would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burden?
- A. 27. The burden of proving that compliance with the Department's regulation would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burden rests with the Department. The decision that compliance would result in such alteration or burdens must be made by the Secretary of the Interior, or his or her designee. The decision must be written and include the reasons for reaching that conclusion.
- Q. 28. Does a person who believes that he or she or any specific class of persons has been injured by the Secretary's decision or failure to make a decision have any redress?
- A. 28. A person who believes that he or she or any specific class of persons has been injured by the Secretary's decision or failure to make a decision may file a complaint pursuant to the procedures explained later in these Guidelines.

Q. 29. What happens if the Secretary's decision is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens?

A. 29. If the Secretary's decision is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the affected bureau or office must still take action, without incurring undue financial and administrative burdens, to open participation in the specific program or activity to disabled persons to the fullest extent possible.

Q. 30. How may this be done?

A. 30. This may be done for example, by:

(a) relocating a program or activity to an accessible location;

(b) reassignment of services to an accessible location;

(c) assignment of aides, e.g., signers; or

(d) by providing an alternative method of participation.

Q. 31. Give an example of an alternative method of participation.

A. 31. An alternative method of participation might be provided by audio-visual means, for example, by providing television monitors in an accessible location which show the picture of a view being taken by a video camera atop a tower which is inaccessible. Photograph albums, movies, slide presentations also provide alternative methods of participation and enjoyment of a program or activity.

INFORMATION DISSEMINATION

Q. 32. Is the Department required to disseminate any information concerning section 504?

A. 32. Bureaus and offices which are responsible for implementation of section 504 are required to disseminate information to their employees, applicants, participants, beneficiaries, visitors, and other interested persons of their rights and protections afforded by section 504 and the Department's regulation.

Q. 33. How is this information disseminated?

A. 33. Bureaus and offices may disseminate and/or provide this information in printed handouts, handbooks, manuals, posters, and television and radio broadcasts. The

information should be provided in a manner that is accessible to the general public, including persons who may be hearing-impaired, sight-impaired, and mobility-impaired.

Q. 34. What types of information should be disseminated?

A. 34. The types of information provided should advertise those programs and activities which are accessible to handicapped persons. Pamphlets, handbooks, handouts, and other materials advertising accessible programs and activities should fully explain the extent of accessibility for hearing-impaired persons, sight-impaired persons, and mobility-impaired persons.

SELF-EVALUATION

Q. 35. What is a self-evaluation and why is it required?

A. 35. Section 17.510 of the Department's regulation enforcing section 504 requires the agency to evaluate its policies and practices and their effects that do not meet the requirements of section 504.

Q. 36. When must the requisite self-evaluations be conducted?

A. 36. The Department's regulation mandates that the evaluation be conducted within one year of the effective date of the regulation. Since the regulation is effective on May 4, 1987, all evaluations must be conducted by May 4, 1988.

Q. 37. Who will conduct the self-evaluations?

A. 37. The particular bureau or office which operates or conducts the program or activity will conduct the self-evaluation. In those instances where two or more bureaus or offices share a program or activity or area where a program or activity is presented, each bureau or office will be responsible for the evaluation of the program, activity, or area under their jurisdiction.

The regulation also requires that the evaluation be conducted with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

Q. 38. How is the assistance of interested persons, including handicapped persons or organizations representing handicapped persons solicited and/or obtained?

A. 38. Bureau and office headquarters personnel responsible for the implementation of section 504 in their respective bureau or office should maintain liaison with, and a list

of national and local interested persons and/or organizations which represent handicapped persons. They should provide this information to their field and other bureau or office subunits.

Q. 39. What is the role of the interested persons, including handicapped persons or organizations representing handicapped persons, in the self-evaluation process?

A. 39. Outside groups or individuals who participate in the requisite self-evaluations should assist in the conduct of the self-evaluation and provide: (a) an assessment of the accessibility to each program and activity evaluated; and (b) recommendations as appropriate to correct any accessibility deficiencies to make the particular program and/or activity accessible to persons who may be mobility-impaired, hearing-impaired, or sight-impaired.

Q. 40. Who bears the expense for the participation of interested persons, including handicapped persons or organizations representing handicapped persons, in the self-evaluation process?

A. 40. The outside, or non-Federal person(s) or organization(s) participating in the self-evaluation bear the cost of their own expenses.

Q. 41. Is it mandatory that outside interested persons, including handicapped persons or organizations representing handicapped persons be included in the self-evaluation process?

A. 41. Yes. The Department's regulation requires that interested persons, including handicapped persons or organizations representing handicapped persons be included in the self-evaluation process. A good faith effort should be made in all cases to obtain the participation of outside handicapped persons or organizations representing handicapped persons. However, in some cases, especially when evaluating programs or activities located in remote areas, it may not be possible for outside interested persons to participate in the self-evaluation process. In those instances, the bureau or office's efforts to comply with the regulatory requirement for outside participation should be clearly documented.

Q. 42. Is a report prepared at the end of the evaluation, and who prepares it?

A. 42. A report is prepared by the bureau or office personnel who conducted the self-evaluation.

- Q. 43. Is there a special form or format specified for reporting a self-evaluation?
- A. 43. Yes. A special format has been developed by the Departmental Office for Equal Opportunity with bureau and office input, and will be used to report all self-evaluations.
- Q. 44. What information must the report contain?
- A. 44. The self-evaluation report should contain:
- (a) the name, location, and description of the evaluated program or activity;
 - (b) a list of the persons who participated in the evaluation, including any interested persons, handicapped persons or organizations representing handicapped persons;
 - (c) a description of each identified accessibility deficiency;
 - (d) a description of the modification required to correct each identified accessibility deficiency;
 - (e) estimated cost of the modification;
 - (f) time frame for completion of the modification; and
 - (g) a description of each deficiency identified and corrected subsequent to the evaluation and prior to the issuance of the self-evaluation report.
- Q. 45. Should the recommendations of the outside participants in the self-evaluation be included in the report?
- A. 45. Input and recommendations from the outside participants who assisted in the self-evaluation should be considered in the preparation of the self-evaluation report.
- Q. 46. What distribution is made of the report?
- A. 46. The facility where the self-evaluation program or activity is located should retain a copy of the report. A copy should also be sent to the bureau or office headquarters, and to the Departmental Office for Equal Opportunity.
- Q. 47. How long must the report be kept?
- A. 47. The report must remain on file for three years and be available for public inspection.

ACCESSIBILITY

Q. 48. What does accessibility mean?

A. 48. Accessibility means that each agency program or activity when viewed in its entirety must be accessible to, and usable by, handicapped persons.

Q. 49. Does this mean that each agency program or activity must be accessible to, and usable by, handicapped persons?

A. 49. No. Each individual agency program or activity does not need to be accessible to, or usable by, handicapped persons. For example, not every trail in a national park, national wildlife refuge, or wilderness area must be accessible. Neither must each floor, or each room, of a historic building, residence, or other structure be physically accessible.

The important thing is that the experience offered by the program or activity is available for enjoyment by all persons, including handicapped persons. For example, an experience may be made available though the use of audio-visual aids including photographs.

Q. 50. To whom must accessibility be provided?

A. 50. Accessibility must be provided to all persons, including those who are mobility-impaired, sight-impaired, and hearing-impaired.

Mobility-impaired persons include those with physical handicaps who use wheelchairs, crutches, canes, walkers, or other aids or appliances for assistance. Mobility-impaired persons also include the elderly and those with "invisible" physical impairments, for example, heart or respiratory problems.

Varying degrees of physical impairments and conditions should be accommodated as well as varying degrees of sight and hearing impairments.

UNIFORM FEDERAL ACCESSIBILITY STANDARDS

Q. 51. Are there any guidelines available for providing physical accessibility to programs and activities?

A. 51. Yes. The Uniform Federal Accessibility Standards (UFAS) provide uniform standards for the design, construction, and alteration of buildings so that physically handicapped persons will have ready access to and use of them.

The UFAS are incorporated into the General Service Administration (GSA) Architectural Barriers Act regulation.

The UFAS meet or exceed the requirements in the Architectural and Transportation Barriers Compliance Board Minimum Guidelines and Requirements for Accessible Design.

Q. 52. Where can I get a copy of the UFAS?

A. 52. A copy of the UFAS is attached to these guidelines, and you can also get a copy from your bureau or office headquarters.

Q. 53. Do the UFAS address accessibility to all programs and activities?

A. 53. The UFAS address accessibility to all buildings and indoor facilities where programs and activities are conducted or located.

PROGRAMS AND ACTIVITIES

Q. 54. What are some examples of indoor programs and activities?

A. 54. Examples of indoor programs and activities include:

- a) audio and/or visual programs;
- b) auditoriums;
- c) displays and display areas;
- d) exhibits and exhibit rooms;
- e) historic buildings, houses, sites, and structures;
- f) information desks and areas;
- g) informative talks;
- h) museums;
- i) self-guided and guided tours; and
- j) visitor centers.

Q. 55. Are programs and activities conducted outdoors covered by the Department's regulation?

A. 55. Yes.

Q. 56. How do I find out how to provide accessibility to outside facilities where programs and activities are conducted?

A. 56. Accessibility solutions to some outdoor facilities may be found by using the applicable standards in the UFAS for, for example, restrooms, drinking fountains, showers, etc.

For information concerning accessibility to other types of outdoor facilities where programs or activities are conducted, contact the Department's section 504 program administrator or your bureau or office headquarters.

- Q. 57. What types of outdoor facilities are covered by the Department's regulation if they are used for programs or activities?
- A. 57. Examples of outdoor facilities covered by the Department's regulation if they provide programs or activities include:
- a) amphitheatres;
 - b) beaches;
 - c) benches;
 - d) boardwalks;
 - e) boat docks;
 - f) boat launch ramps;
 - g) campgrounds and related camping facilities;
 - h) descriptive signs/bulletin boards;
 - i) information kiosks;
 - j) natural features/sites;
 - k) outdoor exhibits;
 - l) parking lots;
 - m) pay telephones;
 - n) picnic areas;
 - o) picnic grills;
 - p) playgrounds;
 - q) scenic overlooks;
 - r) trails.
- Q. 58. How do I get accessible pay telephones at my program or activity?
- A. 58. Contact your local telephone company. Most telephone companies are interested in, and helpful in providing pay telephones that are accessible to persons in wheelchairs, and which also are usable by hearing-impaired persons.
- Q. 59. Are there any types of outdoor facilities which while they do not themselves provide a program or activity are covered by the regulation and must be accessible?
- A. 59. Yes. Restrooms, drinking fountains, showers, parking facilities, trails, sidewalks, curb cuts, ramps, etc.
- Q. 60. How many designated and marked handicapped parking spaces should serve an agency program or activity area?
- A. 60. Each parking lot serving an agency program or activity area must have a minimum of one designated and marked handicapped parking space, meeting the specified dimensions, for each twenty-five parking spaces. Parking lots with less than twenty-five parking spaces should have a minimum of one designated and marked handicapped parking space.

Programs or activities with heavier visitation levels by handicapped persons should have additional handicapped parking spaces above the UFAS specified minimum.

CONCESSIONAIRES

- Q. 61. What types of concessionaire operated programs or activities are covered by the Department's regulation?
- A. 61. Examples of concessionaire operated programs or activities covered by the Department's regulation include:
- a) bathing, showering, and related activities;
 - b) boat or raft trips;
 - c) bus or other motor-vehicle conducted trips or tours;
 - d) camping and related activities;
 - e) gift shops;
 - f) laundry areas;
 - g) lodging, hotel, and motel activities;
 - h) marinas and related activities;
 - i) restaurant, snack bar, or other eating areas;
 - j) swimming;
 - k) tours.
- Q. 62. Where do I get information on the type of language to include in a contract with a concessionaire to assure accessibility for handicapped persons?
- A. 62. From that segment of your bureau or office headquarters that negotiates contracts with concessionaires, or from the Department's section 504 program administrator.

EMPLOYMENT COMPLAINTS

- Q. 63. How are complaints alleging employment discrimination on the basis of physical or mental handicap processed?
- A. 63. Complaints filed by employees or applicants for employment alleging discrimination on the basis of physical or mental handicap are processed in accordance with the procedures established by the Equal Employment Opportunity Commission at 29 Code of Federal Regulations Part 1613. The first step in pursuing an allegation of employment discrimination is for the aggrieved person to contact a bureau or office Equal Employment Opportunity Counselor.

SECTION 504 ACCESSIBILITY COMPLAINTS

- Q. 64. How are complaints alleging discrimination on the basis of handicap in programs or activities conducted by the Department, or any of its bureaus or offices, processed?
- A. 64. Complaints alleging discrimination on the basis of handicap in programs or activities, except for employment, conducted

by the Department or any of its bureaus or offices, will be processed in accordance with the procedures set forth in the Department of the Interior's regulation which appears at 43 Code of Federal Regulations Part 17, Subpart E.

- Q. 65. With whom should complaints alleging discrimination on the basis of handicap in any programs or activities conducted by the Department or any of its bureaus or offices be filed?
- A. 65. Complaints alleging discrimination on the basis of handicap in any programs or activities conducted by the Department or any of its bureaus or offices should be delivered or mailed to the Director, Office for Equal Opportunity, U.S. Department of the Interior, Washington, D.C. 20240.
- Q. 66. What happens if a complaint alleging discrimination on the basis of handicap in any programs or activities conducted by the Department or any of its bureaus or offices is received by someone other than the Department's Director of the Office for Equal Opportunity?
- A. 66. If a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices is received by someone other than the Department's Director of the Office for Equal Opportunity, he or she should immediately forward the complaint to the Department's Director of the Office for Equal Opportunity.
- Q. 67. Is there a time frame for filing a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices?
- A. 67. Yes. All complete complaints must be filed within 180 days of the alleged act of discrimination. However, the Department's Director of the Office for Equal Opportunity may extend the time period for good cause.
- Q. 68. Must the Department accept and investigate all complete complaints for which it has jurisdiction?
- A. 68. Yes. The Department must accept and investigate all complete complaints which are timely filed and for which it has jurisdiction.
- Q. 69. What happens if the Department's Director of the Office for Equal Opportunity receives a complaint that is not complete?
- A. 69. If the Department's Director of the Office for Equal Opportunity receives a complaint that is not complete, he

or she must notify the complainant within 30 days of receipt of the complaint, that additional information is needed.

If the complainant does not submit the requested information within 30 days of his or her receipt of the Director's notice, the Director shall dismiss the complaint without prejudice.

Q. 70. Who makes the determination whether a complaint is complete?

A. 70. The Department's Director of the Office for Equal Opportunity.

Q. 71. Who investigates complaints alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices?

A. 71. The Department's Director of the Office for Equal Opportunity arranges for the investigation of accepted complete complaints of discrimination alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices.

All employees of the Department or its bureaus or offices are required to cooperate and participate in the investigation and resolution of complaints. Employees who are required to cooperate and participate in an investigation shall do so as part of their official duties.

Q. 72. May the Department delegate its authority for conducting an investigation of a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices?

A. 72. Yes. The Department may delegate its authority for conducting an investigation of a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department of any of its bureaus or offices to another Federal agency.

Q. 73. What happens if the Department's Director of the Office for Equal Opportunity receives a complaint over which the Department does not have jurisdiction?

A. 73. If the Department's Director of the Office for Equal Opportunity receives a complaint over which the Department does not have jurisdiction, he or she must promptly notify the complainant and refer the complaint to the appropriate government agency.

Q. 74. Does the Department have any inter-agency responsibility when it receives a complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended, or section 502 of the Rehabilitation Act of 1973, as amended, is not readily accessible to and usable by handicapped persons?

A. 74. Yes. When the Department receives a complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended, or section 502 of the Rehabilitation Act of 1973, as amended, is not readily accessible to and usable by handicapped persons, the Department's Director of the Office for Equal Opportunity must notify the Architectural and Transportation Barriers Compliance Board.

SECTION 504 COMPLAINT DECISIONS

Q. 75. Who issues the Department's decisions on complaints alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices?

A. 75. The Department's Director of the Office for Equal Opportunity.

Q. 76. May the Department delegate its authority for making the final decision on a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices?

A. 76. No. The Department may not delegate its authority for making the final decision on a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or office.

Q. 77. What is the time frame for issuing the decision?

A. 77. One hundred eighty (180) days from the date of receipt of the complete complaint.

Q. 78. What elements must the decision include?

A. 78. The Department's decision on a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices must include:

- (a) Findings of fact and conclusions of law (which will be reviewed for legal sufficiency by the Office of the Solicitor);
- (b) A description of a remedy for each violation found (if no violation is found, then no remedies are prescribed); and
- (c) A notice of the right to appeal.

SECTION 504 APPEAL RIGHTS

- Q. 79. Can the decisions of the Department's Director of the Office for Equal Opportunity be appealed?
- A. 79. Yes. The decisions of the Department's Director of the Office for Equal Opportunity may be appealed regarding: (1) the findings of fact and conclusions of law; or (2) the remedies.
- Q. 80. With whom may the appeal be filed?
- A. 80. The appeal may be filed with, and shall be accepted and processed by, the Chief Operating Officer, U.S. Department of the Interior, Washington, D.C. 20240.
- Q. 81. May the Department delegate its authority for making the final decision on an appeal of a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or offices?
- A. 81. No. The Department may not delegate its authority for making the final decision on an appeal of a complaint alleging discrimination on the basis of handicap in any of the programs or activities conducted by the Department or any of its bureaus or office.
- Q. 82. What is the time frame for filing an appeal?
- A. 82. Appeals must be filed by the complainant within ninety (90) days of receipt of the Department's decision. The Department's Chief Operating Officer may extend the time limit for good cause.
- Q. 83. What is the time frame for issuing a decision on an appeal?
- A. 83. The Department must notify the complainant of the results of the appeal within sixty (60) days of the receipt of the appeal. If the Department determines that it needs additional information from the complainant in order to process the appeal, it shall have sixty (60) additional days from the date it receives the additional information

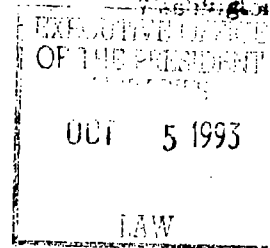
to issue its decision on the appeal. These time limits may be extended in an individual case by the Department's Chief Operating Officer when he or she determines that there is good cause for the extension, based on the particular circumstances of the specific complaint.

Q. 84. May the Department award attorneys fees to complainants in cases filed pursuant to this regulation (43 CFR Part 17, Subpart E)?

A. 84. No. Nothing contained in Title V of the Rehabilitation Act provides for an agency award of attorneys fees in administrative proceedings other than those involving Federal employment.

code of federal regulations

The President



3

1992 COMPILATION
AND

PARTS 100 TO 102

Revised as of January 1, 1993

DO NOT DISCARD THIS VOLUME
Note: Because Title 3 of the CFR is
an annual compilation, this volume
should be retained as a permanent
reference source.



§ 101.8 Office of the United States Trade Representative.

Freedom of Information regulations for the Office of the United States Trade Representative appear at 15 CFR part 2004.
[55 FR 48037, Nov. 1, 1990]

**PART 102—ENFORCEMENT OF NONDISCRIMINATION ON
THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES
CONDUCTED BY THE EXECUTIVE OFFICE OF THE
PRESIDENT**

Sec.

- 102.101 Purpose.
- 102.102 Application.
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- 102.171–102.999 [Reserved]

Authority: 29 U.S.C. 794.

Source: The provisions of this part 102 appear at 53 FR 25879, July 8, 1988, and 55 FR 48037, November 1, 1990, unless otherwise noted.

§ 102.101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 102.102 Application.

This regulation (§§ 102.101–102.170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 102.103 Definitions.

For purposes of this regulation, the term—

"Agency" means, for purposes of this regulation only, the following entities in the Executive Office of the President: the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement

Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.

"Agency head" or "head of the agency"; as used in §§ 102.150(a)(3), 102.160(d) and 102.170 (i) and (j), shall be a three-member board which will include the Director, Office of Administration, the head of the Executive Office of the President, agency in which the issue needing resolution or decision arises and one other agency head selected by the two other board members. In the event that an issue needing resolution or decision arises within the Office of Administration, one of the board members shall be the Director of the Office of Management and Budget.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Historic preservation programs" means programs conducted by the agency that have preservation of historic properties as a primary purpose.

"Historic properties" means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple

sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 102.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

"Substantial impairment" means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 102.104—102.109 [Reserved]

§ 102.110 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A description of areas examined and any problems identified; and
- (2) A description of any modifications made.

§ 102.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 102.112—102.129 [Reserved]

§ 102.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 102.131—102.139 [Reserved]

§ 102.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§ 102.141—102.148 [Reserved]

§ 102.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 102.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 102.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 102.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 102.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of § 102.150(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to com-

plete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 102.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 102.152—102.159 [Reserved]

§ 102.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue

financial and administrative burdens, the agency has the burden of proving that compliance with § 102.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 102.161—102.169 [Reserved]

§ 102.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Director, Facilities Management, Office of Administration, Executive Office of the President, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Director at the following address: Room 486, Old Executive Office Building, 17th and Pennsylvania Ave. NW., Washington, DC 20500.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 102.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the

agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§§ 102.171—102.999 [Reserved]

Title 3 Finding Aids

Table 1—Proclamations

Table 2—Executive Orders

Table 3—Other Presidential Documents

Table 4—Presidential Documents Affected During 1991

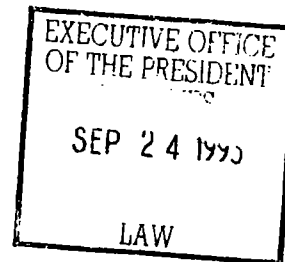
Table 5—Statutes Cited as Authority for Presidential Documents

List of CFR Sections Affected

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code of federal regulations

Labor



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PRESIDENT LAW LIBRARY
Room 5224 C-708
PARTS 990 TO 1899
Revised as of July 1, 1993



§ 1612.10 Recordkeeping requirements.

(a) In the case of any meeting or portion(s) thereof to be closed to public observation under the provisions of this part, the following records shall be maintained by the Executive Secretary of the agency:

(1) The certification of the Legal Counsel pursuant to § 1612.9 of this part;

(2) A statement from the presiding officer of the meeting or portion(s) thereof setting forth the time and place of the meeting, and the persons present;

(3) A complete electronic recording adequate to record fully the proceedings of each meeting closed to the public observation, except that in a meeting closed pursuant to paragraph (h) or (j) of § 1612.4, the agency may maintain minutes in lieu of a recording. Such minutes shall fully, and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote. All documents considered in connection with any item shall be identified in the minutes.

(b) If the agency has determined that the meeting or portion(s) thereof may properly be closed to the public, the electronic recording or minutes shall not be made available to the public until such future time, if any, as it is determined by the Commission upon request, that the reasons for closing the meeting no longer pertain; Provided, however, that any separable portion of a recording or minutes will be made promptly available to the public if that portion does not contain information properly withheld under § 1612.4.

(c) The agency shall maintain a copy of the electronic recording or minutes for a period of two years after the meeting, or until one year after the conclusion of the proceeding to which the meeting relates, whichever occurs later.

[42 FR 13830, Mar. 14, 1977, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1612.11 Public access to records.

All requests for information shall be submitted in writing to the Chairman of the agency. Requests to inspect or copy the electronic recordings or minutes of agency meetings or portions thereof will be considered under the provisions of § 1612.4 of this part.

§ 1612.12 Fees.

(a) Records provided to the public under this part shall be furnished at the expense of the party requesting copies of the recording or minutes, upon payment of the actual cost of duplication.

(b) All required fees shall be paid in full prior to issuance of requested copies of records. Fees are payable to the "Treasurer of the United States."

§ 1612.13 Meetings closed by regulation.

(a) This paragraph constitutes the Commission's regulation promulgated pursuant to paragraph (d)(4) of the Government in the Sunshine Act and may be invoked by the agency to close meetings or portions thereof where the subject matter of such meeting or portion of a meeting is likely to involve:

(1) Matters pertaining to the issuance of subpoenas;

(2) Subpoena modification and revocation requests, and

(3) The Agency's participation in civil actions or proceedings pertaining thereto.

(b) When closing a meeting or portion thereof under the Commission's regulation set forth in paragraph (a) of this section, a majority of the Commission membership shall vote at or before the beginning of such meeting or portion thereof to do so. The vote to close a meeting by regulation shall be recorded and made publicly available.

(c) The Commission's determination to promulgate the regulation in paragraph (a) of this section is based upon a review of the agenda of Commission meetings for the two years prior to the promulgation of these regulations.

(1) Since the Commission's practice of conducting weekly meetings began in 1975, proposed litigation against title VII respondents has been a regu-

lar agenda item. The tenth exemption of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(10), exempts the discussion of these matters from the open meeting requirements of the Act.

(2) Thus, the Commission has determined that a majority of its meetings or portions thereof may properly be closed to the public under the tenth exemption of the Sunshine Act, and that paragraph (d)(4) of the Sunshine Act is properly relied upon in promulgating the Commission's regulation in paragraph (a) of this section.

§ 1612.14 Judicial review.

Any person may bring an action in a United States District Court to challenge or enforce the provisions of this part. Such action may be brought prior to or within sixty (60) calendar days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within sixty (60) days after such announcement is made. An action may be brought where the agency meeting was held or in the District of Columbia.

PART 1613—EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

Subpart A—[Reserved]

Subpart B—Equal Opportunity Without Regard to Race, Color, Religion, Sex, or National Origin

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APPENDIX A TO PART 1613—POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION

AUTHORITY: 42 U.S.C. 2000e-16; 29 U.S.C. 633a; 29 U.S.C. 791 and 794a; 29 U.S.C. 206(d); E.O. 10577, 3 CFR 218 (1954-1958 Comp.); E.O. 11222, 3 CFR 306 (1964-1965 Comp.); E.O. 11478, 3 CFR 133 (1969 Comp.); E.O. 12106, 44 FR 1053 (1978); Reorg. Plan No. 1 of 1978, 43 FR 19807 (1978), unless otherwise noted.

Subpart A—[Reserved]

Subpart B—Equal Opportunity Without Regard to Race, Color, Religion, Sex, or National Origin

SOURCE: 37 FR 22717, Oct. 21, 1972, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

GENERAL PROVISIONS

§ 1613.201 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations

without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) *Applicability.* (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 1613.202 General policy.

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 1613.203 Agency program.

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials re-

sponsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employees by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior accomplishment in equal employment opportunity;

(l) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

§ 1613.204 Implementation of agency program.

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 1613.202 and its program established in accordance with § 1613.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Employment Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of:

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 1613.202 and the agency program required to be established under § 1613.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 1613.214;

(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§ 1613.211 through 1613.222;

(6) Providing for the acceptance and processing and/or rejection of class complaints in accordance with subpart F of this part;

(7) When authorized by the head of the agency, making the decision under § 1613.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing, at his discretion, the record on any complaint before the decision is made under § 1613.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 1613.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 1613.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor;

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a

change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so;

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity; and

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972; 42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.205 Commission review and evaluation of agency program operations.

The Commission shall review and evaluate agency program operations periodically, obtain such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 1613.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regula-

tions, orders, and instructions issued by the Commission.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.211 General.

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition comply with the principles and requirements in §§ 1613.212 through 1613.222, except where excluded in § 1613.514.

[52 FR 41922, Oct. 30, 1987]

§ 1613.212 Coverage.

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or handicapping condition. A complaint may also be filed by an organization for the aggrieved person with that person's consent.

(b) The agency shall provide in its regulations for the acceptance of class complaints in accordance with subpart F.

[37 FR 22717, Oct. 21, 1972, as amended at 42 FR 11808, Mar. 14, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 52 FR 41922, Oct. 30, 1987]

§ 1613.213 Precomplaint processing.

(a) The agency shall require that an aggrieved person who believes that he or she was discriminated against because of race, color, religion, sex, national origin, age or handicapping condition consult with an Equal Employment Opportunity Counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised

that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination. The notice shall inform the complainant of his or her right to file a discrimination complaint at any time up to 15 calendar days after receipt of the notice of the appropriate official with whom to file a complaint and of complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

(b) Upon initial contact or as soon thereafter as possible, the Equal Employment Opportunity Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. 7121(d) to the alleged discriminatory action. The Equal Employment Opportunity Counselor shall communicate the substance of § 1613.219 concerning the election of remedies to each aggrieved person.

(c) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(d) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24131, Apr. 9, 1980; 52 FR 41922, Oct. 30, 1987]

§ 1613.214 Filing and processing of complaint.

(a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an

appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in § 1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

(b) *Representation and official time.* (1) At the stage in the processing of a complaint, including the counseling stage under § 1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(2) If the complainant is an employee of the agency, he/she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another employee of the agency as his/her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(3) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or the agency prior to a hearing on the complaint) may, after

giving the representative an opportunity to respond, disqualify the representative.

[52 FR 41922, Oct. 30, 1987]

§ 1613.215 Rejection or cancellation of complaint.

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency;

(2) That alleges that an agency is proposing to take action that may be discriminatory;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party;

(4) That is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4);

(5) That the complainant elected to pursue under a negotiated grievance procedure as identified in § 1613.219;

(6) That the complainant has failed to prosecute. The agency may cancel an allegation or a complaint for failure to prosecute only after it has provided the complainant with a written request, that includes a notice of the proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 calendar days of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available; or

(7) If the complainant refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes full relief. An offer of full relief under this subsection is the appropriate relief in § 1613.271. The offer need not contain the decision whether disciplinary action is necessary, but the basis for the decision shall be recorded separately from the complaint file.

(b) The agency head or designee shall transmit the decision to reject or cancel a complaint by letter to the complainant and the complainant's representative. The decision letter shall inform the complainant of the right to appeal the decision to the Commission, the time limit for filing an appeal with the Commission, and the complainant's right to file a civil action as described in § 1613.281.

[52 FR 41923, Oct. 30, 1987]

§ 1613.216 Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name

in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant and witnesses, and copies of, or extracts from records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization:

(1) To investigate all aspects of complaints of discrimination,

(2) To require all employees of the agency to cooperate with him in the conduct of the investigation, and

(3) To require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

(c) The Commission may assume responsibility for the investigation of any portion or all of an agency's complaints upon the execution of a memorandum of understanding to this effect with the agency. The agency shall reimburse the Commission for all expenses incurred in connection with the investigation. The Commission shall forward to the agency upon completion of the investigation the investigative file and the recommended proposed disposition. The agency shall adopt as its proposed disposition of the complaint the Commission's recommended disposition unless within 30 days after the agency receives the investigative file and recommended disposition the complaint has been informally adjusted in accordance with § 1613.217(a), or the agency has notified the complainant of its own proposed disposition in accordance with § 1613.217(c).

[52 FR 41923, Oct. 30, 1987]

§ 1613.217 Adjustment of complaint and offer of hearing.

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant, or the complainant's representative if there is one, a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. Where the parties agree on an adjustment of the complaint, but cannot agree on whether attorney's fees or costs should be awarded or on the amount of attorney's fees or costs, the issue of the award of attorney's fees or costs or the amount which should be awarded may be severed and shall be the subject of a final decision under § 1613.221(d). The decision of whether to award attorney's fees or costs or of the amount to be awarded may be the subject of an appeal to the Commission under the provisions of §§ 1613.231 through 1613.240.

(b) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement, the complainant shall notify the Director of Equal Employment Opportunity, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint

be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the complainant's written allegation of non-compliance with the settlement agreement, the agency shall have thirty (30) calendar days in which to resolve the matter and to respond to the complainant, in writing, concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the complainant's written allegations of noncompliance with the settlement agreement, the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement. The complainant may file such an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 20 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted, as may be appropriate. If the Commission determines that agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Complaints that alleged reprisal or further discrimination violate a settlement agreement shall be processed as individual complaints under § 1613.214 rather than under this section.

(c) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing:

(1) Of the proposed disposition of the complaint,

(2) Of the right to a hearing, unless a recommended decision is issued under § 1613.218(g), and decision by the agency head or designee if he/she

notifies the agency in writing within 15 calendar days of the receipt of the notice that he/she desires a hearing, and

(3) Of the right to a decision by the head of the agency or designee without a hearing.

(d) If the complainant fails to notify the agency of his/her wishes within the 15-day period prescribed in paragraph (c) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (c) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and the representative which shall inform the complainant of the right of appeal to the Commission and the time limit applicable to such an appeal and of the right to file a civil action as described in § 1613.281. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency or designee for decision under § 1613.221.

(52 FR 41924, Oct. 30, 1987)

§ 1613.218 Hearing.

(a) *Administrative Judge.* The hearing shall be conducted by a Commission Administrative Judge with an appropriate security clearance, except in instances where the Commission finds it is practical to delegate this responsibility to a complaints examiner or Administrative Judge from another agency who shall not be an employee of the agency in which the complaint arose. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) When the Commission does not provide the Administrative Judge, it will supply the agency with the name of an Administrative Judge from another agency with an appropriate security clearance who has been certified by the Commis-

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sion as qualified to conduct a hearing under this section.

(b) *Arrangement for hearing.* The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the Administrative Judge in making a recommended decision on the complaint), to the Administrative Judge who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the Administrative Judge determines that further investigation is needed, the Administrative Judge shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 1613.216 apply to any further investigation by the agency on the complaint. The Administrative Judge shall schedule the hearing for a convenient time and place.

(c) *Conduct of hearing.* (1) Attendance at the hearing is limited to persons determined by the Administrative Judge to have a direct connection with the complaint. Hearings are part of the investigative process and are thus closed to the public.

(2) The Administrative Judge shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policies or practices relevant to the complaint shall be received in evidence. The complainant and the agency, or the representative of either shall be given the opportunity at the hearing to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) *Powers of Administrative Judge.* In addition to the other powers vested in the Administrative Judge in accord-

ance with this subpart, the Administrative Judge is authorized to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof and receive relevant evidence;

(4) Order the production of documents, records, comparative data, statistics, affidavits or the attendance of witnesses;

(5) Limit the number of witnesses whose testimony would be unduly repetitious; and

(6) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. In cases of repeated or flagrant contumacious conduct or misbehavior by a representative, the Administrative Judge may refer the matter to the Commission, and the Commission may, after giving the representative an opportunity to respond to the allegations of misconduct, suspend or disqualify the representative from further representational activity and report the misconduct to other appropriate authorities.

(e) If the complainant or agency in bad faith refuses or fails without adequate explanation to respond fully and in timely fashion to requests made or approved by the Administrative Judge for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the Administrative Judge:

(1) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(2) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(3) To exclude other evidence offered by the party failing to produce the requested information;

(4) To take such other actions as deemed appropriate.

(f) *Witnesses at hearing.* The Administrative Judge shall request any agency subject to this subpart to make available as a witness at the hearing

an employee requested by the complainant when the Administrative Judge determines that the appearance of an employee is necessary. The Administrative Judge may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The Administrative Judge shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the Administrative Judge and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the Administrative Judge. If the explanation is inadequate, the Administrative Judge shall so advise the agency and it shall make the employee available as a witness at the hearing. If the explanation is adequate, the Administrative Judge shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee at another time or through written interrogatory. An employee of an agency shall be in a duty status during the time he/she is made available as a witness.

(g) If the Administrative Judge determines that there are no issues of material fact, the Administrative Judge may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue a recommended decision without holding a hearing. The recommended decision will conform to § 1613.218(i) in all other aspects.

(h) *Record of hearing.* The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the Administrative Judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the

document to the complainant. If the complainant submits a document that is accepted, the Administrative Judge shall make the document available to the agency representative for reproduction.

(i) Findings, analysis, and recommendations. The Administrative Judge shall transmit to the head of the agency or designee:

(1) The complaint file (including the record of the hearing),

(2) The findings and analysis of the Administrative Judge with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and

(3) The recommended decision of the Administrative Judge on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose.

The Administrative Judge shall notify the complainant of the date on which this was done. In addition, the Administrative Judge shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

[52 FR 41925, Oct. 30, 1987]

§ 1613.219 Relationship to grievance procedures.

(a) Allegations of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition may be raised under a grievance procedure by employees in agencies that are subject to the provisions of 5 U.S.C. 7121(d) and who are covered by a collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure. Allegations of discrimination by employees not covered by such a negotiated grievance procedure or by employees of agencies not subject to 5 U.S.C.

7121(d) shall be processed as complaints under § 1613.214 *et seq.*

(b) In cases where a person is covered by a negotiated grievance procedure permitting allegations of discrimination, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect the forum in which to pursue the matter: either the process described in this part or a negotiated grievance procedure. An aggrieved employee who files a grievance in writing with an agency whose negotiated agreement with an employee organization permits the acceptance of grievance which allege discrimination prohibited by this subpart, may not thereafter file a complaint on the same matter under the provisions of this subpart irrespective of whether the grievance has raised an allegation of discrimination within the negotiated grievance procedure. Any such complaints filed after a grievance has been filed on the same matter shall be rejected without prejudice to the complainant's rights to proceed through the negotiated grievance process, including the complainant's right to request the Commission to review a final decision as provided in 5 U.S.C. 7121(d) and at § 1613.231(b). The agency decision letter rejecting such a complaint shall advise the complainant of the right to appeal the agency decision to the Commission. An election, pursuant to this paragraph, to proceed under this part is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process as described in § 1613.213 does not constitute an election for the purposes of this section.

[52 FR 41925, Oct. 30, 1987]

§ 1613.220 Avoidance of delay.

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the Administrative Judge under § 1613.218.

(b) The head of the agency or designee shall cancel a complaint if the complainant fails to prosecute the

complaint without undue delay by following the procedures for cancelling a complaint under § 1613.215.

(c) The agency shall furnish the Commission reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply an Administrative Judge or complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the Administrative Judge has submitted a recommended decision it shall become a final decision binding on the agency 60 calendar days after the receipt of the complete complaint file and the recommended decision by the agency unless the agency has already issued a final decision. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the Administrative Judge under § 1613.218(i) and a copy of the hearing record and also shall notify him in writing of the right to appeal to the Commission and the time limits applicable to such an appeal and of the right to file a civil action as described in § 1613.281. The agency shall provide the Administrative Judge with a copy of its final decision on each complaint on which a recommended decision has been issued.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 52 FR 10085, Mar. 30, 1987; 52 FR 41926, Oct. 30, 1987]

§ 1613.221 Decision by head of agency or designee.

(a) The head of the agency or designee shall make the decision of the agency on a complaint based on the preponderance of evidence in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing, shall reflect the date of its issuance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other method which enables the agency to show the date of receipt.

(2) When the Administrative Judge has issued a recommended decision on the complaint under § 1613.218(g) or (i)(3), the decision letter shall transmit a copy of such recommended decision and a copy of the hearing record if a hearing was held. The decision of the agency shall adopt, reject, or modify the decision recommended by the Administrative Judge. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejecting or modifying the findings of fact or conclusions of law made by the Administrative Judge.

(3) When there has been no hearing and no recommended decision under § 1613.218(g), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall:

(1) Advise the complainant and his or her representative that any request for attorney's fees or costs must be documented and submitted within 20 calendar days of receipt,

(2) Require remedial action to be taken in accordance with § 1613.271,

(3) Review the matter giving rise to the complaint to determine whether disciplinary action is appropriate and

(4) Record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees or costs, the amount of these awards shall be determined under § 1613.271(c). In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The decision letter shall inform the complainant of his or her right to appeal the decision of the agency to the Commission, and shall include the text of § 1613.233 (a) or (b), as appropriate. The decision letter shall also inform the complainant of his or her right to file a civil action in accordance with § 1613.281, and of the time limits applicable to such an appeal.

[52 FR 41926, Oct. 30, 1987]

§ 1613.222 Complaint file.

The agency shall establish a complaint file. Except as provided in § 1613.221(c), this file shall contain all documents pertinent to the complaint.

(a) The complaint file shall include copies of:

(1) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 1613.213(a);

(2) The written report of the Equal Employment Opportunity Counselor on whatever precomplaint counseling efforts were made with regard to the complainant's case;

(3) The complaint;

(4) The investigative file,

(5) If the complaint is withdrawn by the complainant, a written statement of the complainant or representative to that effect;

(6) If adjustment of the complaint is arrived at under § 1613.217, the written record of the terms of adjustment;

(7) If no adjustment of the complaint is arrived at under § 1613.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of the right to a hearing and documentation of the attempt to adjust the complaint;

(8) If decision is made under § 1613.217(d), a copy of the letter to the complainant transmitting that decision,

(9) If a hearing was held, the record of the hearing, together with the Administrative Judge's findings, analysis and recommendations, if any, made to the head of the agency or designee,

(10) If the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by the Director to the head of the agency or designee,

(11) If decision is made under § 1613.221, a copy of the letter transmitting the decision of the head of the agency or designee, and

(12) Proof of the date of receipt of final agency decision, as required under § 1613.221(b)(1).

(b) The complaint file shall not contain any document that has not been made available to the complainant or the complainant's designated physician under 5 CFR 294.401.

[52 FR 41927, Oct. 30, 1987]

APPEAL TO THE COMMISSION

§ 1613.231 Right to appeal to the Commission.

(a) A complainant may appeal to the Commission the decision of the head of the agency or designee:

(1) To reject or cancel the complaint or any portion for reasons covered by § 1613.215; or

(2) Under the circumstances set forth in § 1613.217(b); or

(3) On the merits of the complaint, under § 1613.217(d), § 1613.220(d) or § 1613.221, or on the award of attorney's fees or costs.

(b) A complainant may appeal to the Commission on issues of employment discrimination raised in a negotiated grievance procedure covered by § 1613.219(a), where the agency's negotiated labor-management agreement permits such issues to be raised. A complainant may appeal the decision:

(1) Of the agency head or designee on the grievance;

(2) Of the arbitrator on the grievance; or

(3) Of the Federal Labor Relations Authority (FLRA) on exceptions to the arbitrator's award.

A complainant may not appeal under this subsection, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration or is before the FLRA. Any appeal prematurely filed in such circumstances shall be dismissed without prejudice.

[52 FR 41927, Oct. 30, 1987]

§ 1613.232 Where to appeal.

The complainant shall file his appeal in writing, either personally or by mail, with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507.

[51 FR 22519, June 20, 1986, as amended at 56 FR 6983, Feb. 21, 1991; 57 FR 11431, Apr. 3, 1992]

§ 1613.233 Time limit.

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) Receipt of an agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next state of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the deci-

sion of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

[44 FR 34495, June 15, 1979, as amended at 48 FR 19707, May 2, 1983]

§ 1613.234 Appellate procedures and finality.

(a) *Procedures.* On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all relevant written representations submitted by either party. The Office may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. There is no right to a hearing before the Office or the Commission upon appeal. The Office or the Commission shall issue a written decision setting forth its reasons for the decision and shall send copies to the complainant, the complainant's designated representative, and the agency. When corrective action is ordered, the agency shall report within the time specified to the Office that the corrective action has been taken.

(b) *Finality.* A decision issued under this section is final within the meaning of §§ 1613.281 and 1613.641 unless:

(1) Within 30 days of receipt a decision issued under paragraph (a) of this section, either party files a timely request to reopen pursuant to § 1613.235, or

(2) The Commission on its own motion reopens the case.

[52 FR 41927, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.235 Reopening and reconsideration.

(a) The Commission may, in its discretion, reopen and reconsider any decision of the Commission notwithstanding any other provisions of this part.

(b) Parties may request reopening or reconsideration provided that such request is made within 30 days of receipt of a decision issued pursuant to § 1613.234 or within 20 days of receipt of another party's timely request to reopen. Such requests shall be submitted to the Office of Federal Operations. The request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law or regulation or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have effects beyond the actual case at hand.

(c)(1) The party requesting reopening or reconsideration shall submit copies of the request and supporting documents to all other parties and their representatives at the time of the request along with proof of such submission.

(2) Any argument in opposition to the request to reopen or cross request to reopen shall be submitted to the Office of Federal Operations and to the requesting party within 20 days of receipt of the request to reopen along with proof of such submission.

(d) A decision on a request to reopen by either party is final and there is no further right by either party to request reopening.

[52 FR 41927, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.236 [Reserved]

§ 1613.237 Corrective action.

(a) Corrective action ordered by the Office of Federal Operations or the Commission is mandatory and binding on the agency except as provided in § 1613.234(b). Failure to implement ordered relief shall be subject to judicial

enforcement as specified in § 1613.239(c).

(b) When the agency requests reopening and when the case involves removal, separation, or suspension continuing beyond the date of the request to reopen, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reopening.

(1) Service under the temporary or conditional restoration provisions of this paragraph shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, provided the Commission—

(i) Upholds its decision after reopening the case, or

(ii) Refuses to reopen.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reopening, that the remedial action it takes is temporary or conditional.

(c) When no request for reopening is filed within 30 days of receipt of the decision, or when a request to reopen is denied, the agency shall execute the action ordered and there is no further right to delay implementation of the ordered relief. The corrective action shall be completed not later than sixty (60) days after the decision becomes final.

[52 FR 41928, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.238 Enforcement of final decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Op-

erations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request to reopen, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

[52 FR 41928, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.239 Enforcement action by the Commission.

(a) *Notice to show cause.* The Commission may issue a notice to the Head of any Federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the Head of the agency or representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons why compliance has not been effectuated.

(b) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of agreement, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(c) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit

its report of corrective action, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to section 717 of title VII, section 15 of the Age Discrimination in Employment Act, or section 505 of the Rehabilitation Act, and to seek judicial review of the agency's refusal to implement corrective action pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the Mandamus Statute, 28 U.S.C. 1361, or commence de novo proceedings pursuant to the appropriate statutes.

[52 FR 41928, Oct. 30, 1987]

§ 1613.240 Computation of time.

With respect to time periods specified in this subpart:

(a) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday, or Federal holiday, in which case the period shall be extended to include the next business day; and

(b) A document shall be deemed timely if it is delivered in person or postmarked before the expiration of the applicable filing period, or if, in the absence of a legible postmark, it is received by mail within five days from the expiration of the applicable filing period.

[52 FR 41928, Oct. 30, 1987]

REPORTS TO THE COMMISSION

§ 1613.241 Reports to the Commission on complaints.

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

CONSOLIDATION OF COMPLAINTS

§ 1613.251 Joint processing and consolidation of complaints.

(a) Two or more complaints of discrimination filed by employees or applicants for employment with the agency consisting of substantially

similar allegations of discrimination may, with the written permission of the complainants, be consolidated by the agency or Commission.

(b) Two or more individual complaints of discrimination from the same employee or applicant for employment may, at the discretion of the agency or the Commission, be joined for processing after notifying the individual that the complaints will be processed jointly.

[42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 1613.261 Freedom from restraint, interference, coercion and reprisal.

It is unlawful to restrain, interfere, coerce or discriminate against complainants, their representatives, witnesses, Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Investigators, Counselors and other agency officials with responsibility for processing discrimination complaints because of involvement with a discrimination charge during any stage in the presentation and processing of a complaint, including the counseling stage under § 1613.213, or because an individual filed a charge of discrimination, testified, assisted or participated in any manner with an investigation, proceeding or hearing or because of any opposition to an unlawful employment practice under this part.

[52 FR 41928, Oct. 30, 1987]

§ 1613.262 Review of allegations of reprisal.

(a) An individual who alleges a violation of § 1613.261 may have the allegation reviewed as an individual complaint of discrimination under §§ 1613.211 through 1613.283.

(b) When a complainant alleges a violation of § 1613.261 in connection with the filing of a prior discrimination complaint and the prior complaint is in process at the agency when the allegation is made, the complainant may request the agency to consolidate the reprisal allegation with the prior complaint. If the prior complaint

is at the hearing stage of the complaint process under § 1613.218, the complainant may request the Administrative Judge to consolidate the allegation with the complaint at the hearing. The agency or Administrative Judge may grant the request. *Provided*, That the request is made within 30 calendar days of:

(1) The act that forms the basis of the allegation,

(2) The effective date of the alleged discriminatory personnel action, or

(3) The date the complainant knew or should reasonably have known that § 1613.261 has been violated.

The agency or the Administrative Judge may exercise discretion and deny the request and require the allegation to be processed under § 1613.262(a).

[52 FR 41928, Oct. 30, 1987]

REMEDIAL ACTIONS

§ 1613.271 Remedial actions.

(a) When an agency, or the Commission, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in Appendix A of this part, which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that similar found violations of the law will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Remedial action involving an applicant.* (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Backpay, computed in the same manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer of employment is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by 5 CFR 550.805, from the date he would have been appointed until the date the offer was made, subject to the limitation of paragraph (b)(4) of this section. The agency shall inform the applicant, in its offer of employment, of his right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency nevertheless shall take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) This paragraph shall be cited as the authority under which the above-

described appointments or awards of backpay shall be made.

(4) Backpay under this paragraph for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant.

(c) *Remedial action involving an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by 5 CFR 550.805, unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade, even absent discrimination. The backpay liability under title VII or the Rehabilitation Act may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date the employee would have been promoted.

(2) If the record contains clear and convincing evidence that, although discrimination existed at the time selection for promotion was made, the employee would not have been promoted even absent discrimination, the agency shall eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) Attorney's fees or costs—(1) Awards of attorney's fees or costs. The provisions of this subpart relating to the award of attorney's fees or costs shall apply to allegations of discrimination or retaliation prohibited by section 717 of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

2000e-16, and sections 501 and 505 of the Rehabilitation Act, 29 U.S.C. 791 and 794a. In a decision by an agency, under §§ 1613.217, 1613.220(d), 1613.221 or 1613.612 or by the Commission, under §§ 1613.234, 1613.235, 1613.262, 1613.631 or 1613.632, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs incurred in the processing of the complaint or charge.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he/she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency which are signed by the representative shall be deemed to constitute notice of representation.

(2) Amount of awards. When a decision of the agency, under §§ 1613.217(c), 1613.220(d), 1613.221 or 1613.612 or of the Commission, under §§ 1613.234, 1613.235, 1613.262, 1613.631 or 1613.632 provides for an award of attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees, as appropriate, to the agency within 20 days of receipt of the decision. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded

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the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing. If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 calendar days of receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs within 30 calendar days of receipt of the statement and affidavit. Such decision shall include the specific reasons for determining the amount of the award.

(i) The amount of attorney's fees shall be calculated in accordance with the existing caselaw using following standards:

(A) The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate.

(B) This amount may be reduced or increased in considering the following factors, although ordinarily many of these factors are subsumed within the calculation set forth above: The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in some cases of exceptional success shall any of these factors be used to enhance an award computed by the formula set forth in paragraph (d)(2)(i)(A).

(ii) The costs which may be awarded are those authorized by 28 U.S.C. 1920 to include—

(A) Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case;

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(B) Fees and disbursements for printing and witnesses; and

(C) Fees for exemplification and copies of papers necessarily obtained for use in the case.

Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a Federal employee who is in a duty status when made available as a witness.

[52 FR 41929, Oct. 30, 1987]

RIGHT TO FILE A CIVIL ACTION

§ 1613.281 Statutory right.

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court:

(a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint,

(b) After one hundred and eighty (180) calendar days from the date of filing a complaint with the agency if there has been no decision,

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission, if there has been no Commission decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

[45 FR 24133, Apr. 9, 1980]

§ 1613.282 Notice of right.

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 1613.215, 1613.217, 1613.220, or § 1613.221. The Commission shall notify an employee or appli-

cant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under § 1613.234.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.283 Effect on administrative processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

[52 FR 41930, Oct. 30, 1987]

Subpart C—Minority Group Statistics System

§ 1613.301 Applicability.

(a) This subpart applies (1) to military departments as defined in section 102 of title 5, United States Code, Executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (2) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employee in those positions.

(b) This subpart does not apply to aliens employed outside the limits of the United States.

[34 FR 5371, Mar. 19, 1969, as amended at 34 FR 14024, Sept. 4, 1969; 36 FR 11999, June 24, 1971. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.302 Agency systems.

(a) Each agency shall establish a system which provides statistical employment information by race or national origin.

(b) Data shall be collected only by visual identification and shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information of the race or national origin of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission

to insure individual privacy and the separation of that information from personnel records.

(c) Each system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(d) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(e) An agency shall report to the Commission on employment by race and national origin in the form and at such times as the Commission may require.

[34 FR 5371, Mar. 19, 1969, as amended at 34 FR 14024, Sept. 4, 1969. Redesignated at 43 FR 60901, Dec. 29, 1978]

Subpart D—Processing Mixed Case Complaints

AUTHORITY: Sec. 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, secs. 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 794a, sec. 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, sec. 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d), Reorg. Plan No. 1 of 1978 (43 FR 19807) and E.O. 12106 (44 FR 1053).

SOURCE: 48 FR 19708, May 2, 1983, unless otherwise noted.

§ 1613.401 Purpose, scope and applicability.

(a) *Purpose.* This subpart sets forth the regulations under which the Equal

Employment Opportunity Commission will carry out its responsibilities for the administration and enforcement of section 205 of the Civil Service Reform Act of 1978, 5 U.S.C. 7702, with respect to matters of alleged employment discrimination prohibited by section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a, section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, and section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d).

(b) *Scope.* This subpart shall govern the treatment of complaints in which allegations of discrimination are raised, in connection with an action appealable to the Merit Systems Protection Board (MSPB), provided that the action which forms the basis of the complaint was initiated on or after January 11, 1979 (the effective date of the Civil Service Reform Act). This subpart governs the procedures applicable: (1) When a complainant elects to bring the matter which forms the basis of the complaint before his/her agency, by filing a complaint of discrimination, pursuant to this part; (2) when an appealable action, pending before the MSPB, is remanded for agency processing, pursuant to 5 CFR 1201.155(c); and (3) when a petition to review the decision of the MSPB on the issues of discrimination is filed with the Commission, pursuant to 5 U.S.C. 7702(b).

(c) *Applicability.* This subpart applies to all persons who have a right of appeal to the MSPB.

§ 1613.402 Definitions.

(a) *Mixed case complaint.* A mixed case complaint is: (1) A complaint of employment discrimination filed with a Federal agency, based on race, color, religion, sex, national origin, handicap, age, and/or reprisal, related to, or stemming from an action taken by an agency against the complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation; or (2) a complaint of sex-based wage discrimination, filed with the Commission, related to or stemming from an action taken by an

agency against a complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations which the MSPB has jurisdiction to address.

(b) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB, which jurisdiction to entertain, and which alleges that the agency action which forms the basis for the appeal was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, age and/or reprisal, or alleges that such appealable action resulted in sex-based wage discrimination.

(c) *Complaint.* A complaint is a formal complaint of discrimination, filed with the appropriate person designated to receive complaints at the agency, pursuant to § 1613.214 of subpart B of this part.

(d) *Proposal.* A proposal, as used in this subpart, means any document issued by an agency to an employee, pursuant to any requirements contained in regulations issued by the Office of Personnel Management (OPM), which proposes to take an action against that employee which, if effected, could be appealed by that employee to the MSPB.

(e) *Handicap definitions.* The definitions set forth at § 1613.702 of subpart G of this part are hereby incorporated by reference into this subpart and are applicable to any mixed case complaint which contains issues of handicap discrimination.

§ 1613.403 Election.

An aggrieved person may initially file a mixed case complaint with an agency, pursuant to this part, or (s)he may file a mixed case appeal directly with the MSPB, pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action which is appealable to the MSPB and who has raised the issue of discrimination either orally or in writing, during the processing of the action, of his/her right to file a mixed case complaint, if

the employee believes the action to be based, in whole or in part, on discrimination, or to file a mixed case appeal with the MSPB. The person shall be advised that (s)he may not initially file both and that whichever is filed first (the mixed case complaint or the appeal) shall be considered an election to proceed in that forum. For the purposes of this subsection, filing of a mixed case complaint occurs when the complaint is filed with an appropriate agency official, in accordance with § 1613.214(a)(3) of subpart B of this part.

§ 1613.404 Retroactivity.

The following shall apply, with respect to mixed case complaints filed prior to the effective date of these regulations, where any issues in such mixed case complaints were also appealed to the MSPB:

(a) *Discrimination allegations considered.* If the MSPB considered, or is considering, the allegations of discrimination raised in the mixed case complaint, in connection with any appeal, the mixed case complaint before the agency shall be cancelled, pursuant to § 1613.405(b).

(b) *Discrimination allegations not considered.* If the MSPB was not presented with or did not consider the allegations of discrimination raised in the mixed case complaint in connection with any appeal, the agency shall process such mixed case complaint in accordance with § 1613.405(e). The final agency decision on such complaint shall advise the complainant of his/her right to file a civil action, pursuant to § 1613.417, and that (s)he may petition the MSPB to review his/her previous appellate decision, to include the allegations of discrimination raised with the agency which were not previously decided on appeal by the MSPB. The decision shall further advise the complainant that, whether or not the MSPB chooses to review its previous decision, the complainant may thereafter petition the EEOC to review the matter, pursuant to § 1613.414, provided that the complainant has fulfilled the procedural prerequisite of first petitioning the MSPB.

§ 1613.405 Procedures for agency processing of mixed case complaints.

(a) *Rejections.* Whenever an agency is presented with a mixed case complaint concerning an action that has previously been appealed by the complainant to the MSPB, the agency shall reject the complaint (in writing), citing this sub-section as the authority therefor, regardless of whether the allegations of discrimination raised in the mixed case complaint were raised in the previous appeal to the MSPB. The agency shall advise the aggrieved person, as part of the decision rejecting such a complaint, that (s)he must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155.

(b) *Cancellation.* Whenever the agency learns that a mixed case complaint, which has been filed with and accepted by the agency, contains issues which also form the basis of an appeal which has been filed with the MSPB, the agency shall determine which was filed first (i.e., the mixed case complaint or the appeal). If the appeal to the MSPB was filed first, the agency shall cancel (in writing) that portion of the mixed case complaint related to the action appealed to the MSPB and advise the complainant, as part of the decision which cancels the complaint (in whole or in part), that (s)he must bring the allegations of discrimination to the attention of the MSPB, pursuant to 5 CFR 1201.155. If the mixed case complaint was filed first, the agency shall so advise the MSPB and request that the MSPB dismiss the appeal without prejudice and, thereafter, the agency shall process the complaint, pursuant to § 1613.405(e), and issue an agency decision within 120 calendar days. An agency may also cancel a mixed case complaint when it learns that the complainant has chosen to appeal the matter to the MSPB upon expiration of 120 calendar days from the date that the mixed case complaint was filed with the agency.

(c) *Effect of rejection or cancellation.* An agency decision to reject or cancel a mixed case complaint pursuant to § 1613.405(a) or (b) is not sub-

ject to appeal to the EEOC, except where § 1613.405(a) or (b) has been misapplied to a nonmixed case matter (in which case an appeal may be filed pursuant to § 1613.231 of subpart B).

(d) *MSPB Remands.* The MSPB may remand allegations of discrimination to an agency or, in Equal Pay Act matters, to the EEOC, pursuant to 5 CFR 1201.155(a) or (c). In such cases, the agency or the EEOC shall investigate those allegations, as required by the MSPB or by applicable EEOC regulation.

(e) *Procedures.* When a complainant, pursuant to § 1613.403, elects to proceed initially through the agency, rather than with the MSPB, the procedures set forth in §§ 1613.211 through 1613.221(d) of subpart B of this part shall govern the processing of the mixed case complaint, with the following exceptions:

(1) There shall be no hearing, as provided in § 1613.218 and as referenced in §§ 1613.217(b)(2) and 1613.221(b)(2) and (3);

(2) At the time that an agency advises a complainant of the acceptance of a mixed case complaint, pursuant to § 1613.214, the agency shall also advise the complainant of the following:

(i) The complaint shall be processed in accordance with this subpart;

(ii) If no agency decision is issued within 120 calendar days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter, up to, but not later than, one year from the filing of the complaint, or may file a civil action, as specified at § 1613.417(g); and

(iii) If the complainant is dissatisfied with the agency's decision on the mixed case complaint, (s)he may appeal the matter to the MSPB (not EEOC), within 20 calendar days of receipt of the agency's decision;

(3) At the time that an agency issues to the complainant its notice of proposed disposition, pursuant to § 1613.217(b), the agency shall advise the complainant that the complainant:

(i) May request a decision (pursuant to § 1613.221 of subpart B of this part) from the agency, without a hearing and, thereafter, appeal that decision to the MSPB (and, in connection

therewith, request a hearing), within 20 calendar days of receipt of that agency decision, or

(ii) If no decision is received within 120 calendar days of filing the mixed case complaint, may appeal the matter directly to the MSPB (not EEOC) at any time after expiration of 120 calendar days, up to, but no later than, one year after filing the mixed case complaint and of his/her right to file a civil action, as described at § 1613.417(g);

(4) At the time that the agency issues its decision on a mixed case complaint (pursuant to § 1613.221) the agency shall advise the complainant of his/her right to appeal the matter to the MSPB (not EEOC), within 20 calendar days of receipt, and of his/her right to file a civil action, as described at § 1613.417(a).

§ 1613.406 Processing of complaints on proposals.

(a) *Where the agency decision is appealable to the MSPB.* (1) Any complaint which is filed, pursuant to this part, in connection with an agency proposal to take an action that is appealable to the MSPB, shall be consolidated, pursuant to § 1613.251 of subpart B of this part, with any subsequent mixed case complaint filed in connection with that agency decision to take such an action, either as proposed or as modified during the processing of the proposal, and shall be processed in accordance with this subpart.

(2) If, following a complaint on a proposal, the complainant subsequently files an appeal with the MSPB on the subsequent agency decision resulting from that proposal, the agency shall cancel the complaint on the proposal. The complainant shall be advised by the agency that any allegations of discrimination contained in that complaint should be raised with the MSPB, in connection with the pending appeal.

(3) If a complaint is filed on a proposal, and no appeal is filed with the MSPB on the subsequent appealable agency decision resulting from that proposal, and no complaint is filed with the agency on that appealable de-

cision, the complaint on the proposal shall be deemed to include the final decision as an issue (as of the effective date of such final decision) and shall be processed as a mixed case complaint, in accordance with § 1613.405.

(b) *Where the agency decision is not appealable to the MSPB.* Where a proposal does not result in an agency decision which is appealable to the MSPB (e.g., a proposal to remove which is modified by the agency decision to a 5 day suspension), such a complaint shall be processed pursuant to subparts B, E, F and/or G of this part, as appropriate.

§ 1613.407 Timely processing.

A mixed case complaint shall be processed in a timely manner by the agency, so that the agency's decision (pursuant to § 1613.221 of subpart B of this part) on such a complaint is issued within 120 calendar days from the date the complaint was filed. When a complaint concerning a proposal to take an action that is appealable to the MSPB is consolidated, pursuant to § 1613.406, with a mixed case complaint concerning an agency decision to take the action as proposed or as modified, and that agency decision is appealable to the MSPB, the 120 calendar day time frame for processing the consolidated mixed case complaint begins to run as of the date the complaint concerning that agency decision is filed. For the purposes of § 1613.406(a)(3), the 120 calendar day time frame for processing the complaint shall begin to run as of the effective date of the final decision.

§ 1613.414 Filing requirements.

(a) *Who may file.* Petitions to consider issues of prohibited discrimination may be filed by individuals (and/or their representatives) who have been before the Merit Systems Protection Board with a matter involving allegations of discrimination and have received a final decision pursuant to the Merit Systems Protection Board's regulations at 5 CFR 1201.151 *et seq.* and under 5 U.S.C. 7702.

(b) *Method of filing.* Filing should be made by certified or registered mail return receipt requested to the Office of Federal Operations, Equal Employ-

ment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507

(c) *Time to file.* In order to be timely any petition must be filed with the Commission either within thirty (30) days after receipt of notice of the final decision of the Merit Systems Protection Board, or within thirty (30) days after the initial decision of a Merit Systems Protection Board field office becomes final. The date of filing shall be determined by the date of mailing indicated on the certified or registered mail.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980, as amended at 51 FR 22519, June 20, 1986; 56 FR 6983, Feb. 21, 1991; 57 FR 11431, Apr. 3, 1992]

§ 1613.415 Contents of petition.

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format.

(b) *Contents.* Petitions must contain the following:

(1) The name and address of the individual;

(2) The name and address of the individual's representative, if any;

(3) A statement of the reasons why the individual and/or representative believes the decision of the Merit Systems Protection Board is incorrect, in whole or in part, with regard to issues of discrimination based on race, color, religion, sex, national origin, age, handicap and/or violations of the Equal Pay Act;

(4) A copy of the decision issued by the Merit Systems Protection Board; and

(5) The signature of the individual and/or representative, if any.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980]

§ 1613.416 Consideration procedures.

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission should consider the decision of the Merit Systems Protection Board and issue its own decision. The Commission's decision in such a case may differ from or

concur with the Merit Systems Protection Board's decision.

(b) The Commission shall determine whether to consider the decision of the Merit Systems Protection Board within thirty (30) days after the date of the petition. For the purpose of this section the date of the petition shall be the date on which the Commission's Office of Federal Operations receives the petition. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within sixty (60) calendar days after the date of its determination, consider the entire record of the proceedings of the Merit Systems Protection Board and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the Merit Systems Protection Board, or

(2) Issue in writing a decision which differs from the decision of the Merit Systems Protection Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Merit Systems Protection Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B), or (ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the Merit Systems Protection Board, the Commission pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the Merit Systems Protection Board for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed) of additional evidence or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.417 Referral of case to Special Panel.

If the Merit Systems Protection Board (Board) reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Equal Employment Opportunity Commission (EEOC) the administrative record in the proceeding including—

(a) The factual record compiled under this section which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and/or the Commission.

[50 FR 52898, Dec. 27, 1985]

§ 1613.418 Organization of Special Panel.

(a) The Special Panel is composed of—

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is six (6) years;

(2) One member of the MSPB, designated by the Chairman of the Board each time a panel is convened;

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) *Designation of Special Panel member—*(1) Time of designation. Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) *Manner of designation.* Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

[50 FR 52898, Dec. 27, 1985]

§ 1613.419 Practices and procedures of the Special Panel.

(a) *Scope.* The rules in this subpart apply to proceedings before the Special Panel.

(b) *Suspension of rules.* In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule is required by statute, suspend these rules on application of a party, or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) *Time limit for proceedings.* Pursuant to 5 U.S.C. 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days after a matter has been certified to it.

(d) *Administrative assistance to Special Panel.* (1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) *Maintenance of the official record.* The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties shall file the original and six copies of all submissions with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:30 a.m.—5:00 p.m.). Due to

the short statutory time limit, parties are required to file their submissions by overnight Express Mail, provided by the U.S. Postal Service, should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for Express Mail. If the filing is by personal delivery, it shall be considered filed on the date it is received in the office of the Clerk, Merit Systems Protection Board.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, briefs shall be filed with the Special Panel within fifteen (15) days from the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) *Oral argument.* The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within fifteen (15) days from the date of the Board's certification order. Upon receipt of a request for argument the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) *Postargument submissions.* Due to the short statutory time limit, no postargument submissions will be permitted, except by order of the Chairman of the Special Panel.

(j) *Procedural matters.* Any procedural matters not addressed in these regulations shall be resolved by written order of the Chairman of the Special Panel.

[50 FR 52898, Dec. 27, 1985]

§ 1613.420 Enforcement of Special Panel decision.

The Board shall, upon receipt of the decision of the Special Panel, order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 CFR part 1201, subpart E.

[50 FR 52898, Dec. 27, 1985]

§ 1613.421 Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR 1201.151 *et seq.* and these regulations is authorized by 5 U.S.C. 7702, to file a civil action based on the decision of the Merit Systems Protection Board in an appropriate U.S. District Court:

(a) Within thirty (30) calendar days of receipt of notice of the final action taken by an agency on a complaint unless an appeal is filed with the Merit Systems Protection Board; or

(b) Within thirty (30) calendar days of receipt of notice of the final decision or action taken by the Merit Systems Protection Board if the individual does not file a petition for reconsideration with the EEOC; or

(c) Within thirty (30) calendar days of receipt of notice that the Commission has determined not to consider the decision of the Merit Systems Protection Board; or

(d) Within thirty (30) calendar days of receipt of notice that the Commission concurs with the decision of the Merit Systems Protection Board; or

(e) If the Commission issues a decision different from the decision of the Merit Systems Protection Board, within thirty (30) calendar days of receipt of notice that the Merit Systems Protection Board concurs in and adopts in whole the decision of the Commission; or

(f) If the Merit Systems Protection Board does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within thirty (30) calendar days of the receipt of notice of the decision of the Special Panel; or

(g) After one-hundred and twenty (120) calendar days from the date of filing a formal complaint if there is no agency action or appeal to the Merit Systems Protection Board; or

(h) After one-hundred and twenty (120) calendar days from the date of filing an appeal with the Merit Systems Protection Board if the Merit Systems Protection Board has not yet made a decision; or

(i) After one-hundred and eighty (180) calendar days from the date of filing a petition for consideration with the Commission if there is no decision

by the Commission, reconsideration decision by the Merit Systems Protection Board or decision by the Special Panel.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980. Redesignated at 50 FR 52897, Dec. 27, 1985]

Subpart E—Nondiscrimination on Account of Age

GENERAL PROVISIONS

§ 1613.501 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of age and the regulations under which an agency will process complaints of discrimination on account of age.

(b) *Applicability.* (1) This subpart applies (i) to military departments as defined in section 102 of title 5, United States Code, and Executive agencies as defined in section 105 of title 5, United States Code, the United States Postal Service and the Postal Rate Commission, and to the employees thereof, including employees paid from non-appropriated funds, and (ii) to those units of the legislative and judicial branches of the Federal Government and the Government of the District of Columbia having positions in the competitive service and to the employees of those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

(3) Except as provided by paragraph (b)(2) of this section, this subpart applies to applicants for positions to which paragraph (b)(1) of this section applies.

(4) This subpart applies to employees and applicants for employment who are at least 40 years of age.

(c) *Exceptions.* Reasonable exemptions to the provisions of this subpart may be established by the Commission for each position for which the Commission establishes a maximum age requirement on the basis of a determination that age is a bona fide occupation-

al qualification necessary to the performance of the duties of the position.

[39 FR 24351, July 2, 1974, as amended at 42 FR 37530, July 22, 1977. Redesignated and amended at 43 FR 60901, Dec. 29, 1978]

§ 1613.502 General Policy.

It is policy of the Government of the United States (and of the government of the District of Columbia) to prohibit discrimination in employment on account of age to assure that all personnel actions affecting employees or applicants for employment are free from discrimination on account of age.

[39 FR 24351, July 2, 1974. Redesignated at 43 FR 60901, Dec. 29, 1978]

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.511 General.

An Agency shall provide regulations governing the acceptance and processing of complaints of discrimination on account of age which, subject to § 1613.514, comply with the principles and requirements in §§ 1613.213 through 1613.222, 1613.241 and 1613.261 through 1613.271 of this part.

[39 FR 24351, July 2, 1974. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.512 Coverage.

The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with the agency who believes that he or she has been discriminated against on account of age and who, at the time of the action complained of, was an employee or applicant for employment at least 40 years of age. A complaint may also be filed by an organization for the person with his or her consent.

[43 FR 60901, Dec. 29, 1978]

§ 1613.513 Effect on Administrative Processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

[52 FR 41930, Oct. 30, 1987]

§ 1613.514 Exclusions.

Sections 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. The reference to § 1613.281 in §§ 1613.215, 1613.217, 1613.220, and 1613.221 may not be included in agency regulations required by this subpart.

[42 FR 19147, Apr. 12, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.521 Appeal to the Commission.

Except for the requirements in § 1613.234 that the decision of the Office of Review and Appeals contain a notice of the right to file a civil action in accordance with § 1613.282, §§ 1613.231 through 1613.240 of this part shall apply to this subpart.

[52 FR 41930, Oct. 30, 1987]

Subpart F—Class Complaints of Discrimination

AUTHORITY: 42 U.S.C. 2000e-16(b).

SOURCE: 42 FR 11808, Mar. 1, 1977, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

AGENCY REGULATIONS FOR PROCESSING CLASS COMPLAINTS OF DISCRIMINATION

§ 1613.601 Definitions.

(a) A *class* is a group of employees, former employees, or applicants for employment who, it is alleged, have been, are being, or may be, adversely affected by an agency personnel management policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age or handicapping condition.

(b) A *class complaint* is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(1) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(2) There are questions of fact common to the class;

(3) The claims of the agent of the class are typical of the claims of the class;

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(4) The agent of the class, or his/her representative, if any, will fairly and adequately protect the interests of the class.

(c) An *agent of the class* is a class member who acts for the class during the processing of the class complaint.

(d) *Age* is an inclusive term which means the age of at least 40 years.

[42 FR 11808, Mar. 1, 1977, as amended at 42 FR 37530, July 22, 1977. Redesignated and amended at 43 FR 60901, Dec. 29, 1978; 52 FR 41930, Oct. 30, 1987]

§ 1613.602 Precomplaint processing.

(a) An employee or applicant who wishes to be an agent and who believes he/she has been discriminated against shall consult with an Equal Employment Opportunity Counselor within 30 calendar days of the matter giving rise to the allegation of individual discrimination, the effective date of a personnel action, or the date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

(b) The Counselor shall (1) advise the aggrieved person of the discrimination complaint procedures, of his/her right to representation throughout the precomplaint and complaint processes, and of the right to anonymity only during the precomplaint process; (2) make whatever inquiry is believed necessary; (3) make an attempt at informal resolution through discussion with appropriate officials; (4) counsel the aggrieved person concerning the issues involved; (5) inform the Equal Employment Opportunity Officer and other appropriate officials when corrective action is believed necessary; (6) keep a record of all counseling activities; and (7) summarize actions and advice in writing both to the Equal Employment Opportunity Officer and the aggrieved person concerning the issues in the personnel management policy or practice.

(c) The Counselor shall conduct a final interview and terminate counseling with the aggrieved person not later than 30 calendar days after the date on which the allegation of discrimination was called to the attention of the Counselor. During the final interview, the Counselor shall inform the aggrieved person in writing that counsel-

ing is terminated, that he/she has the right to file a class complaint of discrimination with appropriate officials of the agency, and that he/she has a duty to assure that the agency is immediately informed if legal representation is obtained.

(d) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint nor to encourage the person to file a complaint.

(e) The Counselor shall not reveal the identity of an aggrieved person during the period of consultation, except, when authorized to do so by the aggrieved person.

(f) The agency shall ensure that full cooperation is provided by all employees to Counselors in the performance of their duties under this section. Counselors shall have routine access to personnel records of the agency without unwarranted invasion of privacy.

(g) Corrective action taken as a result of counseling shall be consistent with law, Executive order, and Civil Service regulations, rules, and instructions.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 52 FR 41930, Oct. 30, 1987]

§ 1613.603 Filing and presentation of a class complaint.

(a) The complaint must be submitted in writing by the agent or his/her representative and be signed by the agent.

(b) The complaint shall set forth specifically and in detail: (1) A description of the personnel management policy or practice giving rise to the complaint; and (2) a description of the resultant personnel action or matter adversely affecting the agent.

(c) The complaint must be filed not later than 15 calendar days after the agent's receipt of the notice of the right to file a complaint.

(d) The officials with whom complaints may be filed are the head of the agency, a designee of the head of the agency, and the Director of Equal Employment Opportunity.

individual opposed an unlawful employment practice under this part.

(b) A person identified in paragraph (a) of this section, if a Federal employee or applicant, may file a complaint of restraint, interference, coercion, or reprisal in connection with the presentation and processing of a complaint of discrimination. The complaint shall be filed and processed in accordance with provisions of subpart B.

[42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 52 FR 41931, Oct. 30, 1987]

§ 1613.608 Obtaining evidence concerning the complaint.

(a) *General.* (1) Upon the acceptance of a complaint, the agency head or his/her designee shall designate an agency representative. The agency representative shall not be any individual designated under § 1613.204(c) of this part.

(2) In representing the agency, the agency representative shall consult with officials, if any, named or identified as responsible for the alleged discrimination, and other officials of the agency as necessary. In such consultation, the agency representative will be subject to the provisions of Civil Service regulations, rules, and instructions concerning privacy and access to individual personnel records and reports.

(b) *Development of evidence.* (1) The Administrative Judge shall notify the agent, or his/her representative and the agency representative that a period of not more than 60 calendar days will be allowed both parties to prepare their cases. This time period may be extended by the Administrative Judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the Administrative Judge to rule on a request to develop evidence. If the agent or

agency in bad faith refuses or fails without adequate explanation to respond fully and in timely fashion to a request made or approved by the Administrative Judge for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the Administrative Judge:

(i) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To take such other actions as the Administrative Judge deems appropriate.

(3) During the time period for development of evidence, the Administrative Judge may, in his/her discretion, direct that an investigation of facts relevant to the complaint, or any portion thereof, be conducted by an Investigator trained and/or certified by the Commission.

(4) Both parties shall furnish the Administrative Judge all materials which they wish him/her to examine and such other material as he/she may request.

[42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 52 FR 10086, Mar. 30, 1987; 52 FR 41931, Oct. 30, 1987]

§ 1613.609 Opportunities for resolution of the complaint.

(a) The Administrative Judge shall furnish the agent or his/her representative and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(b) At any time after acceptance of a complaint, the complaint may be resolved by agreement of the agency and

the agent as long as the agreement is fair and reasonable.

(c) If resolution of the complaint is arrived at, the terms of the resolution shall be reduced to writing, and signed by the agent and the agency head or designee. A resolution may include a finding on the issue of discrimination, an award of attorney's fees or costs, and must include any corrective action agreed upon. Corrective action in the resolution must be consistent with law, Executive order, and Civil Service regulations, rules, and instructions. A copy of the resolution shall be provided to the agent.

(d) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the terms of corrective action, if any, to be granted by the agency. A resolution shall bind all members of the class except in cases where the resolution benefits only the class agent or is otherwise alleged to be unfair or unreasonable, in which case any member of the class may petition the Director of Equal Employment Opportunity within 30 calendar days of the date of the notice of resolution to replace the class agent. Such a petition will be processed according to § 1613.604, and if it is found that the resolution did not comply with § 1613.609(b) and that the petitioner satisfied the requirements of § 1613.601(b), the Administrative Judge will recommend that the petitioner will replace the original class agent and act for the class during processing of the class complaint. Acceptance of a petition under this subsection vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the agent and the petitioner of the right to appeal the decision to the Office of Federal Operations.

(e) Any settlement agreement reached at any stage of the complaint process shall be binding on both parties. If the agent believes that the agency has failed to comply with the terms of a settlement agreement for reasons not attributable to acts or conduct of the agent, his/her representative or class members, the agent shall notify the Director of Equal Employ-

ment Opportunity, in writing, within 30 days of when the agent knew or should have known of the alleged noncompliance, or the alleged noncompliance with the settlement agreement. The agent may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the agent's written allegation of noncompliance with the settlement agreement, the agency shall have thirty (30) calendar days in which to resolve the matter and to respond to the agent, in writing, concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the agent's written allegations of noncompliance with the settlement agreement, the agency has not responded to the agent, in writing, or if the agent is not satisfied with the agency's attempt to resolve the matter, the agent may petition the Commission's Office of Federal Operations for a determination as to whether the agency has complied with the terms of the settlement agreement. The agent may file such an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 20 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary and may direct that an investigation or hearing on the matter be conducted, as may be appropriate.

If the Commission determines that the agreement has not been complied with, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement.

[52 FR 41932, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.610 Hearing.

On the expiration of the period allowed for preparation of the case, the Administrative Judge shall set a date for a hearing. The hearing shall be

conducted in accordance with § 1613.218.

[52 FR 41932, Oct. 30, 1987]

§ 1613.611 Report of findings and recommendations.

(a) The Administrative Judge shall transmit to the agency head or his/her designee: (1) The record of the hearing; (2) his/her findings and analysis with regard to the complaint; and (3) his/her report of findings and recommended decision on the complaint, including corrective action pertaining to systemic relief for the class and any individual corrective action, where appropriate, with regard to the personnel action or matter which gave rise to the complaint.

(b) The Administrative Judge shall notify the agent of the date on which the report of findings and recommendations was forwarded to the agency head or his/her designee.

[42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 52 FR 10086, Mar. 30, 1987]

§ 1613.612 Agency decision.

(a)(1) Within 60 calendar days of receipt of the report of findings and recommendations issued under § 1613.611, the agency head or his/her designee shall issue a decision to accept, reject, or modify the findings and recommendations of the Administrative Judge.

(2) The decision of the agency shall be in writing and shall be transmitted to the agent of his/her representative, along with a copy of the record of the hearing and a copy of the findings and recommendations of the Administrative Judge.

(3) When the agency's decision is to reject or modify the findings and recommendations of the Administrative Judge the decision shall contain the specific reasons in detail for the agency's action.

(b) If the agency has not issued a decision within 30 calendar days of its receipt of the Administrative Judge's report of findings and recommendations, the findings and recommendations shall become the final agency decision. The agency shall transmit the final agency decision and the record of the hearing to the agent or his/her

representative within 5 calendar days of the expiration of the 30-day period.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall (1) advise the agent and his or her representative that any request for attorney's fees must be documented and submitted within 20 calendar days of receipt, (2) review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and (3) record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees and/or costs, the amount of these awards shall be determined under § 1613.271(c). When the agency determines not to award attorney's fees or costs, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The agency shall inform the agent or his/her representative of the right to appeal the final agency decision to the Commission's Office of Federal Operations and his/her right to file a civil action in accordance with § 1613.641 of the regulations, and of the time limits applicable thereto.

(f) A final agency decision on a class complaint shall be binding on all members of the class and the agency.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 52 FR 10086, Mar. 30, 1987; 52 FR 41932, Oct. 30, 1987; 56 FR 6983, Feb. 21, 1991]

§ 1613.613 Notification of class members of decision.

Class members shall be notified by the agency, through the same media employed to give notice of the existence of the class complaint, of the agency decision and corrective action, if any. The notice, where appropriate, shall include information concerning

the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 calendar days of the transmittal of its decision to the agent.

§ 1613.614 Corrective action.

(a) When discrimination is found, an agency must eliminate or modify the personnel policy or practice out of which the complaint arose, and provide individual corrective action, including an award of attorney's fees and costs, to the agent in accordance with § 1613.271 of this part. Corrective action in all cases must be consistent with law, Executive order, and Civil Service regulations, rules and instructions.

(b) When discrimination is found and a class member believes that but for that discrimination he/she would have received employment or an employment benefit, the class member may file a written claim with the head of the agency or the Director of Equal Employment Opportunity of the agency within 30 calendar days of notification by the agency of the decision of the agency.

(c) The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice within not more than 135 calendar days preceding the filing of the class complaint.

(d) The agency shall attempt to resolve the claim for relief within 60 calendar days after the date the claim was postmarked, or, in the absence of a postmark, within 60 calendar days after the date it was received by an official with whom claims may be filed. If the agency and claimant do not agree that the claimant is a member of the class or upon the relief to which the claimant is entitled, the agency shall refer the claim, with recommendations concerning it, to the Administrative Judge.

(e) The Administrative Judge shall notify the claimant of the right to a hearing on the claim and shall allow the parties to the claim an opportunity to submit evidence and representations concerning the claim. If a hear-

ing is requested, it shall be conducted in accordance with § 1613.218. If no hearing is requested, the Administrative Judge, in his/her discretion, may hold a hearing to obtain necessary evidence concerning the claim.

(f) The Administrative Judge shall issue a report of findings and recommendations on the claim which shall be treated the same as a report of findings and recommendations under §§ 1613.611 and 1613.612.

(g) If the Administrative Judge determines that the claimant is not a member of the class or that the claim was not timely filed he/she shall recommend rejection of the claim and give notice of his/her action to the agency, the claimant, and his/her representative. Such notice shall include advice as to the complainant's right to appeal to the Office of Federal Operations or to file a civil action in accordance with the provisions of this part.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 52 FR 10086, Mar. 30, 1987; 52 FR 41932, Oct. 30, 1987; 56 FR 6983, Feb. 21, 1991]

APPEAL TO THE COMMISSION

§ 1613.631 Appeal to the Office of Federal Operations.

(a) An agent may appeal to the Office of Federal Operations the decision of the head of the agency or designee:

(1) To reject or cancel a complaint, or a portion thereof, for reasons covered by § 1613.604;

(2) Under the circumstances set forth in § 1613.609 (d) or (e);

(3) On the merits of the complaint;

(4) On the issue of attorney's fees and costs and corrective action; or

(5) The failure of an agency to implement its final agency decision.

(b) A claimant may appeal to the Office of Federal Operations from a decision of the head of the agency or designee:

(1) To cancel or reject a claim for individual relief in accordance with § 1613.614 (f) and (g); and

(2) On the merits of the claim for individual relief including attorney's fees or costs.

(c) An appeal may be filed at any time after receipt of the agency's final decision, but not later than 20 calendar days after receipt of that decision except when the appellant shows that neither the appellant nor the appellant's representative was notified of the prescribed time limit and was not otherwise aware of it, or that the appellant or the appellant's representative was prevented by circumstances beyond the appellant's or representative's control from appealing within the prescribed time limit.

(d) An appeal shall be deemed timely if it is delivered in person or post-marked before the expiration of the filing period, or if, in the absence of a legible postmark, it is received by the Commission by mail within five days of the expiration of the filing period. The Office of Federal Operations' review will be made upon the existing record to determine if the agency decision is in accord with applicable law, Executive order, or Civil Service regulations, rules, and instructions and is supported by substantial evidence.

[52 FR 41932, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.632 Reopening and reconsideration by the Commissioners.

The Commissioners may reopen and reconsider any previous decision of a Commission office on their own motion or at the request of either party in accordance with provisions of § 1613.235.

[52 FR 41932, Oct. 30, 1987]

CIVIL ACTIONS

§ 1613.641 Statutory right.

(a) An agent who has filed a complaint or a claimant who has filed a claim for relief based on race, color, religion, sex, and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. district court:

(1) Within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint or claim;

(2) After 180 calendar days from the date he/she filed a complaint or claim

with his/her agency if there has been no decision on the complaint or claim;

(3) Within 30 calendar days of his/her receipt of the decision of the Office of Federal Operations on his/her appeal; or

(4) After 180 calendar days from the date he/she filed an appeal with the Office of Federal Operations, if there has been no Office of Federal Operations decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees and costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) An agent who filed a complaint or a claimant who has filed for relief based on age discrimination, is authorized to file a civil action in an appropriate U.S. district court.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 56 FR 6983, Feb. 21, 1991]

§ 1613.642 Notice of right.

When the agent alleges that the agency discriminated against a class on the basis of race, color, religion, sex, national origin, and/or age, or a claimant files for relief, the agency or the Commission shall notify him/her of his/her right to file a civil action in any final action on a complaint, or claim, under §§ 1613.604, 1613.612, 1613.614, or 1613.631.

§ 1613.643 Effect on administrative processing.

The filing of a civil action by an agent involving a complaint filed under this subpart terminates processing of that complaint. The filing of a civil action by a claimant involving a claim filed under this subpart, terminates processing of that claim.

[52 FR 41933, Oct. 30, 1987]

Subpart G—Prohibition Against Discrimination Because of a Physical or Mental Handicap

AUTHORITY: 5 U.S.C. 7153; § 5.1 of the Civil Service Rules; 29 U.S.C. 791.

SOURCE: 43 FR 12295, Mar. 24, 1978, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

GENERAL PROVISIONS

§ 1613.701 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) *Applicability.* (1) This subpart applies to executive agencies as defined in section 105 of title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service.

(2) This subpart applies to the U.S. Postal Service and Postal Rate Commission.

(3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Definitions.

(a) *Handicapped person* is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) *Physical or mental impairment* means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or

mental illness, and specific learning disabilities.

(c) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) *Is regarded as having such an impairment* means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

(f) *Qualified handicapped person* means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or

(2) Meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§ 1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

§ 1613.705 Employment criteria.

(a) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the agency, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Civil Service Commission's Director of Personnel Research and Development Center to be available.

(b) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's

or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 1613.706 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Civil Service Commission may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(b) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty. *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for handicapped persons.

(c) To enable and evaluate affirmative action to hire, place, or advance handicapped individuals, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if: (1)

The agency states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action and (2) the agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that: (1) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that the applicant is a handicapped individual eligible for affirmative action; (2) supervisors and managers may be informed regarding necessary accommodations; (3) first aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; (4) government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for handicapped individuals shall be provided information upon request; and (5) statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 46 FR 11285, Feb. 6, 1981]

§ 1613.707 Physical access to buildings.

(a) An agency shall not discriminate against qualified handicapped applicants or employees due to the inaccessibility of its facility.

(b) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.708 General.

An agency shall provide regulations governing the acceptance and process-

ing of complaints of discrimination based on a physical or mental handicap which comply with the principles and requirements in §§ 1613.213 through 1613.283 and §§ 1613.601 through 1613.643. Nothing in the foregoing shall be construed to postpone the effective date of this rule.

[46 FR 51384, Oct. 20, 1981]

§ 1613.709 Coverage.

(a) An agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against because of a handicap as defined in § 1613.702.

(b) An agency must process complaints of discrimination based on acts or actions that occurred 1 year prior to the effective date of these regulations *Provided*: (1) The complaint of discrimination was brought to the attention of the agency within 30 calendar days of the alleged discriminatory act, or, if a personnel action, within 30 calendar days of its effective date, (2) the complaint of discrimination was not adjudicated under some other grievance or appeals procedure, and (3) the complaint of discrimination is filed within 180 calendar days of the effective date of these regulations. Complaints of discrimination based on alleged discriminatory acts or personnel actions that occurred on or after the effective date of these regulations are subject to the time restraints set forth in § 1613.214(a).

(c) Notwithstanding the provision of subsection (b), a complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance, and were pending with the agency, the Civil Service Commission or in a Federal Court on April 10, 1978. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days from the publication of this subsection in final form in the FEDERAL REGISTER.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 41634, June 20, 1980]

Subpart H—Regulations for Processing Appealable Actions, Alleging Prohibited Discrimination, Pending on or Before January 10, 1979

AUTHORITY: 42 U.S.C. 2000e-16; 29 U.S.C. 633a; 29 U.S.C. 791; Reorganization Plan No. 1 of 1978.

SOURCE: 44 FR 50541, Aug. 28, 1979, unless otherwise noted.

§ 1613.801 Scope.

This subpart establishes regulations for the processing of an allegation that an action otherwise appealable to the Merit Systems Protection Board (the Board) was based in whole or in part on discrimination because of race, color, religion, sex, national origin, age, or handicap. This subpart applies only to administrative procedures pending before January 11, 1979, to which section 205 of the Civil Service Reform Act of 1978, 5 U.S.C. 7702, is inapplicable.

§ 1613.802 Definitions.

(a) As used in this section, the term *prohibited discrimination* means discrimination prohibited by section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16); section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791); and sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631 and 633a).

(b) As used in this section, the term *initial decision* means a decision on an appeal, rendered by a presiding official of the Board pursuant to 29 CFR part 1613 or 5 CFR part 772 (as in effect prior to January 11, 1979), in which issues of prohibited discrimination have been raised.

(c) As used in this section, the term *preliminary decision* means (1) an initial decision within the meaning of § 1613.802(b), which has not been reopened by a Board member or as to which no petition to reopen was filed by a party within 35 days after issuance of the decision; or (2) a decision by the Board itself pursuant to 29 CFR part 1613 or 5 CFR part 772 (as in effect prior to January 11, 1979), in which issues of prohibited discrimina-

tion are addressed, or a decision by the Board denying all petitions to reopen.

§ 1613.803 Election.

An appellant who alleges that an action otherwise appealable to the Board was based in whole or in part on prohibited discrimination shall elect to proceed under 29 CFR part 1613 (43 FR 60901, formerly 5 CFR part 713) or under 5 CFR part 772 (as in effect prior to January 11, 1979). This section is applicable only to persons who had not previously made an election under regulations of the former Civil Service Commission.

§ 1613.804 Election of part 1613.

(a) When an appellant elects or has elected to proceed under 29 CFR part 1613 (43 FR 60901, formerly 5 CFR part 713) the provisions of part 1613 are applicable to that proceeding.

(b) The Commission hereby delegates to the Merit Systems Protection Board the authority to make initial and preliminary decisions on issues of prohibited discrimination in appeals from final agency decisions under 29 CFR part 1613 (43 FR 60901, formerly 5 CFR part 713).

§ 1613.805 Election of part 772.

(a) When a complainant elects or has elected to proceed under 5 CFR part 772, the allegations of discrimination shall be referred to the EEO Officer of the agency for investigation in accordance with 29 CFR 1613.216 (43 FR 60901, formerly 5 CFR 713.216).

(b) The Commission hereby delegates to the Merit Systems Protection Board the authority to make initial and preliminary decisions on issues of prohibited discrimination in appeals from final agency decisions under 5 CFR part 772.

§ 1613.806 Petition to EEOC; finality of decisions.

(a) A petition to review the preliminary decision of the Board shall be filed in writing with the Office of Federal Operations, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507 (1) within 35 days after the initial decision of the Board becomes a prelimi-

nary decision (as contemplated in § 1613.802(c)(1)) or (2) within 35 days after the issuance of a preliminary decision by the Board.

(b) A decision of the EEOC on a petition to review the preliminary decision of the Board shall be final when issued.

(c) If a petition to review is not timely filed with the EEOC, the preliminary decision of the Board shall become final on all issues on the day after the expiration of the 35-day period for filing with EEOC, unless the EEOC chooses to exercise its discretion under the standards of 29 CFR 1613.233(b) and accept the late petition.

[44 FR 50541, Aug. 28, 1979, as amended at 51 FR 22519, June 20, 1986; 56 FR 6983, Feb. 21, 1991; 57 FR 11431, Apr. 3, 1992]

APPENDIX A TO PART 1613—POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices. Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation, pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated.

The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular type of discrimination found or conciliated will not recur;

(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) Notice Requirement.

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

APPENDIX M

ADA QUESTIONS AND ANSWERS

Employment

Q. What employers are covered by Title I of the ADA, and when is the coverage effective?

A. The Title I employment provisions apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees are covered as of July 26, 1992. Employers with 15 or more employees will be covered two years later, beginning July 26, 1994.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Q. Who is protected from employment discrimination?

A. Employment discrimination is prohibited against “qualified individuals with disabilities.” This includes applicants for employment and employees. An individual is considered to have a “disability” if s/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected.

The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.

The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the “negative reactions” of customers or co-workers.

Q. Who is a “qualified individual with a disability”?

A. A qualified individual with a disability is a person who meets legitimate skill, experience,

education, or other requirements of an employment position that he s/he holds or seeks, and who can perform the “essential functions” of the position with or without reasonable accommodation. Requiring the ability to perform “essential” functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.

Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability. For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. What limitations does the ADA impose on medical examinations and inquiries about disability?

A. An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how s/he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a “direct threat” in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the “direct threat” level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an indi-

vidual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current "fitness" to perform a particular job, and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

Q. When can an employer ask an applicant to "self-identify" as having a disability?

- A.** Federal contractors and subcontractors who are covered by the affirmative action requirements of Section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the Section 503 affirmative action requirements. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.

A pre-employment inquiry about a disability is allowed if required by another Federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services.

Q. Does the ADA require employers to develop written job descriptions?

- A.** No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Q. What is "reasonable accommodation"?

- A.** Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the

application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

Q. What are some of the accommodations applicants and employees may need?

- A.** Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

Q. When is an employer required to make a reasonable accommodation?

- A.** An employer is only required to accommodate a “known” disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual’s known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

- A.** The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an “undue hardship” on the operation of the employer’s business. “Undue hardship” is defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure

of the employer's operation. It is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

Q. Must an employer modify existing facilities to make them accessible?

- A.** The employer's obligation under Title I is to provide access for an **individual** applicant to participate in the job application process, and for an **individual** employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers. The employer must provide such access unless it would cause an undue hardship.

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment related activities or benefits.

Q. Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

- A.** No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Q. Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

- A.** Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

Q. Can an employer maintain existing production/performance standards for an employee with a disability?

A. 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, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing a job's essential functions.

Q. Can an employer establish specific attendance and leave policies?

A. An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

Q. Can an employer consider health and safety when deciding whether to hire an applicant or retain an employee with a disability?

A. Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or of others, if that risk cannot be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Q. Are applicants or employees who are currently illegally using drugs covered by the ADA?

A. No. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use.

Q. Is testing for the illegal use of drugs permissible under the ADA?

- A.** Yes. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

Q. Are alcoholics covered by the ADA?

- A.** Yes. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Q. Does the ADA override Federal and State health and safety laws?

- A.** The ADA does not override health and safety requirements established under other Federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another Federal law, then the employer must do so.

The ADA does not override State or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a state or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

Q. How does the ADA affect workers' compensation programs?

- A.** Only injured workers who meet the ADA's definition of an "individual with a disability"

will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments which heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA.

An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may inquire about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or worker's compensation history.

An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

Q. What is discrimination based on "relationship or association" under the ADA?

- A.** The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. How are the employment provisions enforced?

- A.** The employment provisions of the ADA are enforced under the same procedures now appli-

cable to race, color, sex, national origin, and religious discrimination under title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated State human rights agencies. Available remedies will include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

Q. What financial assistance is available to employers to help them make reasonable accommodations and comply with the ADA?

- A.** A special tax credit is available to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to \$5,000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of "eligible access expenditures" that are more than \$250 but less than \$10,250.

A full tax deduction, up to \$15,000 per year, also is available to any business for expenses of removing qualified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, restroom facilities, and transportation vehicles. Information about the tax credit and the tax deduction can be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service.

Tax credits are available under the Targeted Jobs Tax Credit Program (TJTCP) for employers who hire individuals with disabilities referred by state or local vocational rehabilitation agencies, State Commissions on the Blind and the U.S. Department of Veterans Affairs, and certified by a State Employment Service. Under the TJTCP, a tax credit may be taken for up to 40 percent of the first \$6,000 of first-year wages of a new employee with a disability. This program must be reauthorized each year by Congress, and currently is extended through June 30, 1993. Further information about the TJTCP can be obtained from the State Employment Services or from State Governors' Committees on the Employment of People with Disabilities.

Q. What are an employer's recordkeeping requirements under the employment provisions of the ADA?

- A.** An employer must maintain records such as application forms submitted by applicants and other records related to hiring, requests for reasonable accommodation, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship for one year after making the record or taking the action described (whichever occurs later). If a charge of discrimination is filed or an action is brought by EEOC, an employer must save all personnel records related to the charge until final disposition of the charge.

Q. Does the ADA require that an employer post a notice explaining its requirements?

A. The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available from EEOC summarizing the requirements of the ADA and other federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

Q. What resources does the Equal Employment Opportunity Commission have available to help employers and people with disabilities understand and comply with the employment requirements of the ADA?

A. The Equal Employment Opportunity Commission has developed several resources to help employers and people with disabilities understand and comply with the employment provisions of the ADA.

Resources include:

- * A Technical Assistance Manual that provides "how-to" guidance on the employment provisions of the ADA as well as a resource directory to help individuals find specific information.
- * A variety of brochures, booklets, and fact sheets.

For information on how to contact the Equal Employment Opportunity Commission, see page 19.

State and Local Governments

Q. Does the ADA apply to State and local governments?

A. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities. It applies to all State and local governments, their departments and agencies, and any other instrumentalities or special purpose districts of State or local governments. It clarifies the requirements of section 504 of the Rehabilitation Act of 1973 for public transportation systems that receive Federal financial assistance, and extends coverage to all public entities that provide public transportation, whether or not they receive Federal financial assistance. It establishes detailed standards for the operation of public transit systems, including commuter and intercity rail (AMTRAK).

Q. When do the requirements for State and local governments become effective?

A. In general, they became effective on January 26, 1992.

- Q. How does title II affect participation in a State or local government's programs, activities, and services?**
- A.** A state or local government must eliminate any eligibility criteria for participation in programs, activities, and services that screen out or tend to screen out persons with disabilities, unless it can establish that the requirements are necessary for the provision of the service, program, or activity. The State or local government may, however, adopt legitimate safety requirements necessary for safe operation if they are based on real risks, not on stereotypes or generalizations about individuals with disabilities. Finally, a public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate that a particular modification would fundamentally alter the nature of its service, program, or activity, it is not required to make that modification.
- Q. Does title II cover a public entity's employment policies and practices?**
- A.** Yes. Title II prohibits all public entities, regardless of the size of their work force, from discriminating in the employment against qualified individuals with disabilities. In addition to title II's employment coverage, title I of the ADA and section 504 of the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities by certain public entities.
- Q. What changes must a public entity make to its existing facilities to make them accessible?**
- A.** A public entity must ensure that individuals with disabilities are not excluded from services, programs, and activities because existing buildings are inaccessible. A State or local government's programs, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to facilities of a public entity that existed on January 26, 1992. Public entities need not make each of their existing facilities accessible. They may provide program accessibility by a number of methods including alteration of existing facilities, acquisition or construction of additional facilities, relocation of a service or program to an accessible facility, or provision of services at alternate accessible sites.
- Q. When must structural changes be made to attain program accessibility?**
- A.** Structural changes needed for program accessibility must be made as expeditiously as possible, but no later than January 26, 1995. This three-year time period is not a grace period; all alterations must be accomplished as expeditiously as possible. A public entity that employs 50 or more persons must have developed a transition plan by July 26, 1992, setting forth the steps necessary to complete such changes.
- Q. What is a self-evaluation?**
- A.** A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with

title II's requirements. All public entities must complete a self-evaluation by January 26, 1993. A public entity that employs 50 or more employees must retain its self-evaluation for three years. Other public entities are not required to retain their self-evaluations, but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with title II's requirements.

Q. What does title II require for new construction and alterations?

A. The ADA requires that all new buildings constructed by a State or local government be accessible. In addition, when a State or local government undertakes alterations to a building, it must make the altered portions accessible.

Q. How will a State or local government know that a new building is accessible?

A. A State or local government will be in compliance with the ADA for new construction and alterations if it follows either of two accessibility standards. It can choose either the Uniform Federal Accessibility Standards or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, which is the standard that must be used for public accommodations and commercial facilities under title III of the ADA. If the State or local government chooses the ADA Accessibility Guidelines, it is not entitled to the elevator exemption (which permits certain private buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

Q. What requirements apply to a public entity's emergency telephone services, such as 911?

A. State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access. Where a public entity provides 911 telephone service, it may not substitute a separate seven-digit telephone line as the sole means for access to 911 services by nonvoice users. A public entity may, however, provide a separate seven-digit line for the exclusive use of nonvoice callers in addition to providing direct access for such calls to its 911 line.

Q. Does title II require that telephone emergency service systems be compatible with all formats used for nonvoice communications?

A. No. At present, telephone emergency services must only be compatible with the Baudot format. Until it can be technically proven that communications in another format can operate in a reliable and compatible manner in a given telephone emergency environment, a public entity would not be required to provide direct access to computer modems using formats other than Baudot.

Q. How will the ADA's requirements for State and local governments be enforced?

A. Private individuals may bring lawsuits to enforce their rights under title II and may receive

routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

Q. Will businesses need to rearrange furniture and display racks?

A. Possibly. For example, restaurants may need to rearrange tables and department stores may need to adjust their layout of racks and shelves in order to permit wheelchair access.

Q. Will businesses need to install elevators?

A. Businesses are not required to retrofit their facilities to install elevators unless such installation is readily achievable, which is unlikely in most cases.

Q. When barrier removal is not readily achievable, what kinds of alternative steps are required by the ADA?

A. Alternatives may include such measures as in-store assistance for removing articles from inaccessible shelves, home delivery of groceries, or coming to the door to receive or return dry cleaning.

Q. Must alternative steps be taken without regard to cost?

A. No, only readily achievable alternative steps must be undertaken.

Q. How is "readily achievable" determined in a multisite business?

A. In determining whether an action to make a public accommodation accessible would be "readily achievable," the overall size of the parent corporation or entity is only one factor to be considered. The ADA also permits consideration of the financial resources of the particular facility or facilities involved and the administrative or fiscal relationship of the facility or facilities to the parent entity.

Q. Who has responsibility for ADA compliance in leased places of public accommodation, the landlord or the tenant?

A. The ADA places the legal obligation to remove barriers or provide auxiliary aids and services on both the landlord and the tenant. The landlord and the tenant may decide by lease who will actually make the changes and provide the aids and services, but both remain legally responsible.

Q. What does the ADA require in new construction?

A. The ADA requires that all new construction of places of public accommodation, as well as of "commercial facilities" such as office buildings, be accessible. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless

the building is a shopping center or mall; the professional office of a health care provider; a terminal, depot, or other public transit station; or an airport passenger terminal.

Q. Is it expensive to make all newly constructed places of public accommodation and commercial facilities accessible?

A. The cost of incorporating accessibility features in new construction is less than one percent of construction costs. This is a small price in relation to the economic benefits to be derived from full accessibility in the future, such as increased employment and consumer spending and decreased welfare dependency.

Q. Must every feature of a new facility be accessible?

A. No, only a specified number of elements such as parking spaces and drinking fountains must be made accessible in order for a facility to be "readily accessible." Certain nonoccupiable spaces such as elevator pits, elevator penthouses, and piping or equipment catwalks need not be accessible.

Q. What are the ADA requirements for altering facilities?

A. All alterations that could affect the usability of a facility must be made in an accessible manner to the maximum extent feasible. For example, if during renovations a doorway is being relocated, the new doorway must be wide enough to meet the new construction standard for accessibility. When alterations are made to a primary function area, such as the lobby of a bank or the dining area of a cafeteria, an accessible path of travel to the altered area must also be provided.

The bathrooms, telephones, and drinking fountains serving that area must also be made accessible. These additional accessibility alterations are only required to the extent that the added accessibility costs do not exceed 20% of the cost of the original alteration. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center or mall; the professional office of a health care provider; a terminal, depot, or other public transit station; or an airport passenger terminal.

Q. Does the ADA permit an individual with a disability to sue a business when that individual believes that discrimination is about to occur, or must the individual wait for the discrimination to occur?

A. The ADA public accommodations provisions permit an individual to allege discrimination based on a reasonable belief that discrimination is about to occur. This provision, for example, allows a person who uses a wheelchair to challenge the planned construction of a new place of public accommodation, such as a shopping mall, that would not be accessible to individuals who use wheelchairs. The resolution of such challenges prior to the construction of an inaccessible facility would enable any necessary remedial measures to be incorporated in the building at the planning stage, when such changes would be relatively inexpensive.

the same remedies as those provided under section 504 of the Rehabilitation Act of 1973, including reasonable attorney's fees. Individuals may also file complaints with eight designated Federal agencies, including the Department of Justice and the Department of Transportation.

Public Accommodations

Q. What are public accommodations?

- A.** A public accommodation is a private entity that owns, operates, leases, or leases to, a place of public accommodation. Places of public accommodation include a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the ADA's title III requirements for public accommodations.

Q. Will the ADA have any effect on the eligibility criteria used by public accommodations to determine who may receive services?

- A.** Yes. If a criterion screens out or tends to screen out individuals with disabilities, it may only be used if necessary for the provision of the services. For instance, it would be a violation for a retail store to have a rule excluding all deaf persons from entering the premises, or for a movie theater to exclude all individuals with cerebral palsy. More subtle forms of discrimination are also prohibited. For example, requiring presentation of a driver's license as the sole acceptable means of identification for purposes of paying by check could constitute discrimination against individuals with vision impairments. This would be true if such individuals are ineligible to receive licenses and the use of an alternative means of identification is feasible.

Q. Does the ADA allow public accommodations to take safety factors into consideration in providing services to individuals with disabilities?

- A.** The ADA expressly provides that a public accommodation may exclude an individual, if that individual poses a direct threat to the health or safety of others that cannot be mitigated by appropriate modifications in the public accommodation's policies or procedures, or by the provision of auxiliary aids. A public accommodation will be permitted to establish objective safety criteria for the operation of its business; however, any safety standard must be based on objective requirements rather than stereotypes or generalizations about the ability of persons with disabilities to participate in an activity.

Q. Are there any limits on the kinds of modifications in policies, practices, and procedures required by the ADA?

- A.** Yes. The ADA does not require modifications that would fundamentally alter the nature of the services provided by the public accommodation. For example, it would not be discriminatory for a physician specialist who treats only burn patients to refer a deaf individual to another physician for treatment of a broken limb or respiratory ailment. To require a physician

to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice.

Q. What kinds of auxiliary aids and services are required by the ADA to ensure effective communication with individuals with hearing or vision impairments?

A. Appropriate auxiliary aids and services may include services and devices such as qualified interpreters, assistive listening devices, notetakers, and written materials for individuals with hearing impairments; and qualified readers, taped texts, and brailled or large print materials for individuals with vision impairments.

Q. Are there any limitations on the ADA's auxiliary aids requirements?

A. Yes. The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and caselaw under section 504 of the Rehabilitation Act and are to be determined on a case-by-case basis.

Q. Will restaurants be required to have brailled menus?

A. No, not if waiters or other employees are made available to read the menu to a blind customer.

Q. Will a clothing store be required to have brailled price tags?

A. No not if sales personnel could provide price information orally upon request.

Q. Will a bookstore be required to maintain a sign language interpreter on its staff in order to communicate with deaf customers?

A. No, not if employees communicate by pen and notepad when necessary.

Q. Are there any limitations on the ADA's barrier removal requirements for existing facilities?

A. Yes. Barrier removal need be accomplished only when it is "readily achievable" to do so.

Q. What does the term "readily achievable" mean?

A. It means "easily accomplishable and able to be carried out without much difficulty or expense."

Q. What are examples of the types of modifications that would be readily achievable in most cases?

A. Examples include the simple ramping of a few steps, the installation of grab bars where only

Q. How does the ADA affect existing State and local building codes?

- A.** Existing codes remain in effect. The ADA allows the Attorney General to certify that a State law, local building code, or similar ordinance that establishes accessibility requirements meets or exceeds the minimum accessibility requirements for public accommodations and commercial facilities. Any State or local government may apply for certification of its code or ordinance. The Attorney General can certify a code or ordinance only after prior notice and a public hearing at which interested people, including individuals with disabilities, are provided an opportunity to testify against the certification.

Q. What is the effect of certification of a State or local code or ordinance?

- A.** Certification can be advantageous if an entity has constructed or altered a facility according to a certified code or ordinance. If someone later brings an enforcement proceeding against the entity, the certification is considered "rebuttable evidence" that the State law or local ordinance meets or exceeds the minimum requirements of the ADA. In other words, the entity can argue that the construction or alteration met the requirements of the ADA because it was done in compliance with the State or local code that had been certified.

Q. When are the public accommodations provisions effective?

- A.** In general, they became effective on January 26, 1992.

Q. How will the public accommodations provisions be enforced?

- A.** Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed \$50,000 for a first violation or \$100,000 for any subsequent violation.

Miscellaneous**Q. Is the Federal government covered by the ADA?**

- A.** The ADA does not cover the executive branch of the Federal government. The executive branch continues to be covered by title V of the Rehabilitation Act of 1973, which prohibits discrimination in services and employment on the basis of handicap and which is a model for the requirements of the ADA. The ADA, however, does cover Congress and other entities in the legislative branch of the Federal government.

Q. Does the ADA cover private apartments and private homes?

- A.** The ADA does not cover strictly residential private apartments and homes. If, however, a place of public accommodation, such as a doctor's office or day care center, is located in a

private residence, those portions of the residence used for that purpose are subject to the ADA's requirements.

Q. Does the ADA cover air transportation?

A. Discrimination by air carriers in areas other than employment is not covered by the ADA but rather by the Air Carrier Access Act (49 U.S.C. 1374 (c)).

Q. What are the ADA's requirements for public transit buses?

A. The Department of Transportation has issued regulations mandating accessible public transit vehicles and facilities. The regulations include requirements that all new fixed-route, public transit buses be accessible and that supplementary paratransit services be provided for those individuals with disabilities who cannot use fixed-route bus service. For information on how to contact the Department of Transportation, see page 20.

Q. How will the ADA make telecommunications accessible?

A. The ADA requires the establishment of telephone relay services for individuals who use telecommunications devices for the deaf (TDD's) or similar devices. The Federal Communications Commission has issued regulations specifying standards for the operation of these services.

Q. Are businesses entitled to any tax benefit to help pay for the cost of compliance?

A. As amended in 1990, the Internal Revenue Code allows a deduction of up to \$15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers.

The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed \$1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed \$250 but do not exceed \$10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

Telephone Numbers for ADA Information

This list contains the telephone numbers of Federal agencies that are responsible for providing information to the public about the Americans with Disabilities Act and organizations that have been funded by the Federal government to provide information through staffed information centers.

The agencies and organizations listed are sources for obtaining information about the law's requirements and informal guidance in understanding and complying with the ADA. They are not, and should not be viewed as, sources for obtaining legal advice or legal opinions about your rights or responsibilities under the ADA.

For your convenience, the numbers for reaching these offices by both voice telephone and TDD.

American Foundation for the Blind	202/223-0101 (voice & TDD)
Association on Higher Education and Disability (AHEAD)	1-800-247-7752 (voice & TDD)
Architectural and Transportation Barriers Compliance Board	1-800-872-2253 (voice & TDD)
Association for Retarded Citizens of the United States	1-800-433-5255 (voice) 1-800-855-1155 (TDD) (tell operator you would like to place a collect call to 817/277-0553)
Disability Rights Education and Defense Fund	1-800-466-4232 (voice & TDD)
Equal Employment Opportunity Commission	
For questions and documents	1-800-669-3362 (voice) 1-800-800-3302 (TDD)
Alternate number for ordering documents (print and other formats)	202/663-4264 (voice) 202/663-7110 (TDD)
Federal Communications Commission	
For ADA documents and general information	202/632-7260 (voice) 202/632-6999 (TDD)
Job Accommodation Network	1-800-526-7234 (voice) 1-800-526-7234 (TDD)
Within West Virginia	1-800-526-4698 (voice & TDD)
National Center for Law and Deafness	202/651-5343 (voice & TDD)

National Council on Disability Information Line: ADA Watch	1-800-875-7814 (voice) 301/577-7814 (TDD)
National Easter Seal Society Project ACTION (Accessible Community Transportation in Our Nation)	202/347-3066 (voice) 202/347-7385 (TDD)
National Federation of the Blind	410/659-9314 (voice) 410/625-2867 (TDD)
President's Committee on Employment of People with Disabilities Information Line: ADA Work	1-800-232-9675 (voice & TDD)
The Foundation on Employment and Disability (for California residents only)	1-800-499-4232 (voice) 1-800-499-0559 (TDD)
U.S. Department of Justice	202/514-0301 (voice) 202/514-0383 (TDD)
U.S. Department of Transportation	
Federal Transit Administration (for ADA documents and information)	202/366-1656 (voice) 202/366-2979 (TDD)
Office of the General Counsel (for legal questions)	202/366-9306 (voice) 202/755-7687 (TDD)
Federal Aviation Administration	202/376-6406 (voice)
Rural Transit Assistance Program (for information and assistance on public transportation issues)	1-800-527-8279 (voice & TDD)

Regional Disability and Business Technical Assistance Centers

ADA information, assistance, and copies of ADA documents supplied by the Equal Employment Opportunity Commission and the Department of Justice, which are available in standard print, large print, audio cassette, braille, and computer disk, may be obtained from any of the ten Regional Disability and Business Technical Assistance Centers.

Toll-free number for reaching any of the following Centers	1-800-949-4232 (voice & TDD)
Region I (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut)	207/874-6535 (voice & TDD)

Region II (New York, New Jersey, Puerto Rico)	609/392-4004 (voice) 609/392-7004 (TDD)
Region III (Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, West Virginia)	703/525-3268 (voice & TDD)
Region IV (Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Florida)	404/888-0022 (voice) 404/888-9098 (TDD)
Region V (Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota)	312/413-7756 (voice & TDD)
Region VI (Arkansas, Louisiana, Oklahoma, Texas, New Mexico)	713/520-0232 (voice) 713/520-5136 (TDD)
Region VII (Iowa, Missouri, Nebraska, Kansas)	314/882-3600 (voice & TDD)
Region VIII (North Dakota, South Dakota, Montana, Wyoming, Colorado, Utah)	719/444-0252 (voice & TDD)
Region IX (Arizona, Nevada, California, Hawaii, Pacific Basin)	510/465-7884 (voice) 510/465-3172 (TDD)
Region X (Idaho, Oregon, Washington, Alaska)	206/438-3168 (voice) 206/438-3167 (TDD)

Addresses for ADA Information

U.S. Equal Employment Opportunity Commission
1801 L Street NW
Washington, DC 20507

U.S. Department of Justice
Civil Rights Division
Public Access Section
P.O. Box 66738
Washington, DC 20035-9998

U.S. Department of Transportation
400 Seventh Street SW
Washington, DC 20590

Architectural and Transportation Barriers
Compliance Board
1331 F Street NW
Suite 1000
Washington, DC 20004-1111

Federal Communications Commission
1919 M Street NW
Washington, DC 20554

8. Annotated Regulations

Accordingly, 29 CFR Chapter XIV is amended by adding part 1630 to read as follows:

**PART 1630-- REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT
PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT**

Sec.

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Appendix to part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act.

Authority: 42 U.S.C. 12116.

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1630.1 Purpose, applicability, and construction.

(a) **Purpose.** The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

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

(c) **Construction.** -- (1) **In general.** Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973

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Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The Americans with Disabilities Act was signed into law on July 26, 1990. It is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled. The purpose of title I and this part is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses the term “disabilities” rather than the term “handicaps” used in the Rehabilitation Act of 1973, 29 U.S.C. 701-796. Substantively, these terms are equivalent. As noted by the House Committee on the Judiciary, “[t]he use of the term ‘disabilities’ instead of the term ‘handicaps’ reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than ‘handicapped’ as used in previous laws, such as the Rehabilitation Act of 1973” H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 26-27 (1990) [hereinafter House Judiciary Report]; *see also* S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter House Labor Report].

The use of the term “Americans” in the title of the ADA is not intended to imply that the Act only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality.

Section 1630.1(b) and (c) Applicability and Construction

Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any state or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense

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(29 U.S.C. 790 - 794a), or the regulations issued by Federal agencies pursuant to that title.

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

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to failing to collect information required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. See House Labor Report at 135; House Judiciary Report at 69-70.

This also means that an individual with a disability could choose to pursue claims under a state discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to charges brought under this part. House Judiciary at 69-70.

The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part, and are designed to protect the public health from individuals who pose a direct threat, that cannot be eliminated or reduced by reasonable accommodation, to the health or safety of others. However, the ADA does preempt inconsistent requirements established by state or local law for safety or security sensitive positions. See Senate Report at 27; House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any state or local law that imposes prohibitions or limitations on the eligibility of qualified individuals with disabilities to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with dormant tuberculosis challenges a private school's refusal to hire him or her because of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA.

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1630.2 Definitions.

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

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

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

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

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

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Sections 1630.2(a)-(f) Commission, Covered Entity, etc.

The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," and "Employer." These terms are to be given the same meaning under the ADA that they are given under title VII.

In general, the term "employee" has the same meaning that it is given under title VII. However, the ADA's definition of "employee" does not contain an exception, as does title VII, for elected officials and their personal staffs. It should be further noted that all state and local governments are covered by title II of the ADA whether or not they are also covered by this part. Title II, which is enforced by the Department of Justice, becomes effective on January 26, 1992. See 28 CFR part 35.

The term "covered entity" is not found in title VII. However, the title VII definitions of the entities included in the term "covered entity" (e.g., employer, employment agency, etc.) are applicable to the ADA.

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means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

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

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

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

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

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(g) **Disability** means, with respect to an individual --

(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment. (See section 1630.3 for exceptions to this definition).

INTERPRETIVE GUIDANCE**Section 1630.2(g) Disability**

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment.

To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

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(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

INTERPRETIVE GUIDANCE**Section 1630.2(h) Physical or Mental Impairment**

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23; House Labor Report at 52; House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

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(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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Section 1630.2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

REGULATION**(j) Substantially limits. --**

(1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of "working" --

(i) The term "substan-

INTERPRETIVE GUIDANCE**Section 1630.2(j) Substantially Limits**

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be

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tially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not

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substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments.

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utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

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Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, *i.e.*, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

- (1) the geographical area to which the individual has reasonable access;
- (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a special-

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ized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs

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(e.g., “few,” “many,” “most”) from which an individual would be excluded because of an impairment.

If an individual has a “mental or physical impairment” that “substantially limits” his or her ability to perform one or more “major life activities,” that individual will satisfy the first part of the regulatory definition of “disability” and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term “disability” is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

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(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

INTERPRETIVE GUIDANCE**Section 1630.2(k) Record of a Substantially Limiting Condition**

The second part of the definition provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52-53; House Judiciary Report at 29.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under part 1630. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in part 1630. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of part 1630, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

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(1) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

INTERPRETIVE GUIDANCE**Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity**

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) the individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does

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not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have

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identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

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(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See section 1630.3 for exceptions to this definition).

INTERPRETIVE GUIDANCE**Section 1630.2(m) Qualified Individual with a Disability**

The ADA prohibits discrimination on the basis of disability against qualified individuals with disabilities. The determination of whether an individual with a disability is "qualified" should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in the Rehabilitation Act caselaw as determining whether the individual is "otherwise qualified" for the position. See Senate Report at 33; House Labor Report at 64-65. (See section 1630.9 Not Making Reasonable Accommodation).

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position. House Labor Report at 55.

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers' compensation costs.

REGULATION**(n) Essential functions. -**

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

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

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

INTERPRETIVE GUIDANCE**Section 1630.2(n) Essential Functions**

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the following factors listed in part 1630.

The first factor is whether the position exists to perform a particular function. For example, an individual may be hired to proofread documents. The ability to proofread the documents would then be an essential function, since this is the only reason the position exists.

The second factor in determining whether a function is essential is the number of other employees available to perform that job function or among whom the performance of that job function can be distributed. This may be a factor either because the total number of available employees is low, or because of the fluctuating demands of the business operation. For example, if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited. In such a situation, functions that might not be essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done.

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(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

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See Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

A similar situation might occur in a larger work force if the workflow follows a cycle of heavy demand for labor intensive work followed by low demand periods. This type of workflow might also make the performance of each function during the peak periods more critical and might limit the employer's flexibility in reorganizing operating procedures. See Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987).

The third factor is the degree of expertise or skill required to perform the function. In certain professions and highly skilled positions the employee is hired for his or her expertise or ability to perform the particular function. In such a situation, the performance of that specialized task would be an essential function.

Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. Part 1630 lists various types of evidence, such as an established job description, that should be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.

Although part 1630 does not require employers to develop or maintain job descriptions, written job descriptions prepared before advertising or interviewing applicants for the job, as well as the employer's judgment as to what functions are essential are among the relevant evidence to be considered in determining whether a particular function is essential. The terms of a collective bargaining agreement are also relevant to the determination of whether a particular function is essential. The work experience of past employees in the job or of current employees in similar jobs is likewise relevant to the determination of whether a particular function is essential. See H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 58 (1990) [hereinafter Conference Report]; House Judiciary Report at 33-34. See also Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988).

The time spent performing the particular function may also be an indicator of whether that function is essential. For example,

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if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function. The consequences of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.

It is important to note that 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 section 1630.10 Qualification Standards, Tests and Other Selection Criteria). If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

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(o) Reasonable accommodation. -- (1) The term "reasonable accommodation" means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

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

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work

INTERPRETIVE GUIDANCE**Section 1630.2(o) Reasonable Accommodation**

An individual is considered a "qualified individual with a disability" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. 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. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

Part 1630 lists the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation. Senate Report at 31; House Labor Report at 62; House Judiciary Report at 39.

It may also be a reasonable accommodation to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as a reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.

The accommodations included on the list of reasonable ac-

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schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

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

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accommodations are generally self explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, training rooms, restrooms, etc., may be required as reasonable accommodations.

Another of the potential accommodations listed is "job restructuring." An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position. See Senate Report at 31; House Labor Report at 62.

An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job. See Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979).

An employer or other covered entity may also restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until

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later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour. Likewise, as a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually.

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.

Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances. As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation. See Senate Report at 31-32; House Labor Report at 63.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in section 1630.9 Not Making Reasonable Accommodation.

REGULATION**(p) Undue hardship. --**

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

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

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

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

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

(iv) The type of operation

INTERPRETIVE GUIDANCE**Section 1630.2(p) Undue Hardship**

An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's or other covered entity's business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The "undue hardship" provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. See Senate Report at 35; House Labor Report at 67.

For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. The fact that that particular accommodation poses an undue hardship, however, only means that the employer is not required to provide that accommodation. If there is another accommodation that will not create an undue hardship, the employer would be required to provide the alternative accommodation.

An employer's claim that the cost of a particular accommodation will impose an undue hardship will be analyzed in light of the factors outlined in part 1630. In part, this analysis requires a determination of whose financial resources should be considered in deciding whether the accommodation is unduly costly. In some cases the financial resources of the employer or other covered entity in its entirety should be considered in determining whether the cost of an accommodation poses an undue hardship. In other cases, consideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will actually be required to provide the accommodation. See House Labor Report at 68-69; House Judiciary Report at 40-41; see also Conference Report at 56-57.

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or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

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

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If the employer or other covered entity asserts that only the financial resources of the facility where the individual will be employed should be considered, part 1630 requires a factual determination of the relationship between the employer or other covered entity and the facility that will provide the accommodation. As an example, suppose that an independently owned fast food franchise that receives no money from the franchisor refuses to hire an individual with a hearing impairment because it asserts that it would be an undue hardship to provide an interpreter to enable the individual to participate in monthly staff meetings. Since the financial relationship between the franchisor and the franchise is limited to payment of an annual franchise fee, only the financial resources of the franchise would be considered in determining whether or not providing the accommodation would be an undue hardship. See House Labor Report at 68; House Judiciary Report at 40.

If the employer or other covered entity can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., a State vocational rehabilitation agency, or if Federal, State or local tax deductions or tax credits are available to offset the cost of the accommodation. If the employer or other covered entity receives, or is eligible to receive, monies from an external source that would pay the entire cost of the accommodation, it cannot claim cost as an undue hardship. In the absence of such funding, the individual with a disability requesting the accommodation should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business. To the extent that such monies pay or would pay for only part of the cost of the accommodation, only that portion of the cost of the accommodation that could not be recovered - the final net cost to the entity - may be considered in determining undue hardship. (See section 1630.9 Not Making Reasonable Accommodation). See Senate Report at 36; House Labor Report at 69.

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

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

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

INTERPRETIVE GUIDANCE**Section 1630.2(r) Direct Threat**

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, *i.e.*, high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.

Such consideration must rely on objective, factual evidence - - not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes - - about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experi-

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ence of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56; House Labor Report at 73-74; House Judiciary Report at 45. See also *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Bentivegna v. U.S. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

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1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."

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

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

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

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

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

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Section 1630.3 Exceptions to the Definitions of "Disability" and "Qualified Individual with a Disability"

Section 1630.3 (a) through (c) Illegal Use of Drugs

Part 1630 provides that an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of this part when the employer or other covered entity acts on the basis of such use. Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.

Employers, for example, may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination. The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. See Conference Report at 64.

Individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs are not excluded from the definitions of the terms "disability" and "qualified individual with a disability." Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definitions of those terms. The term "rehabilitation program" refers to both in-patient and out-patient programs, as well as to appropriate employee assistance programs, professionally recognized self-help programs, such as Narcotics Anonymous, or other programs that provide professional (not necessarily medical) assistance and counseling for individuals who illegally use drugs. See Conference Report at 64; see also House Labor Report at 77; House Judiciary Report at 47.

It should be noted that this provision simply provides that certain individuals are not excluded from the definitions of "disability" and "qualified individual with a disability." Consequently, such individuals are still required to establish that they satisfy the requirements of these definitions in order to be protected by the ADA and this part. An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to

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

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

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

(d) Disability does not include:

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

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

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

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

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demonstrate that he or she meets the definition of "disability" as defined in this part.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. (See section 1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

REGULATION**1630.4 Discrimination prohibited.**

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

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

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

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

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

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

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

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

INTERPRETIVE GUIDANCE**Section 1630.4 Discrimination Prohibited**

This provision prohibits discrimination against a qualified individual with a disability in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973.

Part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

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(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term "discrimination" includes, but is not limited to, the acts described in sections 1630.5 through 1630.13 of this part.

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REGULATION**1630.5 Limiting, segregating, and classifying.**

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

INTERPRETIVE GUIDANCE**Section 1630.5 Limiting, Segregating and Classifying**

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of section 1630.4. Covered entities are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement.

Thus, for example, it would be a violation of this part for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. It would be a violation of this part for an employer to adopt a separate track of job promotion or progression for employees with disabilities based on a presumption that employees with disabilities are uninterested in, or incapable of, performing particular jobs. Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges. It would also be a violation of this part to deny employment to an applicant or employee with a disability based on generalized fears about the safety of an individual with such a disability, or based on generalized assumptions about the absenteeism rate of an individual with such a disability.

In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

So, for example, it would be permissible for an employer to

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offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g. limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28-29; House Labor Report at 58-59; House Judiciary Report at 36.

Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees, or reduces the amount of medical insurance coverage that it will provide to all employees, is not in violation of this part, even if the benefits reduction has an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons are in violation of this part. See *Alexander v. Choate*, 469 U.S. 287 (1985). See Senate Report at 85; House Labor Report at 137. (See also, the discussion at section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans).

REGULATION**1630.6 Contractual or other arrangements.**

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

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

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

INTERPRETIVE GUIDANCE**Section 1630.6 Contractual or Other Arrangements**

An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. This provision does not affect the determination of whether or not one is a "covered entity" or "employer" as defined in section 1630.2.

This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect.

Part 1630 notes that this provision applies to parties on either side of the contractual or other relationship. This is intended to highlight that an employer whose employees provide services to others, like an employer whose employees receive services, must ensure that those employees are not discriminated against on the basis of disability. For example, a copier company whose service representative is a dwarf could be required to provide a stepstool, as a reasonable accommodation, to enable him to perform the necessary repairs. However, the employer would not be required, as a reasonable accommodation, to make structural changes to its customer's inaccessible premises.

The existence of the contractual relationship adds no new obligations under part 1630. The employer, therefore, is not liable through the contractual arrangement for any discrimination by the contractor against the contractor's own employees or applicants, although the contractor, as an employer, may be liable for such discrimination.

An employer or other covered entity, on the other hand, cannot evade the obligations imposed by this part by engaging in a contractual or other relationship. For example, an employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement. See Conference Report at 59; House Labor Report at 59-61; House Judiciary Report at 36-37.

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To illustrate, assume that an employer is seeking to contract with a company to provide training for its employees. Any responsibilities of reasonable accommodation applicable to the employer in providing the training remain with that employer even if it contracts with another company for this service. Thus, if the training company were planning to conduct the training at an inaccessible location, thereby making it impossible for an employee who uses a wheelchair to attend, the employer would have a duty to make reasonable accommodation unless to do so would impose an undue hardship. Under these circumstances, appropriate accommodations might include (1) having the training company identify accessible training sites and relocate the training program; (2) having the training company make the training site accessible; (3) directly making the training site accessible or providing the training company with the means by which to make the site accessible; (4) identifying and contracting with another training company that uses accessible sites; or (5) any other accommodation that would result in making the training available to the employee.

As another illustration, assume that instead of contracting with a training company, the employer contracts with a hotel to host a conference for its employees. The employer will have a duty to ascertain and ensure the accessibility of the hotel and its conference facilities. To fulfill this obligation the employer could, for example, inspect the hotel first-hand or ask a local disability group to inspect the hotel. Alternatively, the employer could ensure that the contract with the hotel specifies it will provide accessible guest rooms for those who need them and that all rooms to be used for the conference, including exhibit and meeting rooms, are accessible. If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory, for the cost of any accommodation needed to provide access to the hotel and conference, and for any other costs accrued by the employer. (In addition, the hotel may also be independently liable under title III of the ADA). However, this would not relieve the employer of its responsibility under this part nor shield it from charges of discrimination by its own employees. See House Labor Report at 40; House Judiciary Report at 37.

REGULATION**1630.7 Standards, criteria, or methods of administration.**

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

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

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

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REGULATION**1630.8 Relationship or association with an individual with a disability.**

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

INTERPRETIVE GUIDANCE**Section 1630.8 Relationship or Association with an Individual with a Disability**

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

This provision also applies to other benefits and privileges of employment. For example, an employer that provides health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report at 61-62; House Judiciary Report at 38-39.

REGULATION**1630.9 Not making reasonable accommodation.**

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

INTERPRETIVE GUIDANCE**Section 1630.9 Not Making Reasonable Accommodation**

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, *e.g.*, specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

It should be noted, however, that the provision of such items may be required as a reasonable accommodation where such items are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office.

The term "supported employment," which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional ("job coach") to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as "supported employment." For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of a qualified individual with a disability as a reasonable accommodation. However, an employer would not be

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required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of section 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. That individual is not entitled to a reasonable accommodation because the individual is not "otherwise qualified" for the position.

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On the other hand, if the individual has graduated from an accredited law school and passed the bar examination, the individual would be "otherwise qualified." The law firm would thus be required to provide a reasonable accommodation, such as a machine that magnifies print, to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. See Senate Report at 33-34; House Labor Report at 64-65.

The reasonable accommodation that is required by this part should provide the qualified individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an employee disabled by a back impairment with a state-of-the-art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. See Senate Report at 35; House Labor Report at 66; see also Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that are known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation. See Senate Report at 34; House Labor Report at 65.

REGULATION**INTERPRETIVE GUIDANCE****Process of Determining the Appropriate Reasonable Accommodation**

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34-35; House Labor Report at 65-67.

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- (1) analyze the particular job involved and determine its purpose and essential functions;
- (2) consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate

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accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from state or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that, as provided in section 1630.9(c) of this part, the failure to obtain or receive technical assistance from the federal agencies that administer the ADA will not excuse

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

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

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

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the employer from its reasonable accommodation obligation. Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, 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, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. It should also be noted that the individual's willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation should the individual for any reason be unable or unwilling to continue to provide the accommodation.

Reasonable Accommodation Process Illustrated

The following example illustrates the informal reasonable accommodation process. Suppose a Sack Handler position requires that the employee pick up fifty pound sacks and carry them from the company loading dock to the storage room, and that a sack handler who is disabled by a back impairment requests a reasonable accommodation. Upon receiving the request, the employer analyzes the Sack Handler job and determines that the essential function and purpose of the job is not the requirement that the job holder physically lift and carry the sacks, but the requirement that the job holder cause the sack to move from the loading dock to the storage room.

The employer then meets with the sack handler to ascertain precisely the barrier posed by the individual's specific disability to the performance of the job's essential function of relocating the sacks. At this meeting the employer learns that the individual can, in fact, lift the sacks to waist level, but is prevented by his or her disability from carrying the sacks from the loading dock to the storage room. The employer and the individual agree that any of a number of potential accommodations, such as the provision of a dolly, hand truck, or cart, could enable the individual to transport the sacks that he or she has lifted.

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Upon further consideration, however, it is determined that the provision of a cart is not a feasible effective option. No carts are currently available at the company, and those that can be purchased by the company are the wrong shape to hold many of the bulky and irregularly shaped sacks that must be moved. Both the dolly and the hand truck, on the other hand, appear to be effective options. Both are readily available to the company, and either will enable the individual to relocate the sacks that he or she has lifted. The sack handler indicates his or her preference for the dolly. In consideration of this expressed preference, and because the employer feels that the dolly will allow the individual to move more sacks at a time and so be more efficient than would a hand truck, the employer ultimately provides the sack handler with a dolly in fulfillment of the obligation to make reasonable accommodation.

Section 1630.9(b).

This provision states that an employer or other covered entity cannot prefer or select a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual's need for an accommodation cannot enter into the employer's or other covered entity's decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d).

The purpose of this provision is to clarify that an employer or other covered entity may not compel a qualified individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided would not be required to accept a reader as an accommodation. However, if the individual were not able to read unaided and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 65; House Judiciary Report at 71-72.

REGULATION**1630.10 Qualification standards, tests, and other selection criteria.**

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

INTERPRETIVE GUIDANCE**Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria**

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that that criteria, as used by the employer, are job-related to the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under Section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing Section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See Senate Report at 37-39; House Labor Report at 70-72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. (See section 1630.2(n) Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

REGULATION**1630.11 Administration of tests.**

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

INTERPRETIVE GUIDANCE**Section 1630.11 Administration of Tests**

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. If, when the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

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Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (e.g., through an interview, or through education, license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. (See section 1630.9 Not Making Reasonable Accommodation) See Senate Report at 37-38; House Labor Report at 70-72; House Judiciary Report at 42; see also Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); Crane v. Dole, 617 F. Supp. 156 (D.D.C. 1985).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

REGULATION**1630.12 Retaliation and coercion.**

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

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

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REGULATION**1630.13 Prohibited medical examinations and inquiries.****(a) Pre-employment examination or inquiry.**

Except as permitted by section 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

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

INTERPRETIVE GUIDANCE**Section 1630.13 Prohibited Medical Examinations and Inquiries****Section 1630.13(a) Pre-employment Examination or Inquiry**

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 39; House Labor Report at 75; House Judiciary Report at 44.

REGULATION**1630.14 Medical examinations and inquiries specifically permitted.**

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

INTERPRETIVE GUIDANCE**Section 1630.14 Medical Examinations and Inquiries Specifically Permitted****Section 1630.14(a) Pre-employment Inquiry**

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation. For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category. So, for example, it would not be permitted for an employer to request that an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration.

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function

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must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function. If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Rather, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

An employer is permitted to ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer within a reasonable established time period prior to the administration of the test. The employer may also request that documentation of the need for the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats. (See section 1630.11 Administration of Tests).

Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. (See section 1630.9 Not Making Reasonable Accommodation: Process of Determining the Appropriate Reasonable Accommodation).

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

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

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

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

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As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act is not restricted by this part. (See section 1630.1(b) and (c) Applicability and Construction).

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59-60; Senate Report at 39; House Labor Report at 73-74; House Judiciary Report at 43.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance

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emergency treatment; and

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

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

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

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

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examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating this part.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part.

Consistent with this section and with section 1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in section 1630.16(f).

Section 1630.14(c) Examination of employees

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers or other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part. This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are

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

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

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

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

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

(d) Other acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program

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required by medical standards or requirements established by Federal, state, or local law that are consistent with the ADA and this part (or in the case of a federal standard, with Section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74-75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription

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available to employees at the work site.

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

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

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

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

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

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drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 75; House Judiciary Report at 43-44.

REGULATION**1630.15 Defenses.**

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

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

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

INTERPRETIVE GUIDANCE**Section 1630.15 Defenses**

The section on defenses in part 1630 is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of a individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15(b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, *i.e.*, that

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

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

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

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screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

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

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It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (e.g., no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at section 1630.5 Limiting, Segregating and Classifying, and section 1630.10 Qualification Standards, Tests, and Other Selection Criteria.

Section 1630.15(d) Defense to Not Making Reasonable Accommodation

An employer or other covered entity alleged to have discriminated because it did not make a reasonable accommodation, as required by this part, may offer as a defense that it would have been an undue hardship to make the accommodation.

It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship, as defined in section 1630.2(p), and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite. See House Judiciary Report at 42.

The concept of undue hardship that has evolved under Section 504 of the Rehabilitation Act and is embodied in this part is unlike the "undue hardship" defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed

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to satisfy the "de minimis" title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68-69; House Judiciary Report at 40-41.

Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business' thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

It should be noted, moreover, that the employer would not be able to show undue hardship if the disruption to its employees were the result of those employees' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.

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

(f) Additional defenses.

It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by sections 1630.14 or 1630.16.

INTERPRETIVE GUIDANCE**Section 1630.15(e) Defense - Conflicting Federal Laws and Regulations**

There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a non-exclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

REGULATION**1630.16 Specific activities permitted.**

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

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

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

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

INTERPRETIVE GUIDANCE**Section 1630.16 Specific Activities Permitted****Section 1630.16(a) Religious Entities**

Religious organizations are not exempt from title I of the ADA or this part. A religious corporation, association, educational institution, or society may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria. See Senate Report at 42; House Labor Report at 76-77; House Judiciary Report at 46.

Section 1630.16(b) Regulation of Alcohol and Drugs

This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds all of its other employees. Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part. As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of part 1630 when the employer acts on the basis of such use.

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(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(c) **Drug testing.** -- (1) **General policy.** For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its

INTERPRETIVE GUIDANCE**Section 1630.16(c) Drug Testing**

This provision reflects title I's neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual's medical condition beyond whether the individual

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job applicants or employees is not a violation of section 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) Transportation Employees. This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) Confidentiality. Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of

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is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47.

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(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f)(1),(2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

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disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part. Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted.

However, an employer or other covered entity cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks. Part 1630 requires that decisions not based on risk classification be made in conformity with non-discrimination requirements. See Senate Report at 84-86; House Labor Report at 136-138; House Judiciary Report at 70-71. See the discussion of section 1630.5 Limiting, Segregating and Classifying.

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section 1630.14(b)(2) and (3) of this part.

(d) Regulation of smoking. A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) Infectious and communicable diseases: food handling jobs. -- (1) In general. Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) Effect on state or other laws. This part does not

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Section 1630.16(e) Infectious and Communicable Diseases; Food Handling Jobs

This provision addressing food handling jobs applies the "direct threat" analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.

If no such reasonable accommodation is possible, the employer may refuse to assign, or to continue to assign the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual. However, if the individual is a current employee, the employer would be required to consider the accommodation of reassignment to a vacant position not involving food handling for which the individual is qualified. Conference Report at 61-63. (See section 1630.2(r) Direct Threat).

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preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) Health insurance, life insurance, and other benefit plans. --(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

INTERPRETIVE GUIDANCE**Section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans**

This provision is a limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans. It does not apply to those who establish, sponsor, observe or administer plans not involving benefits, such as liability insurance plans.

The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This provision is not intended to disrupt the current regulatory structure for self-insured employers. These employers may establish, sponsor, observe, or administer the terms of a bona fide benefit plan not subject to state laws that regulate insurance. This provision is also not intended to disrupt the current nature of insurance underwriting, or current insurance industry practices in sales, underwriting, pricing, administrative and other services, claims and similar insurance related activities based on classification of risks as regulated by the States.

The activities permitted by this provision do not violate part 1630 even if they result in limitations on individuals with



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U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

SEP 27 1988

Memorandum for Arthur B. Culvahouse, Jr.
Counsel to the President

Re: Application of Section 504 of the
Rehabilitation Act to HIV-Infected Individuals

Introduction and Summary

This memorandum responds to your request for an opinion on the application of section 504 of the Rehabilitation Act of 1973 (Act), 29 U.S.C. 794, to individuals who are infected with the Human Immunodeficiency Virus ("HIV" or "AIDS virus"). You specifically asked us to consider this subject in light of School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (Arline). Congress has also sought to clarify the law in this area by amending the Rehabilitation Act to address directly the situation of contagious diseases and infections in the employment context. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31 (1988) (Civil Rights Restoration Act). Although your opinion request was limited to the application of section 504 in the employment context, we have also considered the non-employment context because the President has directed the Department of Justice to review all existing federal anti-discrimination law applicable in the HIV infection context and to make recommendations with respect to possible new legislation.¹ See Memorandum for the Attorney General from President Ronald Reagan (Aug. 5, 1988).

For the reasons stated below, we have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals² against

¹ We defer to others in the Department to make the policy determinations necessary to recommend legislation, and, in keeping with the tradition of this Office, confine our analysis to matters of legal interpretation.

² In this opinion, individuals who are infected with the AIDS virus and have developed the clinical symptoms known as Acquired Immune Deficiency Syndrome ("AIDS") or AIDS-Related Complex ("ARC") will sometimes be referred to as "symptomatic HIV-infected individuals." Individuals who are infected with the
(continued...)

discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity³ -- so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in Arline. We have further concluded that section 504 is similarly applicable in the employment context, except for the fact that the Civil Rights Restoration Act replaced the Arline "otherwise qualified" standard with a slightly different statutory formulation. We believe this formulation leads to a result substantively identical to that reached in the non-employment context: namely, that an HIV-infected individual is only protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.⁴

²(...continued)

AIDS virus but do not have AIDS or ARC will sometimes be referred to as "asymptomatic HIV-infected individuals." References to AIDS should be understood to include ARC, except where a distinction between the two is expressly drawn. Finally, where we intend to refer to all HIV-infected individuals, whether symptomatic or not, we either refer to "HIV-infected individuals" or to "HIV infection" (without any "symptomatic" or "asymptomatic" modifier) or clearly indicate in the text that the discussion refers to both categories.

³ The medical information available to us indicates that HIV infection is a physical impairment which in a given case may substantially limit a person's major life activities. See infra at 6-11. In addition, others may regard an HIV-infected person as being so impaired. See infra at 12-13. Either element in a given case, we believe, would be sufficient for a court to conclude that an HIV-infected person is an "individual with handicaps" within the terms of the Act. By virtue of the fact that the handicap here, HIV infection, gives rise both to disabling physical symptoms and to contagiousness, it is unnecessary to resolve with respect to any other infection or condition which gives rise to contagiousness alone whether that singular fact could render a person handicapped. In other words, the medical information available to us undermines the accuracy of the assumption or contention referenced in Arline that carriers of the AIDS virus are without physical impairment. 107 S. Ct. at 1128 n.7.

⁴ These conclusions differ from, and supersede to the extent of the difference, a June 20, 1986 opinion from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, for Ronald E. Robertson, General Counsel, Department of Health and
(continued...)

I. Statutory Framework Under Section 504

Section 504 was intended to proscribe discrimination against the handicapped in programs or activities that are conducted by federal agencies or that receive federal funds. In relevant part, the statute provides:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794.⁵

There are two definitions of "individual with handicaps," one or both of which may be applicable to HIV-infected

⁴(...continued)

Human Services (Cooper Opinion). The conclusions herein incorporate subsequent legal developments (the Supreme Court's decision in Arline and Congress' passage of the Civil Rights Restoration Act) and subsequent medical clarification (see July 29, 1988 letter from C. Everett Koop, M.D., Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel (Koop Letter) (attached).

⁵ Section 504 thus has five elements. First, an individual claiming discriminatory treatment must be an "individual with handicaps," as defined in the Act. Second, the individual must be "otherwise qualified" for the benefit or program participation being sought. Third, the individual must be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under a covered program or activity. Fourth, the contested treatment must be "solely by reason of . . . handicap." And fifth, the discrimination must occur in a program or activity conducted or funded by the federal government.

The definition of "program or activity" is set forth in a new section 504(b), which was added by section 4 of the Civil Rights Restoration Act. In general, the term is to be given an institution-wide scope rather than the program- or activity-specific scope called for by Grove City College v. Bell, 465 U.S. 555 (1984). Grove City was superseded by the Civil Rights Restoration Act. See sec. 2, Pub. L. No. 100-259.

individuals depending upon the context in which the discrimination occurs. The generally-applicable definition is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). Thus, an individual can qualify as handicapped under the general definition if he actually suffers from a disabling impairment, has recovered from a previous such condition, was previously misclassified as having such a condition, or is regarded as having such a condition, whether or not he actually has it.

The Civil Rights Restoration Act amended the definitions section of the Rehabilitation Act to provide, in the employment context, a qualification of the definition of an "individual with handicaps" with respect to contagious diseases and infections. This provision qualifies rather than supplants the general definition of "individual with handicaps".⁶ The amendment provides as follows:

For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31-32 (1988).

II. Application of Section 504 in Contexts Other Than Employment

Section 504, as interpreted by the Supreme Court in Arline, has two primary elements: the definition of "individual with

⁶ The Civil Rights Restoration Act amended 29 U.S.C. 706(8) to add the qualification as a new subparagraph (C), to follow subparagraph (B), which contains the generally-applicable definition of "individual with handicaps." The new subparagraph thus constitutes a specific qualification of the preceding general definition. The qualification operates in the same way as the qualification Congress enacted in 1978 with respect to alcohol and drug abuse, on which the contagious disease provision was modeled. See note 19, *infra*, and accompanying text. Both provisions are structured as exclusions from the general definition. The natural implication of both statutory exclusions is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section.

handicaps" and the "otherwise qualified" requirement. We will first determine whether in the non-employment context an HIV-infected individual, whether symptomatic or asymptomatic, is an "individual with handicaps," and then discuss the application of the "otherwise qualified" requirement to such an individual.⁷

A. Symptomatic HIV-Infected Individuals

As discussed below, Arline requires the conclusion that persons with AIDS (i.e., symptomatic HIV-infected individuals) are within the section 504 definition of handicapped individual notwithstanding their contagiousness. Contagiousness, by itself, does not obviate the existence of a handicap for purposes of section 504. Arline, 107 U.S. at 1128.

Arline involved an elementary school teacher who had been discharged after suffering a third relapse of tuberculosis within two years. All parties conceded, and the Court found, that the plaintiff was handicapped because her tuberculosis had adversely affected her respiratory system, requiring hospitalization. Id. at 1127-1128. Plaintiff's respiratory ailment thus was a physical impairment that substantially limited one of her major life activities. Id. The Court concluded that the defendant's action came within the coverage of section 504, notwithstanding the fact that Ms. Arline was dismissed not because of any disabling effects of her tuberculosis but because of her employer's fear that her contagiousness threatened the health of her students. The Court concluded that "the fact that a person with a record of physical impairment is also contagious does not suffice to remove that person from coverage under § 504." Id. at 1130 (emphasis added).

⁷ Arline was also concerned with a third element: namely, whether the contagiousness of a handicapped individual covered by the Act could be used as a justification for discrimination against that individual. Subject to the "otherwise qualified" limitation, the Court held that contagiousness cannot be used for this purpose. The Court stated: "We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant. . . . It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." Arline, 107 S. Ct. at 1128. In light of the Court's holding, we conclude that the contagiousness of an HIV-infected individual cannot be relied upon to remove that individual from the coverage of the Act. Contra Cooper Opinion at 27 and n.70.

We believe that symptomatic HIV-infected individuals are handicapped under section 504. For these individuals, the disease has progressed to the point where the immune system has been sufficiently weakened that a disease such as cancer or pneumonia has developed, and as a result, the individual is diagnosed as having clinical AIDS. Because of the substantial limiting effects these clinical symptoms have on major life activities, such a person is an "individual with handicaps" for purposes of section 504. This same conclusion should also apply to a person with ARC, who also has serious disabling physical effects caused by HIV infection, although the physical symptoms are not the particular diseases that the Centers for Disease Control have included in its list of the clinical symptoms that constitute AIDS. As with the tuberculosis that afflicted Ms. Arline, AIDS (or ARC) is often "serious enough to require hospitalization, a fact more than sufficient [in itself] to establish that one or more . . . major life activities [are] substantially limited" *Id.* at 1127. Therefore, assuming they are otherwise qualified, contagiousness does not excuse or justify discrimination against individuals handicapped by symptomatic HIV infection. As will be seen, the consideration of the "otherwise qualified" standard allows for a reasonable determination of whether contagiousness threatens the health or safety of others or job performance, and in those events, permits the exclusion of the individual from the covered program or activity.

B. Asymptomatic HIV-Infected Individuals

Arline did not resolve the application of section 504 to asymptomatic HIV-infected individuals.⁸ The Court left open the

⁸ Since the plaintiff had disabling physical symptoms and thus was clearly a handicapped individual under section 504, the Court declined to reach the question of whether a person without such an impairment could be considered handicapped by virtue of a communicable disease alone. As the Court stated, "[t]his case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS [who suffers no physical impairment] could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." *Id.* at 1128 n.7. Subsequent to Arline, the Surgeon General informed this Office that even an asymptomatic HIV-infected individual is physically impaired, stating that "from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B." Koop Letter at 2. In light of Dr. Koop's letter, this Office has no occasion to determine whether a contagious, but not impaired

(continued...)

question of whether such individuals are "individuals with handicaps" under section 504, a question which turns on whether an asymptomatic HIV-infected individual "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). These determinations primarily focus upon: (1) whether HIV infection by itself is a physical or mental impairment; and (2) whether the impairment substantially limits a major life activity (*i.e.*, whether it has a disabling effect); or (3) whether someone with HIV infection could be regarded as having an impairment which substantially limits a major life activity.

1. Asymptomatic HIV-Infected Individuals Are Physically Impaired

The Department of Health and Human Services regulations implementing section 504 define "physical impairment" as:

[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.

45 C.F.R. 84.3(j)(2)(i) (1987). In addition, an appendix to the regulations provides an illustrative (but not exhaustive) list of diseases and conditions that are "physical impairments" for purposes of section 504: "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A, p. 344 (1987).

The first question is whether an asymptomatic HIV-infected individual is physically impaired for purposes of section 504. For this factual determination we necessarily must rely heavily on the views of the Public Health Service of the United States. In this respect, Dr. C. Everett Koop, the Surgeon General of the Public Health Service, has indicated that it is

⁸(...continued)

individual, such as a Hepatitis B carrier, would be protected by the Act. See note 3, *supra*. Cf., Kohl by Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226, 1236 (W.D. Mo. 1987) (finding a Hepatitis B carrier to be within the Act).

inappropriate to think of [HIV infection] as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system.

Koop Letter at 1-2. On the basis of these facts, the Surgeon General concluded that

from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.

Id. at 2.

In our view, the type of impairment described in the Surgeon General's letter fits the HHS definition of "physical impairment" because it is a "physiological disorder or condition" affecting the "hemic and lymphatic" systems.⁹ We therefore

⁹ Moreover, it would also appear that the impairment affects the brain and central nervous system as well. Medical evidence indicates that the AIDS virus, apart from any effect it has on the immune system, also attacks the central nervous system and may result in some form of mental deficiency or brain dysfunction in a significant percentage of persons infected with the virus. "Mental disease (dementia) will occur in some patients who have the AIDS virus before they have any other manifestation such as ARC or classic AIDS." U.S. Department of Health Services, Surgeon General's Report on Acquired Immune Deficiency Syndrome 32 (1986) (Surgeon General's Report). See also id. at 12 ("The AIDS virus may also attack the nervous system and cause delayed damage to the brain. This damage may take years to develop and the symptoms may show up as memory loss, indifference, loss of coordination, partial paralysis, or mental disorder. These symptoms may occur alone, or with other symptoms mentioned earlier.").

In addition, as discussed below with respect to the effects of HIV infection on major life activities, infection with the virus affects the reproductive system because of the significant danger that the virus will be transmitted to a baby during

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believe that, in light of the Surgeon General's medical assessment, asymptomatic HIV-infected individuals, like their symptomatic counterparts, have a physical impairment.

2. Asymptomatic HIV-Infected Individuals and Limits on Major Life Activities

The second question, therefore, is whether the physical impairment of HIV infection substantially limits any major life activities.

Under the HHS regulations implementing section 504, "'major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. 84.3(j)(2)(ii) (1987) (emphasis added). Although the definition is illustrative and not exhaustive, it does provide a helpful starting point for our analysis. We would expect that courts will resolve the factual question of whether the impairment of HIV infection limits a major life activity by reviewing this list for guidance in ascertaining whether a particular activity constitutes a basic function of life comparable to those on the list.

As indicated earlier, the disabling effects of HIV infection are readily apparent in the case of symptomatic HIV infection. The salient point with respect to symptomatic HIV-infected individuals is not that they have AIDS or ARC but rather that their impairment has manifest disabling effects. Again, as noted above, we believe that the courts will find that such individuals are limited in a number of major activities. Due to the weakness of their immune system and depending on the nature of the particular disease afflicting symptomatic HIV-infected individuals, any and perhaps all of the life activities listed in the HHS regulations could be substantially limited.

The question with respect to asymptomatic HIV-infected individuals is more difficult because such individuals would not appear at first glance to have disabling physical effects from their infection that substantially affect the type of life activities listed in the HHS regulations. Their ability, for example, to work, to care for themselves, to perform manual tasks, or to use their senses are usually not directly affected.

⁹(...continued)
pregnancy. Also bearing on whether HIV infection is a physical impairment under the HHS regulations is the Surgeon General's statement in his letter that HIV infection in its early stages is comparable to cancer -- a disease that is listed in the HHS regulations as a physical impairment -- in that infected individuals "may appear outwardly healthy but are in fact seriously ill." Koop Letter at 2.

Nevertheless, we believe it is likely that the courts will conclude that asymptomatic HIV-infected individuals have an impairment that substantially limits certain major life activities. While the Supreme Court explicitly refrained from answering this precise question in Arline, because HIV infection was not before it and perhaps in the mistaken understanding that asymptomatic HIV infection was not accompanied by an impairment,¹⁰ the logic of the decision cannot fairly be said to lead to a different conclusion. This conclusion, we believe, may be based either on the effect that the knowledge of infection will have on the individual or the effect that knowledge of the infection will have on others. With respect to the latter basis, the Court observed, "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use this distinction to justify discriminatory treatment." Arline, 107 S. Ct. at 1128.

a. Limitation of Life Activities Traceable to Knowledge of Infection by Asymptomatic HIV-Infected Individual

Turning first to the effect knowledge of infection may have on the asymptomatic individual, it can certainly be argued that asymptomatic HIV infection does not directly affect any major life activity listed in the HHS regulations. 45 C.F.R. 84.3(j)(2)(ii) (1987). However, since the regulatory list was not intended as an exhaustive one, we believe at least some courts would find a number of other equally important matters to be directly affected. Perhaps the most important such activities are procreation and intimate personal relations.

Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation -- the fulfillment of the desire to conceive and bear healthy children -- is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy,¹¹ HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life

¹⁰ Compare Arline, 107 S. Ct. at 1128 n.7 (suggesting that HIV infection is a disease without physical impairment) with Koop Letter at 2 (HIV infection is a physical impairment).

¹¹ Surgeon General's Report at 20-21 ("Approximately one third of the babies born to AIDS-infected mothers will also be infected with the AIDS virus.").

activity and that the physical ability to engage in normal procreation -- procreation free from the fear of what the infection will do to one's child -- is substantially limited once an individual is infected with the AIDS virus.

This limitation -- the physical inability to bear healthy children -- is separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation. The secondary decision to forego having children is just one of many major life decisions that we assume infected individuals will make differently as a result of their awareness of their infection. Similarly, some courts can be expected to find a limitation of a major life activity in the fact that an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection. The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.¹²

Finding limitations of life activities on the basis of the asymptomatic individual's responses to the knowledge of infection might be assailed as not fully persuasive since it depends upon the conscience and good sense of the person infected. The causal nexus, it would be argued, is not between the physical effect of the infection (as specified in the Koop Letter) and life activities, but between the conscience or normative judgment of the particular infected person and life activities. Thus, it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations.¹³

It is undoubtedly true that some HIV-infected individuals have not or will not change their behavior after learning they are infected, thereby exhibiting disregard for the health of their offspring or sexual partners. Nonetheless, in any case where the evidence indicates that the plaintiff HIV-infected individual has in fact changed his or her behavior -- as, for example, where the plaintiff represents that procreation has been foregone -- the court might well find a limitation of major life activity. Moreover, courts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection. We turn to that rationale next.

¹² Id. at 14-18.

¹³ As indicated in the text, we think this argument is disingenuous at least insofar as infection physically precludes the normal procreation of healthy children.

b. Limitation of Life Activities Traceable to Reaction of Others to Asymptomatic HIV Infection

The Arline Court relied on the express terms of the statute for the proposition that a handicapped individual includes someone who is regarded by others as having a limitation of major life activities whether they do or not. 29 U.S.C. 706(8)(B)(iii). This provision was added by Congress in 1974. The Court cited the legislative history accompanying this textual expansion to show that an impaired person could be protected even if the impairment "in fact does not substantially limit that person's functioning," S. Rep. No. 1297, 93rd Cong., 2d Sess. 64 (1974), and observed that such an impairment "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 107 S. Ct. at 1129.

This construction by the Court of the statutory definition of the term "handicapped individual" has particular significance for the application of section 504 to asymptomatic HIV-infected individuals. The Court found that in order "[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped," *id.* at 1126, Congress intended by its 1974 amendment to expand the section's scope to include persons who are regarded as handicapped, but who "may at present have no actual incapacity at all." *Id.* at 1126-1127 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 405-406 n.6 (1979)). Stressing this point, the Court repeated later in the opinion that the amended definition covers persons "who, as a result [of being incorrectly regarded as handicapped], are substantially limited in a major life activity." *Id.* at 1129. The effect of this interpretation is that the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in Arline, the activity of working).¹⁴ Thus, at least one district court

¹⁴ The Arline Court appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (the literal meaning of the statutory language) and having a condition the misperception of which results in limitation of a life activity. This may have been the distinction the Solicitor General was attempting to draw by suggesting there was a difference between being perceived as having a handicap that precludes work and being perceived as contagious, which does not physically preclude work, except that because of the perception, no work is offered. As recited by the Court, the Solicitor General stated at oral argument "that to argue that a condition that impaired only the ability to work was a handicapping condition was to make 'a totally circular argument

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following Arline has held that if an individual or organization limits an HIV-infected individual's participation in a section 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited.¹⁵

C. Application of the "Otherwise Qualified" Requirement

The Supreme Court's opinion in Arline concluded by remanding the case for consideration by the district court of whether the plaintiff was "otherwise qualified." The Court indicated more generally that section 504 cases involving persons with contagious diseases should turn on the "otherwise qualified" issue, that such individuals must "have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise quali-

¹⁴(...continued)

which lifts itself by its bootstraps.' [Citation omitted] The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." Id. at 1129 n.10. This last statement, of course, returned the Court to the statute's literal meaning. The only justification for departing from that meaning occurs not in footnote 10 of Arline, but in footnote 9, where the Court relied on legislative history which does indicate that at least some members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but simply that the perception of the condition by others in itself has that effect. Id. at 1128 n.9 (physically repulsive aspects of cerebral palsy, arthritis, and facial deformities).

¹⁵ Doe v. Centinela Hospital, Civ. 87-2514 (C.D. Cal. June 30, 1988) (holding HIV-infected individual to be "individual with handicaps" because he was perceived as such by the defendant). The district court wrote that a person is an individual with handicaps if he "has a physiological disorder or condition affecting a body system that substantially limits a 'function' only as a result of the attitudes of others toward the disorder or condition; . . ." Slip op. at 12. The HHS regulations are in accord with this view. 45 C.F.R. section 84.3(j)(2)(iv)(B) (1987). Although as indicated in the previous footnote we think this aspect of the Supreme Court's reasoning departs from the literal meaning of the statutory text in favor of legislative history, we do not question that the district court in Centinela Hospital fairly reads Arline to support a finding that the reaction of others to the contagiousness of an HIV-infected individual in itself may constitute a limitation on a major life activity.

fied.'" 107 S. Ct. at 1130. The Court stressed that before making this determination the trial court must

conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks In the context of the employment of a person handicapped with a contagious disease . . . this inquiry should include "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." (Quoting Brief for American Medical Association as Amicus Curiae 19.) In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Id. at 1131 (footnotes omitted).

It is important to emphasize that the Court recognized that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." Id. at 1131 n.16. The Court has thus made it clear that persons infected with the AIDS virus will not be "otherwise qualified" to perform jobs that involve a significant risk of transmitting the virus to others. In addition, an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).¹⁶

¹⁶ In ascertaining whether a person is otherwise qualified, the court considers "whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, . . . , or requires 'a fundamental alteration in the

(continued...)

Based on current medical knowledge, it would seem that in most situations the probability that the AIDS virus will be transmitted is slight, and therefore as a matter of health and safety there will often be little, if any, justification for treating infected individuals differently from others.¹⁷ Similarly, mere HIV infection involving only "subclinical manifestations" will generally also not render an individual unqualified to participate in a covered program or activity on the basis of inability to perform. As the disease progresses, however, and conditions such as ARC or "full blown" AIDS affect the physical or mental capacity of the individual, it may well be that an "individualized inquiry" will reveal that such person is not otherwise qualified to participate.

In addition, current medical knowledge does suggest the possibility of specialized contexts where, even with respect to person in the early stages of the disease, a court might find an individual to be not otherwise qualified. These situations are very likely to involve individuals who have responsibility for health or safety, such as health care professionals or air traffic controllers. In these and similar situations where there is a greater possibility that the AIDS virus could be transmitted (see generally, Surgeon General's Report), or the consequences of a dementia attack could be especially dangerous (see note 9, supra), we believe a court could find, within the scope of "otherwise qualified" standard, a justification for treating HIV infected individuals differently from uninfected individuals.

In brief, whether HIV-infected individuals will be found after the individualized inquiry required by Arline to be otherwise qualified will often depend on how far the disease has progressed. At the early stages of the disease, it is likely that neither health and safety nor performance will provide a justification for excluding an HIV-infected person. Moreover, while current medical knowledge suggests that safety should not be a concern in most contexts even as the disease progresses, an individualized assessment of performance may result in those with AIDS or ARC being found not otherwise qualified. Finally, courts may find in certain specialized contexts that an HIV-infected individual is not otherwise qualified at any stage of the disease because infection in itself presents an especially serious health or safety risk to others because of the nature of

¹⁶(...continued)
nature of [the] program." 107 S. Ct. at 1131 n.17 (citations omitted).

¹⁷ See Surgeon General's Report at 13 ("No Risk from Casual Contact").

the position. The inquiry in each case will be a factual one, and because of that, we are unable to speculate further.

III. Application of Section 504 in the Employment Context

A. Introduction and Summary

The Civil Rights Restoration Act included a provision, the Harkin-Humphrey amendment,¹⁸ which amended the definitions section of the Rehabilitation Act to provide, with respect to employment, a specific qualification of the definition of an "individual with handicaps" in the context of contagious diseases and infections:

For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

As discussed below, application of the Harkin-Humphrey amendment in the employment context should result in substantially the same conclusions as result from application in the non-employment context of section 504 as interpreted in Arline. Specifically, we conclude that Harkin-Humphrey provides that HIV-infected individuals (regardless of whether or not they are symptomatic) are protected against discrimination in the employment context so long as they fall within the general section 504 requirements defining an "individual with handicaps" and do not contravene the specific qualification to the general requirements that the amendment provides: namely, that they do not "constitute a direct threat to the health or safety of other individuals" and they can "perform the duties of the job." In our judgment, this qualification merely codifies the "otherwise qualified" standard discussed by the Court in Arline and discussed above in this memorandum, including the provision of a means of reasonable accommodation that can eliminate the health or safety threat or enable the employee to perform the duties of the job, if it is provided for under the employer's existing personnel policies and does not impose an undue financial or administrative burden.

¹⁸ Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31-32 (1988). Since this amendment to section 504 was jointly sponsored by Senators Harkin and Humphrey, we will refer to the amendment in this opinion as "Harkin-Humphrey."

Because Harkin-Humphrey was a floor amendment that was not developed by a committee, there is no committee report explaining it. The only explanatory statement that accompanied its introduction was a one-sentence statement of purpose -- "Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context", 134 Cong. Rec. S256 (daily ed. Jan. 28, 1988) -- and a brief colloquy between the two sponsors. *Id.* at S256-257:

The sponsors' colloquy made three basic points. First, the amendment was designed to do in the contagious disease and infection context what the comparably phrased 1978 amendment to section 504 did in the context of alcohol and drug abuse¹⁹ -- "assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals, or cannot perform the essential duties of a job." *Id.* at S256-57. Second, the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." *Id.* at S257. Finally, "as we stated in 1978 with respect to alcohol and drug abusers, . . . the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified." *Id.*

With that description of Harkin-Humphrey's principal legislative history as background, we now discuss the amendment's impact on two aspects of the application of section 504 to HIV infection cases in the employment context: (1) whether section 504 applies to both asymptomatic and symptomatic HIV-infected individuals; and (2) the manner in which the section's "otherwise qualified" requirement is to be applied, including whether employers must provide "reasonable accommodation" to infected individuals.

B. Coverage of All HIV-Infected Individuals (Subject to the Stated Limitations)

We have no difficulty concluding that the Harkin-Humphrey amendment, and thus section 504 in the employment context,

¹⁹ "For purposes of sections 503 and 504 as such sections relate to employment, [the term "handicapped individual"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Pub. L. No. 95-602, sec. 122(a), 92 Stat. 2955, 2985 (1978), codified at 29 U.S.C. 706(8)(B).

includes within its coverage both asymptomatic and symptomatic HIV-infected individuals. The amendment's language draws no distinction between asymptomatic and symptomatic individuals and, notably, applies to a "contagious disease or infection." It therefore applies to all HIV-infected individuals, whether or not they are symptomatic. It is true that the amendment is phrased in the negative in that it says who is not handicapped, rather than defining who is handicapped. Nevertheless, we believe the natural implication of this statutory exclusion is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section. Accordingly, in light of our previous discussion of the application of the general provisions of section 504 to HIV-infected persons, we conclude that all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their job are covered by section 504.

Harkin-Humphrey's legislative history reinforces this reading of the amendment.²⁰ There was no disagreement expressed concerning the amendment's applicability to asymptomatic HIV-infected individuals, and a number of legislators expressly stated that such persons were covered. Senator Harkin described the purpose of the amendment in a letter, dated February 26, 1988, to Representatives Hawkins and Edwards. Senator Harkin explained that

[t]he objective of the amendment is to expressly state in the statute the current standards of section 504 so as to reassure employers that they are not required to hire or retain individuals with contagious diseases or infections who pose a direct threat to the health or safety of others or who cannot perform the duties of a job.

The basic manner in which an individual with a contagious disease or infection can present a direct threat to the health or safety of others is when the individual poses a significant risk of transmitting the contagious disease or infection to other individuals. The Supreme Court in Arline explicitly recognized this necessary limitation in the protections of section 504. The amendment is consistent with this standard.

²⁰ Moreover, the model for the Harkin-Humphrey amendment -- the 1978 amendment to section 504 concerning drug addicts and alcoholics -- was intended to include within section 504 those covered persons not possessing the deficiencies identified in the statute. See generally, 124 Cong. Rec. 30322-30325 (1978) (statements of Senators Cannon, Williams, and Hathaway).

134 Cong. Rec. H1065 (daily ed. Mar. 22, 1988) (emphasis in original).²¹

During the subsequent debate in the House of Representatives, the Representatives who commented on the amendment indicated their understanding that persons with contagious diseases or infections were covered. For example, referring to the dissenting opinion in Arline, see 107 S. Ct. at 1132-1134, Representative Weiss observed:

[Chief] Justice Rehnquist stated that Congress should have stated explicitly that individuals with contagious diseases were intended to be covered under section 504. Congress has done so now with this amendment, stating clearly that individuals with contagious diseases or infections are protected under the statute as long as they meet the "otherwise qualified" standard. This clarity is particularly important with regard to infections because individuals who are suffering from a contagious infection -- such as carriers of the AIDS virus or carriers of the hepatitis B virus -- can also be discriminated against on the basis of their infection and are also individuals with handicaps under the statute.

134 Cong. Rec. H573 (daily ed. Mar. 2, 1988). Representative Coelho stated that the amendment

provides that individuals with contagious diseases or infections are protected under the statute unless they pose a direct threat to the health or safety of others or cannot perform the duties of the job.

* * * * *

People with contagious diseases and infections, such as people with AIDS or people infected with the AIDS virus, can be subject to intense and irrational discrimination. I am pleased that this amendment makes clear that such individuals are covered under the protections of the Rehabilitation Act.

Id. at H560-61. Representative Owens commented:

I am glad to see that [the amendment] refers to individuals with contagious infections, thus clarifying

²¹ See also 134 Cong. Rec. S1739 (daily ed. Mar. 2, 1988) ("The purpose of the amendment was to clarify for employers the applicability of section 504 of the Rehabilitation Act of 1973 to persons who have a currently contagious disease or infection.") (statement of Sen. Harkin).

that such infections can constitute a handicapping condition under the Act.

Id. at H574. The record is replete with similar comments.²²

In summary, we believe that under the Harkin-Humphrey amendment, section 504 applies in the employment context to all HIV-infected individuals, which necessarily includes both asymptomatic and symptomatic HIV-infected individuals. This parallels our conclusions with respect to HIV-infected individuals, both symptomatic and asymptomatic, outside the employment context. The difference between the employment and non-employment contexts because of the Harkin-Humphrey amendment is thus more apparent than real. Specifically, it is our view that the Harkin-Humphrey amendment merely collapses the "otherwise qualified" inquiry applicable outside the employment context into the definition of "individual with handicaps" in the employment text. Thus, whether outside the employment context a particular infected person is deemed to be handicapped but ultimately receives no protection under the statute because that person poses a danger to others and is thereby not "otherwise qualified" or whether that same person is not deemed to be handicapped under the Harkin-Humphrey amendment in the employment context for the same reason is of only semantic significance. In either case, if the infection is a direct threat to the health or safety of others or renders the individual unable to perform the duties of the job, the grantee or employer is not required to include that person in the covered program or activity or retain or hire him in a job. Indeed, the legislative history suggests that the principal purpose of the Harkin-Humphrey amendment was the codification of the "otherwise qualified" limitation as discussed in Arline.²³

²² See, e.g., 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("I commend the Members of the Senate for fashioning this amendment in such a way that the courts will continue to adjudicate cases involving AIDS, HIV infection and other communicable conditions on a case by case basis."); id. at E487 (statement of Rep. Hoyer) (referring to "people with AIDS and people infected with the AIDS virus" as equally subject to the amendment); id. at H580 (statement of Rep. Dannemeyer) (opposing amendment because it covers "asymptomatic carriers").

²³ "Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context." 134 Cong. Rec. S256 (daily ed. Jan. 28, 1988). See also the sponsors' colloquy, discussed supra in the text, as well as the comments of individual members. E.g., 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("This amendment . . . codif[ies] the 'otherwise qualified' framework (continued...)")

C. Is There a "Reasonable Accommodation" Requirement Under Harkin-Humphrey?

The Department of Health and Human Services (HHS) regulations implementing section 504, first issued in 1977, reflect HHS' determination that a "reasonable accommodation" requirement is implicit in the "otherwise qualified" element of section 504. 42 Fed. Reg. 22676, 22678 (May 4, 1977). Then, now, the regulations provided the following statement of the "otherwise qualified" requirement: "'Qualified handicapped person' means . . . [w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."²⁴ In Arline, the Supreme Court endorsed the "reasonable accommodation" requirement of the regulations, explaining that when a handicapped person is not able to perform the essential functions of the job, and is therefore not "otherwise qualified," "the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions."²⁵

²³ (...continued)
for courts to utilize in these cases."); id. at H573 (statement of Rep. Weiss) ("In such circumstances [significant risk of communicating a contagious disease], the individual is not 'otherwise qualified' to remain in that particular position. The Supreme Court in Arline explicitly recognized this necessary limitation in the protections of section 504. The Senate amendment places that standard in statutory language"); id. E487 (statement of Rep. Hoyer) ("[T]his amendment essentially codifies the existing standard of otherwise qualified in section 504, as explicated by the Supreme Court in Arline.").

²⁴ 45 C.F.R. 84.3(k)(1) (1987) (emphasis added). See also 45 C.F.R. 84.12 (1987) (setting forth the "reasonable accommodation" requirements).

²⁵ Arline, 107 S. Ct. at 1131 n.17. The Court suggested that two factors, originally employed by the Court in Davis, should be used to ascertain the reasonableness of an employer's refusal to accommodate a handicapped individual: "Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, Southeastern Community College v. Davis, supra, at 412, 99 S. Ct. at 2370, or requires a 'fundamental alteration in the nature of [the] program' id. at 410. See 45 C.F.R. § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship)" Id.

As noted above, the Harkin-Humphrey amendment includes within it the "otherwise qualified" standard. We must determine whether a "reasonable accommodation" requirement is implicit in Harkin-Humphrey's special section 504 formulation, just as HHS and the Supreme Court found such a requirement to be implicit in section 504 prior to this amendment. More specifically, was Harkin-Humphrey intended to require reasonable accommodation of a contagious individual who, absent such accommodation, poses a "direct threat to the health or safety of other individuals or . . . is unable to perform the duties of the job?" The amendment's legislative history convinces us that Congress intended that consideration of "reasonable accommodation" should be factored into an employer's determination of whether an infected employee poses a direct threat or can perform the job.

The legislative history of the Harkin-Humphrey amendment indicates that Congress was quite aware that administrative and judicial interpretation had added the "reasonable accommodation" gloss to section 504, and Congress understood and intended that such a gloss would be put on Harkin-Humphrey. The first evidence of this is found in the colloquy between Senators Harkin and Humphrey upon the introduction of the amendment. The colloquy stressed that the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." 134 Cong. Rec. S257 (daily ed. Jan. 28, 1988). More expansively, Senator Harkin subsequently stated that

the amendment does nothing to change the requirements in the regulations regarding providing reasonable accommodations for persons with handicaps, as such provisions apply to persons with contagious diseases and infections. Thus, if a reasonable accommodation would eliminate the existence of a direct threat to the health or safety of others or eliminate the inability of an individual with a contagious disease or infection to perform the essential duties of a job, the individual is qualified to remain in his or her position.

134 Cong. Rec. S1740 (daily ed. Mar. 2, 1988).

Senator Harkin's statement cannot be given dispositive weight because it was not joined by his co-sponsor, Senator Humphrey, and it was not made before the Senate voted on the amendment. However, Senator Humphrey never directly challenged this statement, or said that reasonable accommodation was not intended, and unchallenged statements to the same effect were made by members of the House speaking in favor of and against the amendment prior to the House vote on the amendment and by members of the Senate speaking in favor of and against the amendment

prior to the vote to override the President's veto of the Civil Rights Restoration Act.

Prior to the House vote, for example, Representative Weiss remarked that

[a]s the Senate amendment now restates in statutory terms, [individuals with contagious diseases or infections] are also not otherwise qualified if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or could not perform the essential functions of a job.

Id. at H573. Representative Waxman said the same thing:

the Court went on to say [in Arline] that if [persons with contagious diseases] pose a significant risk of transmitting their diseases in the workplace, and if that risk cannot be eliminated by reasonable accommodation, then they cannot be considered to be "otherwise qualified" for the job. The amendment added by the Senate to this bill places that standard in law.

Id. at H575 (emphasis added). Many other Representatives supporting the amendment agreed.²⁶ Opposing the amendment, Representative Dannemeyer stated that "[i]f this bill is passed as presently written, employers will be required to accommodate

²⁶ E.g., 134 Cong. Rec. E501 (daily ed. Mar. 3, 1988) (statement of Rep. Miller) ("[T]he new language added by the Senate changes nothing with respect to current law and is not intended to displace the . . . reasonable accommodations requirement under section 504."); 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("The colloquy in the Senate between the two cosponsors of the amendment clarifies that it is the intent of Congress that the amendment result in no change in the substantive law with regard to assessing whether persons with this kind of handicapping condition are 'otherwise qualified' for the job in question or whether employers must provide 'reasonable accommodations' for such individuals."); id. at H561 (statement of Rep. Coehlo) ("[I]ndividuals with contagious diseases and infections are not otherwise qualified -- and thus are not protected in a particular position -- if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or cannot perform the duties of the job."); id. at E487 (statement of Rep. Hoyer) (not "otherwise qualified" if risk of communicating contagious disease "cannot be eliminated by reasonable accommodation"); id. at H571 (statement of Rep. Jeffords) (same); id. at H574 (statement of Rep. Owens) (same).

victims of this fatal disease despite potential health threats to other employees." *Id.* at H580.

Prior to the Senate vote to override the President's veto of the Civil Rights Restoration Act, Senator Harkin reiterated his intent and understanding that reasonable accommodation was required:

I say to this body this bill does not I repeat does not require an employer to hire or retain in employment all persons with contagious diseases. An employer is free to refuse to hire or fire any employee who poses a direct threat to the health or safety of others who cannot perform the essential functions of the job if no reasonable accommodation can remove the threat to the safety of others or enable the person to perform the essential functions of the job. This determination must be made on an individualized basis and be based on facts and sound medical judgment.

134 Cong. Rec. S2435 (daily ed. Mar. 17, 1988) (emphasis added). Moreover, in arguing that the President's veto should be sustained, a number of Senators stated their understanding that Harkin-Humphrey would require reasonable accommodation. Senator Hatch included in his list of objectionable features of the Civil Rights Restoration Act "the requirement to attempt to accommodate persons with infectious diseases, such as tuberculosis and AIDS." *Id.* at S2403. Senator Symms made the same point, arguing that "[t]he equality-of-result rather than equality-of-opportunity standards [in the Civil Rights Restoration Act] can lead to . . . the need to attempt to accommodate infectious persons" *Id.* at S2410.

Moreover, in addition to this direct evidence of congressional intent concerning the Harkin-Humphrey amendment, we also find illuminating the evidence that the 1978 drug and alcohol abuse amendment, on which Harkin-Humphrey is modeled,²⁷ was intended to require reasonable accommodation. During the Senate debate on Harkin-Humphrey, Senator Cranston observed that the drug and alcohol abuse amendment

did not result in any basic change in the process under section 504 by which it is determined whether the individual claiming unlawful discrimination is handicapped and whether that individual is "otherwise qualified," taking into account -- as in the case of all other handicapped persons -- any reasonable accommodations

²⁷ See sponsors' colloquy, 134 Cong. Rec. S256-57 (daily ed. Jan. 28, 1988).

that should be made to enable him or her to perform the job satisfactorily.

134 Cong. Rec. S724 (daily ed. Feb. 4, 1988) (emphasis added).

The legislative history of the drug and alcohol abuse amendment supports Senator Cranston's assertion that "reasonable accommodation" was required under that amendment. That legislative history is clear that the amendment was designed to codify the existing "otherwise qualified" standard, as interpreted by the Attorney General and the Secretary of HEW, which included the "reasonable accommodation" requirement.²⁸ In explaining the amendment, one of its sponsors specifically cited the "reasonable accommodation" requirement:

Regulations implementing sections 503 and 504 already address [the concerns of employers and others seeking the amendment]. They make clear that the protections of sections 503 and 504 only apply to otherwise qualified individuals. That means . . . that distinction on the basis of qualification is perfectly justifiable. Regulations implementing section 503 define "qualified handicapped individual" as a handicapped person who is capable of performing a particular job with reasonable accommodation to his or her handicap.²⁹

²⁸ 43 Op. Atty' Gen. No. 12, at 2 (1977) (section 504 does not "require unrealistic accommodations" for drug addicts or alcoholics); 42 Fed. Reg. 22676, 22678 (May 4, 1977) (promulgating "otherwise qualified" definition, which is identical to current definition and thus includes reasonable accommodation).

²⁹ 124 Cong. Rec. 30324 (1978) (statement of Sen. Hathaway) (emphasis added). The sponsors of the amendment believed that it "simply [made] explicit what prior interpret[ations] of the act -- including those of the Attorney General and the Secretary of Health, Education, and Welfare -- have found" *Id.* at 37510 (statement of Sen. Williams). They did not believe that a change in law was necessary, but they were willing to provide a clarification in order to "reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." *Id.* at 30323. The amendment used an "otherwise qualified" formulation to clarify how existing law applied to drug and alcohol abusers. As explained by Senator Williams, "while the legislative history of the 1973 act, as authoritatively interpreted by the Attorney General, made clear that qualified individuals with conditions or histories of alcoholism or drug addiction were protected from discrimination by covered employers, this amendment codifies that intent." *Id.*

(continued...)

Our final reason for believing that Congress intended the Harkin-Humphrey amendment to preserve the "reasonable accommodation" requirement of existing law is that a contrary conclusion would entail overruling a specific holding of Arline. After holding that the plaintiff in Arline was a "handicapped individual," the Supreme Court remanded the case to the district court for the "otherwise qualified" determination, which the Court said should include "evaluat[ing], in light of [a series of medical findings], whether the employer could reasonably accommodate the employee under the established standards for that inquiry." 107 S. Ct. at 1131.

Any reading of the Harkin-Humphrey amendment that precluded reasonable accommodation would be inconsistent with that Arline holding. Applying Harkin-Humphrey without reasonable accommoda-

29 (...continued)
at 37509.

Senator Williams' reference to the Attorney General was to an opinion Attorney General Bell provided to HEW Secretary Califano a month before HEW's promulgation (on May 4, 1977) of its regulations implementing section 504. 43 Op. Att'y Gen. No. 12 (1977). While concluding that drug and alcohol abusers were "handicapped individuals" subject to the same protections under section 504 as were all other handicapped individuals, the Attorney General stressed the applicability of the "otherwise qualified" requirement:

[O]ur conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of section 504 does not mean that such a person must be hired or permitted to participate in a federally assisted program if the manifestations of his condition prevent him from effectively performing the job in question or from participating adequately in the program. A person's behavior manifestations of a disability may also be such that his employment or participation would be unduly disruptive to others, and section 504 presumably would not require unrealistic accommodations in such a situation.

Id. at 2 (emphasis added). As Senator Williams noted (124 Cong. Rec. 30324 (1978)), Secretary Califano's statement accompanying issuance of the regulations agreed with the Attorney General's interpretation and his emphasis on the "otherwise qualified" requirement. 42 Fed. Reg. 22676, 22686 (May 4, 1977). The regulations issued by Secretary Califano included the "otherwise qualified" regulation requiring reasonable accommodation. Id. at 22678.

tion to an individual like the plaintiff in Arline would probably result in a finding that the individual is a direct threat to the health and safety of her students without any meaningful consideration of non-burdensome ways to alleviate the danger. Thus, under that reading, an individual with tuberculosis (or an HIV-infected individual) would receive less individualized scrutiny under the amendment than under Arline. However, it is clear that Congress did not intend to overrule Arline. Indeed, supporters of Harkin-Humphrey repeatedly and unequivocally spoke of codifying Arline and acting consistently with Arline, including specifically Arline's approach to "otherwise qualified" and "reasonable accommodation."³⁰ Only a single statement by Senator Humphrey is arguably somewhat to the contrary, and even this remark does not undermine our conclusion, or the overwhelming evidence of legislative intent on which it is based.³¹ Senator Humphrey merely stated that the amendment must result in some change or it would have been "pointless." However, codifying a Supreme Court holding in a manner designed to reassure those infected with a contagious disease of the law's protection and employers of the law's limits has a point.

For the foregoing reasons, we conclude that implicit in Harkin-Humphrey's statement of the "otherwise qualified" standard for the contagious disease context is a "reasonable accommodation" requirement.³² Accordingly, before determining that an HIV-infected employee is not an "individual with

³⁰ E.g., 134 Cong. Rec. S2435 (daily ed. Mar. 17, 1988) (statement of Sen. Harkin); 134 Cong. Rec. S1739 (daily ed. Mar. 2, 1988) (statement of Sen. Harkin, concurred in by Sen. Kennedy and Sen. Weicker); 134 Cong. Rec. S725 (daily ed. Feb. 4, 1988) (statement of Sen. Cranston); 134 Cong. Rec. H560-61 (daily ed. Mar. 2, 1988) (statement of Rep. Coelho); id. at H567 (statement of Rep. Hawkins); id. at H571 (statement of Rep. Jeffords); id. at H574 (statement of Rep. Owens); id. at H575 (statement of Rep. Waxman); id. at H584 (statement of Rep. Edwards).

³¹ 134 Cong. Rec. S970 (daily ed. Feb. 18, 1988) (statement of Sen. Humphrey) ("If the Humphrey-Harkin amendment had not resulted in some substantive change in the law, it would have been a pointless exercise. . . . [The amendment was not] intended merely to codify the status quo in this area. The language of these measures is quite clear, and post facto interpretations should not be construed to alter their actual intent or effect.").

³² The American Law Division of the Library of Congress' Congressional Research Service has reached the same conclusion. CRS Report for Congress, Legal Implications of the Contagious Disease or Infections Amendment to the Civil Rights Restoration Act, S. 557 18-23 (March 14, 1988).

handicaps," an employer must first consider whether, consistent with the employer's existing personnel policies for the job in question, a reasonable accommodation would eliminate the health or safety threat or enable the employee to perform the duties of the job.

Arline's discussion of the HHS regulations' "reasonable accommodation" requirement presents a useful point of reference for considering what "reasonable accommodation" should be provided for HIV-infected individuals in the employment context. As noted by the Court, the HHS regulations provide that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." 107 S. Ct. at 1131 n.19. However, "where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination." 45 C.F.R., Part 84, App. A., p. 350 (1987).

While reasonable accommodation is part of the individualized factual inquiry and therefore difficult to discuss in the abstract, it clearly does not require allowing an HIV-infected individual to continue in a position where the infection poses a threat to others. This would appear to be the case with infected health care workers who are involved in invasive surgical procedures, and it may also be the case with respect to other infected health care workers or individuals employed in jobs that entail responsibility for the safety of others. Limited accommodations might be required if alternative employment is reasonably available under the employer's existing policies. For example, a surgeon in a teaching hospital might be restricted to teaching or other medical duties that do not involve participation in invasive surgical procedures, or a policeman might be reassigned to duties that do not involve a significant risk of a physical injury that would involve bloodshed. In contrast, given the evolving and uncertain state of knowledge concerning the effects of the AIDS virus on the central nervous system, it may not be possible, at least if the disease has sufficiently progressed, to make reasonable accommodation for positions, such as bus driver, airline pilot, or air traffic controller, that may allow very little flexibility in possible job assignment and where the risk of injury is great if the employer guesses wrongly and the infected person is not able to perform the duties of the job.

Conclusion

We have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity -- so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in Arline. We have further concluded that section 504 applies in substance in the same way in the employment context, since the statutory qualification set forth in the Civil Rights Restoration Act merely incorporates the Arline "otherwise qualified" standard for those individuals who are handicapped under the general provisions of section 504 by reason of a currently contagious disease or infection. The result is the same: subject to an employer making reasonable accommodation within the terms of his existing personnel policies, the symptomatic or asymptomatic HIV-infected individual is protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.


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Attachment