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Littler on

Disability in the Workplace

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COVERAGE

Scope of Discussion. This publication provides an overview of the Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA), and the law's coverage and requirements. In addition to evaluating who is protected under the Act and what impairments may constitute a disability, the publication also addresses the ADA's requirement that employers provide reasonable accommodations to qualified individuals with a disability. Practical recommendations and guidelines for engaging in the interactive process and handling employee requests for reasonable accommodation are provided for employers.

Although the major recent developments in federal employment and labor law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. The focus of this publication is federal law. Although some state law distinctions may be included, the coverage is not comprehensive, and many state disability laws offer broader protections than the ADA.

To adhere to publication deadlines, developments and decisions subsequent to **October 15, 2024** are generally not covered.

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1. OVERVIEW OF THE ADA

1.1 Introduction

Congress enacted the Americans with Disabilities Act (ADA) in 1990, a landmark civil rights statute, to ensure that persons with disabilities have equal access to employment opportunities.[1] Its obligations in the employment arena break down into three broad categories: (1) nondiscrimination (which includes preventing workplace harassment) against persons with disabilities, persons associated with individuals with disabilities, and persons regarded as having a disability; (2) protecting privacy and restricting medical inquiries at the various stages of the employment relationship; and (3) making reasonable accommodations for applicants and employees with disabilities.

In the aftermath of a series of court decisions restricting threshold protected status under the ADA, the ADA became subject to significant debate and was ultimately amended by the ADA Amendments Act of 2008 (ADAAA). Effective January 1, 2009, the ADAAA directly overturned several key holdings in seminal decisions of the U.S. Supreme Court that had previously limited the scope of persons receiving protected status under the ADA.[2] The ADAAA sent an unmistakable message to the courts that the concept of disability and protection is to be broadly construed. For employers, the primary consequence is that far more people fall within the definition of having a disability under the ADA. The ADAAA appears to have had an impact. In July 2013, the National Council on Disability, an independent federal agency, released its analysis of case law that has developed under the ADAAA. The report includes the following finding:

> Assessment of overall outcomes in court decisions interpreting and applying the ADAAA shows that the Act has had a dramatic impact in improving the success rates of plaintiffs in establishing disability. In cases in which district courts applied provisions of the Act, plaintiffs prevailed on the showing of disability in more than three out of four decisions—a significant improvement over pre-ADAAA decisions. This very positive development is tempered by the recognition that many plaintiffs who prevailed on establishing a disability still lost their cases on other grounds.[3]

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[1] Other provisions of the ADA seek to guarantee access to public facilities and places of public accommodation. This discussion focuses on the duties found in Title I of the ADA that impose on employers the duty to provide persons with disabilities with equal access to employment.

[2] The ADAAA effectively overturned the U.S. Supreme Court decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), in which the Court held that consideration must be given to mitigating measures that help individuals control impairments when determining whether persons have a disability under the ADA.

[3] National Council on Disability, *A Promising Start: Preliminary Analysis of Court Decisions Under The ADA Amendments Act* (July 23, 2013), at 13, *available at* https://www.ncd.gov/assets/uploads/reports/2013/ncd_a-promising-start.pdf; *see also* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under The ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2031-32 (2013) (evaluation of judgments from January 1, 2010 to April 30, 2013 shows that federal courts granted a "significantly smaller proportion of summary judgment rulings under the ADAAA on the basis of a lack of disability status").

Unless otherwise noted, all references to the ADA in this publication refer both to the ADA and the ADAAA.[4]

The number of ADA charges received by the Equal Employment Opportunity Commission (EEOC or "Commission"), which is the agency tasked with enforcing the ADA, continues to increase. For fiscal year 2013, ADA charges accounted for 27.7% of the total charges filed.[5] By FY 2022 ADA claims rose to 34% of the overall charges filed with the EEOC, trailing only retaliation claims (which tend to be combined with myriad other charges under Title VII of the Civil Rights Act of 1964 ("Title VII") as well as ADA charges).[6] The EEOC filed a record high number of disability-related suits in 2018 with 84 lawsuits containing ADA claims out of 199 merit suits filed. While the numbers of lawsuits filed have decreased in more recent years (with the EEOC filing 91 merit suits in FY 2022, 27 of which concerned disability), the percentage of merits suits that include ADA claims – roughly 30% to 35% of such suits – has held steady. The EEOC filed 143 new employment discrimination cases for FY 2023, which is more than a 50% increase over FY 2022 filings.[7] In FY 2024, however, it filed 110 new unlawful employment discrimination cases.[8]

The top two largest settlements initiated by the EEOC in FY 2018 involved "class" disability discrimination claims.[9] In the first, an employer agreed to pay $9.8 million in stock to settle a nationwide class or pattern and practice disability discrimination lawsuit based on the employer's return-to-work policy. The Commission has taken the position that policies requiring employees to have no medical restrictions upon return from medical leave can violate the ADA if the employer does not first take steps to determine whether reasonable accommodations are available to allow employees to return with restrictions. In the second disability discrimination settlement, an employer agreed to pay $4.4 million to a class of 40 job applicants who were allegedly denied employment as a result of a third-party-administered medical screening process. The EEOC argued that the employer should have individually assessed each applicant's ability to do the job safety. Inflexible leave policies remained a target of the EEOC in 2019, with at least three high-dollar settlements involving such claims.[10] In FY 2022, the EEOC resolved a disability, pregnancy discrimination and retaliation matter for $8 million. In that case, the EEOC claimed that the employer failed to accommodate employees by forcing them to take unpaid leave and only allowing employees to return from leave if they were 100% healed.[11] A late 2023 settlement saw an employer settle an age and

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[4] Courts have generally ruled that the ADAAA is not retroactive; therefore, disability discrimination claims arising before January 1, 2009 are not evaluated under the standards enunciated in the ADAAA. *See Reynolds v. American Nat'l Red Cross*, 701 F.3d 143, 151-52 (4th Cir. 2012) (collecting cases).

[5] Statistics from the EEOC are available at www.eeoc.gov/statistics/enforcement-and-litigation-statistics.

[6] 42 U.S.C. §§ 2000e *et seq*.

[7] EEOC, Press Release, *EEOC Announced Year-End Litigation Round-Up for Fiscal Year 2023* (Sept. 29, 2023) *available at* https://www.eeoc.gov/newsroom/eeoc-announced-year-end-litigation-round-fiscal-year-2023.

[8] EEOC, Press Release, *Fiscal Year 2024 EEOC Litigation Focuses on Emerging Issues and Underserved, Vulnerable Populations* (Oct. 9, 2024) *available at* https://www.eeoc.gov/newsroom/fiscal-year-2024-eeoc-litigation-focuses-emerging-issues-and-underserved-vulnerable.

[9] Barry A. Hartstein et al., Littler Mendelson, P.C., *Annual Report on EEOC Developments: Fiscal Year 2018*, 23 (Jan. 2018), *available at* https://www.littler.com/files/eeoc_annual_report_for_fy_2018.pdf.

[10] Barry A. Hartstein et al., Littler Mendelson, P.C., *Annual Report on EEOC Developments: Fiscal Year 2019*, 35 (Mar. 2020), *available at* https://www.littler.com/files/fy_2019_eeoc_annual_report.pdf.

[11] EEOC, Press Release, *Circle K to Pay $8 Million to Resolve EEOC Disability, Pregnancy, and Retaliation Charges* (Nov. 29, 2022), *available at* https://www.eeoc.gov/newsroom/circle-k-pay-8-million-resolve-eeoc-disability-pregnancy-and-retaliation-charges.

perceived disability case for $6.8 million when its employees were subject to a mandatory retirement age. The employer agreed to require training for certain employees on the ADA, among other things.[12]

The COVID-19 pandemic brought many employment challenges and corresponding ADA claims. As the pandemic seized the country, employers took unprecedented actions to save their businesses and protect their employees. Yet even before most states opened back up for business, plaintiff's lawyers began filing suit against employers for a variety of alleged violations related to the virus, including discrimination. From March 12, 2020, through March 31, 2022, plaintiffs filed approximately 862 federal and 1183 state discrimination suits that included disability claims. In addition, there also has been an increased risk of reasonable accommodation claims from employees who worked remotely during the pandemic and who may have been asked to return to the workplace.

The EEOC responded to the coronavirus pandemic by issuing new or revised guidance related to infection control strategies in the workplace and protections under the ADA for workers who are at a higher risk of severe illness from COVID-19.[13] The agency also announced that employer-mandated COVID-19 testing of employees may be permissible under the ADA where it is job related and consistent with business necessity. As discussed in more detail in **2.2**, the central theme of these changes appears to be that the EEOC initially granted more leeway for employers in handling COVID-19 concerns than they had in response to the 2009 H1N1 virus. More recently, however, the EEOC has signaled that it is time to tighten up the relaxed standards adopted as a temporary measure in response to the crisis. Without a doubt, the federal and state regulatory environment surrounding COVID-19 issues continues to evolve.

President Biden ended the COVID-19 national emergency in April 2023. Although the stark pressures of the pandemic are relenting, the EEOC's focus on disability discrimination is not. For example, the EEOC reported that in FY 2021, it initiated three commissioner's charges that alleged several issues, including: (1) failure to hire based on disability; (2) constructive discharge based on disability; (3) discharge based on disability; and (4) failure to accommodate disability.[14] This emphasis can be expected to continue as pandemic-related claims surface and play out. As employers navigate the post-pandemic reality and changes in workplace norms, they should consult with knowledgeable legal counsel to ensure they are equipped with the latest information to help protect their employees and their businesses.

1.2 Which Employers Are Subject to the ADA?

1.2(a) *Numerical Threshold for Coverage*

The employment provisions of the ADA apply to all employers engaged in an industry affecting commerce that have 15 or more employees for each working day in each of 20 or more calendar weeks in the current

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[12] EEOC, Press Release, *Scripps Clinical Medical Group to Pay $6.875 Million* (Dec. 19, 2023), *available at* https://www.eeoc.gov/newsroom/scripps-clinical-medical-group-pay-6875-million.

[13] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers*, at A.7 (updated May 15, 2023), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. The guidance also contains information about Long COVID and when it may substantially limit a major life activity.

[14] Barry A. Hartstein et al., Littler Mendelson, P.C., *Annual Report on EEOC Developments: Fiscal Year 2021*, 18 (Apr. 2022), *available at* https://www.littler.com/files/eeoc_annual_report_fy_2021.pdf. "Commissioner's charges" are charges brought by the EEOC on its own initiative, based upon an aggregation of the information gathered pursuant to individual charge investigations. Under a commissioner's charge, the EEOC is entitled to investigate broader claims.

or preceding calendar year.[15] The ADA also applies to labor organizations, employment agencies, and joint labor-management committees.[16]

Employers of fewer than 15 employees should know that many states, counties, and municipalities have laws prohibiting discrimination against employees or applicants with disabilities. For example, in the District of Columbia, an employer with one or more employees is subject to local antidiscrimination provisions and other states have coverage thresholds as low as one employee.[17]

1.2(b) *Employment Relationship*

In considering who counts as an "employee" for determining whether an entity employs the threshold number of employees to be covered under the ADA, the U.S. Supreme Court determined that the common law control test applies.[18] The Supreme Court noted that the following factors should be considered, with no one factor controlling: the organization's ability to hire and fire the individual; the organization's level of supervisory control over the individual; whether the individual must report to a higher authority; the individual's level of influence in the organization; the intent of the parties involved; and whether the individual shares in the profits, losses, and liabilities of the organization.[19] The Court specified that each situation must be evaluated on a case-by-case basis and that the list of factors is not exhaustive. The mere fact that an individual has a specific title such as partner, director, or vice president should not determine whether an employment relationship exists.

Likewise, in determining who qualifies as an "employer" under the ADA, courts generally will focus on the employer's control over the individual employee.[20] In determining whether a parent corporation operates as an employer, most courts construe the term broadly to include "superficially distinct entities that are sufficiently interrelated to constitute a single, integrated enterprise."[21]

In *Brown v. Bank of America, N.A.*, a federal district court expanded the concept of entities that might be considered an "employer" for ADA liability purposes.[22] In defending against a motion to dismiss, the plaintiff successfully argued that a third-party leave administrator was an "employer" within the meaning of the ADA because the third-party administrator had the power to decide the amount of leave to

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[15] 42 U.S.C. § 12111(5)(a). This is the same coverage test used under Title VII. *See* 42 U.S. Code §§ 2000e *et seq*.

[16] 42 U.S.C. § 12111(2). The terms *labor organization* and *employment agency* have the same meaning given to those terms under Title VII. 29 C.F.R. § 1630.2(b); 42 U.S.C. § 2000-e(c), (d).

[17] D.C. CODE § 2-1401.02.

[18] *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003); *see also Bluestein v. Central Wis. Anesthesiology, S.C.*, 769 F.3d 944 (7th Cir. 2014) (applying *Clackamas* analysis in determining whether an individual was an employee under the ADA).

[19] *Clackamas*, 538 U.S. at 449-50.

[20] *See Munoz v. Seton Healthcare, Inc.*, 557 F. App'x 314, 318 (5th Cir. 2014) (employer must be the "entity [making] the final decisions regarding employment matters related to the person claiming discrimination") (citation omitted); *Satterfield v. Tennessee*, 295 F.3d 611, 617 (6th Cir. 2002) ("employer" relationship found where "employer" has ability to control job performance and employment opportunities, is an agent delegated to make employment decisions or significantly affects access of individual to employment opportunities).

[21] *Tipton v. Northrup Grumman Corp.*, 242 F. App'x 187, 190 (5th Cir. 2007); *see also Buchanan v. Watkins & Letofsky, L.L.P.*, 30 F.4th 874, 877-78 (9th Cir. 2022) ("Because Title VII and the ADA include the same 15-employee threshold and statutory enforcement scheme, we hold that the integrated enterprise doctrine . . . applies equally under the ADA.").

[22] 5 F. Supp. 3d 121 (D. Me. 2014).

approve, and indeed whether to approve leave as an accommodation. The court reasoned that these decisions are typically the role of the employer. More recently, however, in *Eisenhuth v. ACPI Wood Products, L.L.C.*, a federal district court granted a motion to dismiss, holding that the plaintiff failed to plead sufficient facts to establish that the third-party leave administer was a "joint employer" under the ADA.[23]

1.2(c) *Religious Institutions & the Ministerial Exception*

Religious institutions may not be subject to the ADA with regard to their "ministerial" employees. Specifically, the ADA permits religious employers to give preference in employment "to individuals of a particular religion to perform work connected with the carrying on" of the religious employer.[24] Although an employee must be a "minister" for this exception to apply, the U.S. Supreme Court has read the term "minister" liberally and granted courts broad discretion to determine whether an employee is a minister.[25]

In *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*, the U.S. Supreme Court held that a former church employee's disability discrimination claims under the ADA were barred by the Free Exercise and Establishment Clauses of the First Amendment.[26] Despite the employee spending just 45 minutes per day on her religious duties, and the remainder on secular teaching activities, the Court refused to limit the ministerial exception to employees who "perform exclusively religious functions."[27] The Court expanded upon this decision in 2020 by holding in *Our Lady of Guadalupe School v. Morrissey-Berru* that two Catholic school teachers were also subject to the ministerial exception although the schools did not formally designate them as ministers and they had less formal religious training than the employee in *Hosanna-Tabor*.[28]

In addressing the scope of the ministerial exception in recent years, courts have considered whether the exemption precludes hostile work environment claims (in addition to discrimination claims). The U.S. Court of Appeals for the Seventh Circuit, for example, held that the exemption can apply to bar ADA and Title VII hostile work environment claims.[29]

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[23] 2021 WL 3545079 (M.D. Pa. Aug. 11, 2021).

[24] 42 U.S.C. § 12113(d)(1).

[25] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 190 (2012) (the employee was given the title of commissioned minister, the church congregation periodically reviewed the employee's "skills of ministry" and "ministerial responsibilities," and the employee was formally called by the church's congregation to teach); *see also Behrend v. S.F. Zen Ctr., Inc.*, 108 F.4th 765 (9th Cir. 2024)(finding that the ministerial exception applied to an ADA claim by an employee of a Buddhist Center because the employee helped to carry out the mission of the Buddhist Center in their duties, including maintenance, kitchen, and guest services, assisting with rituals, participating in meditations and services, cleaning the temple, attending talks and classes, and performing ceremonial duties).

[26] 565 U.S. 171.

[27] 565 U.S. at 192; *see also Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206-09 (2d Cir. 2017) (allowing exception as to lay principal who "led school prayers, conveyed religious messages in speeches and writings, and expressed the importance of Catholic prayer and spirituality in newsletters to parents").

[28] 140 S. Ct. 2049 (2020).

[29] *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 978-85 (7th Cir. 2021) (precluding plaintiff's Title VII and ADA claims of minister-on-minister harassment); *see also Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (barring hostile work environment claim brought under Title VII).

Religious institutions must raise the ministerial exception as an affirmative defense.[30]

1.2(d) *Public Employers*

Public employees are limited in their ability to sue under the ADA. The federal government is entirely excluded from coverage as an "employer" under the ADA.[31] Likewise, the U.S. Supreme Court has held that a private individual may not sue a state or state agency to recover monetary relief for employment discrimination under Title I of the ADA because the states have received protection from such suits by sovereign immunity under the Eleventh Amendment.[32] According to the Court: "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States . . . and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[33] Notwithstanding this limitation, private individuals may still sue state officials for prospective, injunctive relief.[34] Additionally, the federal government may continue to sue states for injunctive relief and monetary damages under Title I, and private individuals can still file charges of disability discrimination with the EEOC or state enforcement agency or file a private suit under various state and local laws. Local government agencies, such as municipal police and fire departments, are not immunized against private lawsuits.[35]

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[30] 132 S. Ct. at 709 n.4.

[31] 42 U.S.C. § 12111(5)(B)(i); *see also Henrickson v. Potter*, 327 F.3d 444, 447 (5th Cir. 2003). Disability discrimination claims, however, may be brought by federal employees under the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §§ 791 *et seq*., which prohibits discrimination on the basis of disability in federal employment as well as in programs conducted by federal agencies, in programs receiving federal financial assistance, and in the employment practices of federal contractors. Employees of state agencies that receive federal funding may also bring claims under the Rehabilitation Act.

[32] *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). The status of sovereign immunity under Title II of the ADA, which prohibits discrimination on the basis of disability by public entities, remains in question following the Supreme Court's decision in *Garrett*. In 2002, the Court accepted *certiorari* in *Hason v. Medical Board*, which queried whether the Eleventh Amendment barred suit against the California Medical Board for denying a medical license based on the applicant's clinical depression, but the case was dropped in 2003 after California withdrew its appeal. *See Medical Bd. v. Hason*, 538 U.S. 958 (2003); *Hason v. Medical Bd.*, 294 F.3d 1166, 1168 (9th Cir. 2002) ("It is beyond dispute that recent decisions of the Supreme Court, including *Garrett*, have fundamentally changed the landscape of Eleventh Amendment jurisprudence.") (O'Scannlain, J., dissenting); *see also* Matthew D. Taggart, *Title II of the Americans with Disabilities Act After Garrett: Defective Abrogation of Sovereign Immunity and Its Remedial Impact*, 91 CALIF. L. REV. 827, 829-30 (2003); William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 843-44 (2000). Since *Garrett*, the Supreme Court has addressed the application of Title II in two cases, but neither addressed whether a private individual may sue a state or state agency to enforce the employment discrimination protections of Title II. *See United States v. Georgia*, 546 U.S. 151 (2006) (a prisoner with paraplegia could proceed with his Title II claims for damages against the state based on architectural barriers in the prison); *Tennessee v. Lane*, 541 U.S. 509 (2004) (individuals may sue states directly to require them to make their courts and judicial services accessible under the ADA). To add to this complexity, some state statutes waive sovereign immunity for certain ADA suits, including employment discrimination claims. *See, e.g.*, 745 ILL. COMP. STAT. 5/1.5(d).

[33] 531 U.S. at 374.

[34] *See Maizner v. Hawaii Dep't of Educ.*, 405 F. Supp. 2d 1225, 1231 (D. Haw. 2005) (appropriately suing state when seeking reinstatement); *see also Ex Parte Young*, 209 U.S. 123 (1908).

[35] *See, e.g.*, *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775 (9th Cir. 2005) (recognizing that an air pollution control district was too localized to be considered an arm of the state, and thus was not immune from a former employee's ADA claim).

1.2(e) *Personal Liability for Supervisors*

Courts in most circuits have held there is no individual liability for violations of the ADA against supervisors who do not independently qualify as "employers."[36] As noted above, however, individuals may bring suit for prospective, injunctive relief against state officials if they violate the ADA while acting in their official capacity.[37] Certain state, county, and municipal laws may impose individual liability under their parallel disability discrimination provisions.

1.3 Who is Protected by the ADA?

The ADA protects qualified individuals with a disability, which is defined as a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job the individual holds or desires. The extent to which certain classes of workers, including contingent workers, retirees or former employees, independent contractors and volunteers, may receive protection under the ADA varies.[38]

1.3(a) *Contingent Workers*

The EEOC, the agency charged with overseeing the ADA, takes the position that staffing firms and their clients (*i.e.*, employers) both have obligations under the ADA.[39] Staffing firms include temporary agencies, contract firms, facilities staffing firms, lease-back firms, and welfare-to-work programs. Staffing firms, and their clients, may be liable for their own discrimination against a worker, and, potentially, discrimination by the other entity if either participates in the discrimination or knew or should have known of the discrimination and fails to take corrective action within its control.

Prospective workers enlisting themselves with a staffing firm or agency do not establish an employment relationship with that agency or a client until an offer of a work assignment has been made and accepted. In the application and interview process, however, both entities must comply with the ADA. For further discussion, see **2.1(a)**.

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[36] *Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43 (1st Cir. 2011); *Butler v. City of Prairie Vill.*, 172 F.3d 736 (10th Cir. 1999); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 472 (4th Cir. 1999); *Mason v. Stallings*, 82 F.3d 1007 (11th Cir. 1996); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995).

[37] *Walsh v. Nevada Dep't of Human Res.*, 471 F.3d 1033 (9th Cir. 2006) ("Sovereign immunity, however, does not bar Title I suits against state officials for prospective injunctive and declaratory relief."); *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001) (Eleventh Amendment does not bar suits against individuals in their official capacity where the plaintiff seeks injunctive relief under the ADA and the allegations on the whole are clearly directed against individuals rather than the state agency); *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001) (state department of corrections official could be sued under the ADA by a former employee).

[38] The Fifth Circuit addressed a disability discrimination claim raised by a short-term employee, who alleged that she had been selected for a reduction in force six days after suffering a diabetic episode on the job. *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523 (5th Cir. 2022). While the district had dismissed her claim, in part because her employment was intended to be temporary, the appellate court reversed. Pointing to precedent from retaliation cases, the Fifth Circuit explained that the close temporal proximity between the episode and termination decision still mattered.

[39] EEOC, Enforcement Guidance, *Application of Americans with Disabilities Act to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*, No. 915.002 (Dec. 22, 2000), *available at* https://www.eeoc.gov/policy/docs/guidance-contingent.html. Guidance published from the EEOC does not have the same force as regulations issued by the EEOC and the law will continue to be defined in the courts. The EEOC publications generally can be found on the EEOC's website at http://www.eeoc.gov.

1.3(b) *Retirees & Former Employees*

There is a split of authority as to whether the ADA protects retired employees. Some courts have held retired and other former employees are not protected under the ADA because individuals must be qualified to perform essential job functions of the job held or sought when they bring suit under the ADA. At the time retirees bring suit, they typically are unable to perform essential job functions and they do not have, or are not seeking, any job.[40] Other courts have held that the ADA protects retirees and other former employees because to do otherwise would lead to unfair results inconsistent with the ADA.[41]

In joining the Seventh and Ninth Circuit Courts of Appeals, the Sixth Circuit Court of Appeals held in *McKnight v. General Motors Corp.* that three retirees with disabilities lacked standing to sue under the ADA.[42] In rejecting the Second and Third Circuit's broad interpretation, the Sixth Circuit reasoned that the relevant ADA language uses present-tense verbs and unambiguously excludes retirees with disabilities — "qualified individuals" who "can perform" the essential functions of a job with or without a reasonable accommodation. Further, the Sixth Circuit found that the Employee Retirement Income Security Act (ERISA), not the ADA, addressed the provision of benefits to former employees who can no longer work. The Eleventh Circuit joined in agreement in *Stanley v. City of Sanford*.[43]

1.3(c) *Independent Contractors*

Generally, legitimately classified independent contractors are not covered by the ADA. In *Lerohl v. Friends of Minnesota Sinfonia*, the Eighth Circuit Court of Appeals affirmed the dismissal of a professional musician's claim because she was an independent contractor.[44] The court found that the musicians were professionals who retained control over the extent to which they were available for concerts. Also significant was the fact that the orchestra did not withhold income or FICA taxes, documented payments to the musicians on 1099s and provided no employee benefits other than contributions to a union pension fund.[45] But note that some states have expressly included independent contractors as those covered under the state's anti-discrimination law. In Maryland, for example, an employer may have an obligation to accommodate an independent contractor's disability.[46]

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[40] *See McKnight v. General Motors Corp.*, 550 F.3d 519 (6th Cir. 2008); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *EEOC v. Group Health Plan*, 212 F. Supp. 2d 1094, 1098-99 (E.D. Mo. 2002).

[41] *See, e.g.*, *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998); *Fletcher v. Tufts Univ.*, 367 F. Supp. 2d 99 (D. Mass. 2005) (recognizing that former employees can be considered qualified individuals).

[42] 550 F.3d 519.

[43] *Stanley v. City of Sanford, Fla.*, 2023 WL 6614448 (11th Cir. Oct. 11, 2023).

[44] 322 F.3d 486 (8th Cir. 2003).

[45] 322 F.3d at 492; *see also Smith v. CSRA*, 12 F.4th 396, 412-14 (4th Cir. 2021) (noting that "an employment relationship is determined under agency principles and the 'economic realities'" and finding the plaintiff was not an employee of an entity that did not supervise her work, "determine her work hours or location, or even provide the equipment necessary to perform the work," particularly given the terms of her consulting agreement); *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756,762 (8th Cir. 2014) (independent contractors are not protected employees under the ADA).

[46] *See* MD. CODE ANN., STATE GOV'T § 20-601(c)(1)(ii) ("Employee means . . . an individual working as an independent contractor for an employer").

While the courts are divided, in some circuits independent contractors may bring disability claims against the federal government and government contractors under the Rehabilitation Act of 1973.[47]

1.3(d) *Volunteers*

Generally, courts have held that volunteers are not employees under the ADA.[48] Whether a person is an "employee" depends on whether the person economically depends on the entity to which the person renders service. For example, in *Tawes v. Frankford Volunteer Fire Co.*, the court held that a volunteer fireman was not an employee of the fire company because the line-of-duty benefits, discounts with a wireless carrier, and pension system provided by the fire company did not render him sufficiently economically benefited to be considered an employee.[49] Moreover, the court recognized that the parties viewed their relationship as strictly voluntary where volunteers joined the fire company for the "pride and intangible benefits" rather than for economic reasons.[50]

A "volunteer" may be considered an employee of an entity if the volunteer receives benefits such as a pension, group life insurance, workers' compensation, and access to professional certification, even if the benefits are provided by a third party.[51] Furthermore, a volunteer may be covered by the ADA if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity.[52]

1.3(e) *Employees with a Relationship or Association with a Person with a Disability*

The ADA also prohibits discrimination against employees known to have a relationship or association with a person with a disability.[53] For example, it would be unlawful for an employer to discharge an employee

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[47] *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009); *Schrader v. Ray*, 296 F.3d 968 (10th Cir. 2002). The Fifth, Sixth, and Eighth Circuits, however, have concluded otherwise, precluding independent contractors from asserting disability discrimination claims under the Rehabilitation Act. *See Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016); *Wojewski v. Rapid City Reg'l Hosp.*, 450 F.3d 338 (8th Cir. 2006); *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999).

[48] *See, e.g.*, *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71 (8th Cir. 1990) (recognizing that a member of a rodeo association, who accrued benefits but received no compensation, could not be considered an "employee").

[49] 2005 WL 83784 (D. Del. Jan. 13, 2005).

[50] 2005 WL 83784, at **5-6. *But see Haavistola v. Cmty. Fire Co.*, 6 F.3d 211 (4th Cir. 1993) (volunteer firefighter was an employee because the plaintiff could qualify as an Emergency Medical Technical-Paramedic due to being a member of the fire company and because the plaintiff received benefits based on his role, such as reimbursement for training and group health insurance); *see also Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348 (6th Cir. 2011) (rejecting district court's conclusion that plaintiff must first establish receipt of significant remuneration before applying common law agency test).

[51] *See, e.g.*, *Pietras v. Board of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999) (finding coverage under Title VII even when the putative employee receives no salary so long as the individual gets numerous job-related benefits).

[52] *See* EEOC, Compliance Manual, *Section II: Threshold Issues*, No. 915.003 (May 12, 2000), *available at* https://www.eeoc.gov/policy/docs/threshold.html (citing *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 n.4 (3d Cir. 1994) (Title VII reaches discrimination by any covered employer that has "the ability to directly affect a plaintiff's employment opportunities")).

[53] *See, e.g.*, *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415 (2d Cir. 2016) (announcing standard of review for such claims in the Second Circuit); *Williams v. Union Underwear Co., Inc.*, 614 F. App'x 249 (6th Cir. 2015) (describing three common theories of associational discrimination); *see also Cusick v. Yellowbook, Inc.*, 607 F. App'x 953 (11th Cir. 2015); *see also Wethington v. Sir Goony Golf of Chattanooga, Inc.*, 571 F. Supp. 3d 888, 898-901 (E.D. Tenn.

because the employee associates with or is related to a person with AIDS. Similarly, the EEOC's Interpretive Guidelines forbid employment decisions based on assumptions that an employee will miss work to care for a person with a disability. This directive does not mean, however, that absences caused by caring for that person are necessarily protected under the ADA (though employers should check on the applicability of state or local leave laws). The ADA does not require reasonable accommodations for individuals protected only on an associational basis.

The ADA's prohibition on discrimination against employees with a relationship or association with a person with a disability is intended to protect persons with close familial, social, or physical relationships with such individuals. In *O'Connell v. Isocor Corp.*, a human resources manager claimed the company discriminated against her after her HIV-positive counterpart in another region was laid off (he sued, alleging disability discrimination).[54] When the plaintiff herself was laid off, she sued under the ADA, claiming that her termination resulted from her "association" with her HIV-positive former coworker. The court rejected her claim, noting she had no familial, social, or physical relationship with her former colleague, and her termination would have no chilling effect on his receipt of care or companionship.

1.4 What Is a Disability?

Under the ADA, an *individual with a disability* is a person who:

- has a physical or mental impairment that substantially limits one or more major life activities (*actual impairment*);
- has a record of such an impairment (*record of*); or
- is regarded as having such an impairment (*regarded as*).[55]

The regulations implementing the ADAAA state that the "primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA."[56] To that end, the ADAAA increases ADA coverage and strengthens employee protections by rejecting the strict interpretation of the ADA that defined disability to be an impairment that prevents or severely restricts an individual from doing activities of central importance to one's daily life. Instead, the ADAAA requires that the definition of disability be construed broadly in favor of expansive coverage, despite the statutory language that an impairment must "substantially limit one or more major life activities."[57] For example, the ADAAA prohibits consideration of almost all measures that reduce or mitigate the impact of an impairment in determining whether an individual has a disability. As such, persons with disabilities who have successfully managed their conditions with medication or other mitigating measures are covered by the ADA. Further, the ADAAA expands coverage by allowing persons discriminated against on the basis of a perceived disability to pursue a claim under the ADA regardless of whether the perceived impairment limits or is perceived to limit a major life activity. Persons protected under only the "regarded as" prong are not legally entitled to reasonable accommodations.

2021) (denying defendants' motion for summary judgment where employer allegedly fired employee who had taken leave following his wife's terminal cancer diagnosis but then required additional leave for her ongoing care).

[54] 56 F. Supp. 2d 649 (E.D. Va. 1999).

[55] 42 U.S.C. § 12102(1)(A)-(C).

[56] 29 C.F.R. § 1630.1(b)(4).

[57] 29 C.F.R. § 1630.1(b)(4).

The standard for a disability is not necessarily uniform as between state and federal law. Likewise, the definition of disability used in the ADA should not be confused with the definitions used in other types of laws, such as state workers' compensation laws or other federal and state laws that provide benefits for people with disabilities or veterans with disabilities.

1.4(a) *Physical Impairments*

A *physical impairment* is 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.[58]

Chronic conditions, diseases, and infections may be physical impairments. Such conditions include orthopedic, visual, speech and hearing impairments, as well as cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, human immunodeficiency virus (HIV) infection, cancer, heart disease, or diabetes.[59] On the other hand, simple physical characteristics such as eye or hair color that are within normal range and are not the result of a physiological disorder are not physical impairments.

1.4(a)(i) *Obesity*

While several courts previously found morbid obesity not limiting enough to qualify as a disability under the ADA as originally enacted, some courts have reassessed that view in light of the ADAAA and denied motions for summary judgment on the question of whether morbid obesity constitutes a disability.[60] Further, after the enactment of the ADAAA, the EEOC brought two lawsuits involving morbid obesity as a disability.[61] The EEOC secured consent decrees in both cases, providing monetary relief for the charging parties and imposing training and reporting obligations on the companies at issue.

In 2013, the American Medical Association (AMA) officially recognized obesity as a medical disease.[62] Although the AMA's determination has no legally binding effect, its position arguably bolsters ADA disability claims by employees and applicants for employment. However, the EEOC has regarded those

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[58] 29 C.F.R. § 1630.2(h).

[59] The EEOC issued an updated technical assistance document, *Visual Disabilities in the Workplace and the Americans with Disabilities Act,* explaining how the ADA applies to job applicants and employees with visual disabilities. (updated July 26, 2023), *available at* https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilities-act?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

[60] *EEOC v. Resources for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011); *Lowe v. American Eurocopter L.L.C.*, 2010 WL 5232523 (N.D. Miss. 2010) (noting that many pre-ADAAA cases had concluded that obesity was not a disability, but denying employer's motion to dismiss because of changes made by the ADAAA); *see also Whittaker v. America's Car-Mart, Inc.*, 2014 WL 1648816 (E.D. Mo. Apr. 24, 2014) (denying defendant's motion to dismiss and finding the plaintiff's allegation that he was discriminated against based on his "severe obesity" was a sufficient factual basis to assert he had a disability within the meaning of the ADA).

[61] *EEOC v. Resources for Human Dev.*, 827 F. Supp. 2d 688 (complaint filed Sept. 30, 2010); *EEOC v. BAE Sys. Inc.*, No. 4:11-cv-3497 (S.D. Tex.) (complaint filed Sept. 27, 2011).

[62] Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES, June 19, 2013, at B1.

who are "morbidly obese" (defined as weighing twice the normal body weight) as physically impaired and generally protected under the ADA.[63]

A few federal circuit courts have disagreed with that position, however.[64]The Eighth Circuit Court of Appeals, for example, affirmed judgment against an individual who argued that his morbid obesity constituted a disability within the meaning of the ADA.[65] The plaintiff had received a conditional offer of employment, which was withdrawn when the mandatory medical review revealed that his body mass index (BMI) exceeded the acceptable threshold. In that case, the plaintiff did not assert any other medical condition that caused the obesity, or an existing condition commonly associated with obesity. Relying on the pertinent regulations, the court reasoned that "obesity is not a physical impairment unless it is a physiological disorder or condition and it affects a major body system."[66] Consistent with that interpretation, under most circumstances, those who are merely overweight or obese—without other exacerbating medical conditions—are not substantially limited in some major life activity, so they are not necessarily considered to have disabilities. The Seventh Circuit Court of Appeals, for example, held that a bus driver weighing many hundreds of pounds did not have a disability (or even an impairment) unless his obesity was the result of an underlying physiological disorder or condition.[67] This is the majority view taken by federal courts.[68] Ultimately, even if morbid obesity constitutes an impairment, plaintiffs must still prove that their obesity substantially limits a major life activity.[69]

1.4(b) *Mental Impairments*

Employers often struggle with how to apply the ADA to persons with mental disabilities. A *mental impairment* is any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. Common personality traits such as a quick temper are not impairments where such traits are not symptoms of a mental or psychological disorder.[70] The predicted proliferation of mental illness issues stemming from the COVID-19 pandemic may result in increased ADA claims as well as accommodation challenges.[71]

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[63] *See BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012) (citing EEOC Compliance Manual § 902.2(c)(5)(ii) for proposition that severe obesity—more than 100% over the norm—is an impairment under the ADA); *see also* EEOC, Press Release, *Resources for Human Development Settles EEOC Disability Suit for $125,000* (Apr. 10, 2012) (announcing settlement with employer based on allegations that employer fired complainant because of her severe obesity, which the court accepted as a disability on its own).

[64] *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006); *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); *see also Valtierra v. Medtronic Inc.*, 232 F. Supp. 3d 1117 (D. Ariz. 2017).

[65] *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 256 (Oct. 3, 2016).

[66] 817 F.3d at 1108.

[67] *Richardson v. Chicago Transit Auth.*, 926 F.3d 881 (7th Cir. 2019).

[68] 926 F.3d at 887 (listing example cases).

[69] *Lumar v. Monsanto*, 395 F. Supp. 3d 762, 778-79 (E.D. La. 2019).

[70] 29 C.F.R. § 1630.2(h)(2); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(h).

[71] *See, e.g.*, *Loftus v. School Bd. of Lee Cnty.*, No. 2:21-cv-261 (M.D. Fla. Mar. 26, 2021) (plaintiff alleged disability discrimination under the Rehabilitation Act where employer allegedly denied her requests for accommodations when her PTSD, generalized anxiety disorder, and panic disorder with agoraphobia worsened due to the COVID-19 pandemic; the parties stipulated to dismiss the suit with prejudice in April 2022).

1.4(b)(i) *EEOC's Guidance on Mental Disabilities*

EEOC guidance provides that "personality disorders" described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) may qualify as mental impairments.[72] The DSM is a compilation of accepted psychiatric conditions and is widely used in the medical profession for diagnoses and to classify disorders for insurance reimbursement. Given that the personality disorders (*e.g.*, paranoid personality disorder, antisocial personality disorder, histrionic personality disorder, avoidant personality disorder, dependent personality disorder, and obsessive-compulsive personality disorder) identified in the DSM are characterized by conduct outside societal norms, the guidance has caused concern that employees who engage in misconduct or other disruptive behavior will seek to shield themselves from disciplinary action by reliance on the ADA.

The fifth edition of the DSM, referred to as "DSM-5," added new mental disorders, such as the addition of "social (pragmatic) communication disorder." This disorder applies to people who have significant problems communicating verbally and nonverbally in social situations. Adding new disorders may have implications for employers, as employees refer to these diagnoses in requesting accommodation and asserting claims under the ADA. Still, adding diagnostic categories does not necessarily mean that those impairments will rise to the level of a disability, even under the more permissive standards of the ADAAA.[73]

The EEOC's guidance is also significant in that it indicated that conditions not identified in the DSM may qualify as mental impairments. Likewise, the ADAAA broadened the definition of *major life activities* to include learning, reading, concentrating, thinking, communicating, and interacting with others.[74] This indicates that proof that the individual is substantially limited in the performance of these functions need not come from medical personnel, but may be established by the testimony of the individual and the individual's family and friends, and may include information about the individual's functioning at home and away from work.

The ADA recognizes, however, that an employer is entitled to ascertain whether an employee can perform essential job functions. The mere request that an employee submit to a psychiatric evaluation, based on their behavior, has been held to be insufficient to prove that the employer considered or regarded the employee to be mentally impaired as a matter of law.[75]

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[72] *See* EEOC, Enforcement Guidance, *The Americans with Disabilities Act and Psychiatric Disabilities*, No. 915.002 (Mar. 25, 1997), *available at* https://www.eeoc.gov/policy/docs/psych.html.

[73] *See, e.g.*, *Jordan v. City of Union City*, 646 F. App'x 736 (11th Cir. 2016) (anxiety disorder resulting in panic attacks affected police officer's ability to process stress and impacted breathing, blood pressure, heart rate, and adrenal fatigue); *Jacobs v. North Carolina Admin. Office of Courts*, 780 F.3d 562 (4th Cir. 2015) (anxiety disorder may rise to the level of a disability, and may limit individual's personal interactions; court added "[f]ew activities are more central to the human condition than interacting with others").

[74] 42 U.S.C. § 12102(2)(A); *see also* EEOC, Publication, *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights* (Dec. 12, 2016), *available at* https://www.eeoc.gov/eeoc/publications/mental_health.cfm.

[75] *See Coursey v. Univ. of Md. E. Shore*, 577 F. App'x 167, 174-75 (4th Cir. 2014) (request for individual to undergo a medical examination after harassing and erratic behavior, standing alone, is not sufficient to establish that the employer regarded the employee as having a disability); *Eustace v. South Buffalo Mercy Hosp.*, 36 F. App'x 673 (2d Cir. 2002) (employer's mandate for employee to attend a counseling session in response to her failure to complete necessary tasks was not enough to establish that the employer perceived the employee as having a disability).

1.4(b)(ii) *Cases Analyzing Mental Disabilities*

Some of the cases analyzing mental disabilities demonstrate the struggle between an employer's need to control disruptive behavior and an employee's need for accommodation. In *Reed v. Lepage Bakeries, Inc.*, the First Circuit Court of Appeals did not rule out the possibility that employers may have some duty to reasonably accommodate those whose disability requires them to be permitted to walk away from stressful situations.[76] After an altercation with a coworker, the plaintiff's supervisor advised her to walk away from disputes with coworkers before they escalated out of control. Subsequently, in a meeting with her supervisor and the human resources manager, the plaintiff lost control, burst into profanity, was escorted from the building, and discharged the following day. The plaintiff sued, claiming that her bipolar condition required her to be able to leave stressful situations and that she had been given prior accommodation to walk away from such situations. The employer argued that the plaintiff was fired because of her misconduct, not her disability. On appeal, the court affirmed summary judgment for the employer, noting that even if the plaintiff could have substantiated her claim that she had been denied the previously granted reasonable accommodation of walking away from coworker conflict, it is a "vastly different matter for an employee to walk away from a supervisor engaged in the act of supervision" than to permit an employee to follow the commonplace advice to walk away from confrontational situations with fellow employees. The "ADA is not a license for insubordination."[77]

In *Woods v. Boeing Co.*, the court did not foreclose the possibility that "frequent positive affirmations and behavior modification through encouragement . . . [and] tolerance for less than perfection" may be considered reasonable accommodations.[78] The plaintiff had attention deficit disorder, dysthymia, and obsessive compulsive disorder. The court granted summary judgment to the employer because there was no evidence in the record that the plaintiff could perform the essential functions of his job even with his proposed accommodations. While the court expressly refused to determine whether those accommodations were reasonable, it stated that the record was replete with evidence that defendant did in fact accept less than perfection and that the plaintiff admitted his supervisor provided him with at least some positive affirmations and encouragement.

1.4(c) *"Substantially Limits" Defined*

Under the ADA, an individual does not have a disability unless the individual is substantially limited in one or more major life activities.[79] Following the enactment of the ADA in 1990, the U.S. Supreme Court and the EEOC interpreted the term "substantially limits" to require a significant degree of limitation.[80] Congress enacted the ADAAA in 2008 to counteract some of the more restrictive interpretations of the ADA.

For example, the ADAAA clarifies that an impairment need only limit one major life activity to qualify for protection.[81] This approach significantly departs from the definition of "substantially limited" under the

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[76] 244 F.3d 254 (1st Cir. 2001).

[77] 244 F.3d at 262.

[78] 2013 WL 5308721, at **3, 5(D.S.C. Sept. 19, 2013).

[79] 42 U.S.C. § 12102(2)(A). As noted in **1.4(f)**, under the ADAAA, if an individual makes a "regarded as" claim, the individual no longer needs to demonstrate the actual or perceived impairment substantially limits a major life activity.

[80] *See, e.g.*, *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

[81] 42 U.S.C. § 12102(4)(B).

ADA and prior Supreme Court precedent. Further, whether an activity is a major life activity is no longer determined by whether it is of central importance to an individual's daily life, which is also a departure from pre-amendment law.[82]

Once a major life activity has been identified, the crucial issue is whether an individual has a disabling impairment that substantially limits the major life activity. Individuals with disabilities include those persons with an impairment that is episodic or in remission if the impairment would substantially limit a major life activity when active.[83] Based on this language, in 2010 a federal court—in one of the first cases to rule on the extent to which the ADAAA broadens what conditions are considered disabilities—ruled that a plaintiff's past bout with cancer is considered a disability although the cancer had been in remission and plaintiff had been working with no restrictions.[84]

The decision as to whether an impairment substantially limits a major life activity must also be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment or appliances, low-vision devices, prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment, the use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications.[85] In other words, the ADA now protects individuals whose cancer is in remission, whose diabetes is controlled by medication, whose seizures are prevented by medication, and those who can function at a high level with learning disabilities.

Finally, the ADAAA clarifies that the definition of substantially limited is not "significantly restricted"—as previously defined by the EEOC. In particular, the ADAAA redirects courts to focus on whether employers have complied with their accommodation obligations, rather than focusing on whether an impairment is a disability. As such, Congress intended to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[86]

1.4(c)(i) *EEOC's Rules of Construction on "Substantially Limits"*

In the ADAAA, Congress gave the EEOC express authority to revise its regulations defining "substantially limits" to be consistent with the ADA's purpose. However, the EEOC explicitly declined to redefine the term. Rather, it created nine "rules of construction" derived from the ADAAA language and legislative history to be applied when determining "substantially limits."[87] The net effect of these rules is effectively to downplay the word "substantially."

These rules of construction are:

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[82] 29 C.F.R. § 1630.2(i)(2).

[83] 42 U.S.C. § 12102(4)(D).

[84] *Hoffman v. Carefirst of Fort Wayne, Inc. d/b/a Advanced Healthcare*, 737 F. Supp. 2d 976 (N.D. Ind. 2010); *see also Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173 (E.D. Tex. 2011).

[85] 42 U.S.C. § 12102(4)(E)(i). Notably, the ameliorative and mitigating effects of ordinary eyeglasses or contact lenses are considered in determining whether an impairment substantially limits a major life activity. 42 U.S.C. § 12102(4)(E)(ii).

[86] 29 C.F.R. § 1630.1(b)(4); *see also Mancini v. City of Providence*, 909 F.3d 32, 42 (1st Cir. 2018) ("the revised statutory and regulatory framework now provides . . . that 'substantially limits' is not intended to be a 'demanding standard' and should not engender 'extensive analysis'").

[87] 29 C.F.R. § 1630.2(j)(1).

1. **Broad Construction.** *Substantially limits* is to be construed as broadly as the ADA allows.
2. **Performance of a Major Life Activity.** The impairment need only substantially limit the ability to perform a major life activity compared to most people in the general population. It need not prevent, or significantly or severely restrict, the individual from performing the major life activity.
3. **Focus on Employer Actions.** The focus of analysis is on whether employers have complied with their ADA obligations, not on whether the impairment substantially limits a major life activity. This rule is ancillary to rule number one.
4. **Individualized Assessment Required & "Predictable Assessments."** Determining whether an impairment substantially limits a major life activity requires an individualized assessment. The degree of limitation is lower than it was pre-ADAAA. And, while the EEOC eliminated its previously proposed list of impairments that would "consistently," "sometimes," or "usually not" be disabilities, as well as its recommended list of *per se* disabilities, it introduced a new concept resulting in much the same outcome. The rules contain the concept of *predictable assessments*, meaning that by applying the rules of construction, there are impairments that in virtually all cases will be considered disabilities, such as: deafness, blindness, intellectual disability (formerly called mental retardation), missing limbs, autism, cerebral palsy, cancer, diabetes, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. As a result, in many cases, the "individualized assessment" will be perfunctory.
5. **Comparison with General Population.** The comparison of an individual's performance of a major life activity to that of the general population will not usually require scientific, medical, or statistical analysis, although such analysis may still be used. For those with learning disabilities, the comparison is still with those without the learning disability, even though the usual method of diagnosis may be in terms of the difference between actual and expected achievement of the individual. Further, success in school does not mean that the person does not have a protected disability.
6. **Effects of Mitigating Measures.** The ameliorative effects of mitigating measures are ignored to determine substantial impairment. In contrast, the negative effects of mitigating measures, such as the side effects of medications, should be considered. The ADAAA makes an exception for "ordinary eyeglasses or contact lenses," which may be taken into account in determining whether or not a person has a disability. Consistent with the ADAAA, aids for those with "low vision" are not "ordinary eyeglasses." The EEOC declined to include more detail in the definition of ordinary eyeglasses or contact lenses or low-vision devices, leaving that determination to case-by-case analysis. The EEOC said in its amended Interpretive Guidance that, if any employer imposes a qualification standard that requires uncorrected vision, adversely affected applicants or employees may challenge that standard, and the employer will be required to demonstrate the qualification standard is job-related and consistent with business necessity. If a person has mitigating means available and fails to use them, that fact may affect whether the individual is "qualified" or "poses a direct threat."
7. **Episodic Impairment or Remission.** An impairment that is episodic or in remission is a disability, even if not active or in remission. This applies to a broad range of episodic conditions, conditions with "flare-ups," and conditions that may be at least temporarily cured.
8. **Only One Major Life Activity.** Only one major life activity need be substantially limited. In the amended Interpretive Guidance, the EEOC uses the example of a person with a 20-pound

lifting restriction that lasts for several months. That restriction is sufficient to substantially limit a major life activity without any showing that the person cannot perform other activities of daily living. Without referencing the several cases litigated by the EEOC on the subject, the EEOC also cites the example of a person with monocular vision who has adjusted to the condition as someone who has a substantial impairment in the major life activity of seeing.

9. **Short-Term Limitations.** To determine whether an individual has an actual disability (*prong one* of the tripartite definition of covered persons) or has a record of a disability (*prong two* of the tripartite definition), impairments that last or are expected to last less than six months may be substantially limiting. The EEOC declined to create a bright-line exclusion for short-term limitations, reacting to strong comments from disability rights advocates who argued that short-term conditions can impose very significant limitations on a major life activity. The final rule retains the concepts of "condition, manner, or duration" as factors that may be relevant to determining whether an impairment substantially limits a major life activity. Thus, duration is just a factor, along with severity, and this approach probably signals the development of a "sliding-scale" standard: the more severe, the less lengthy the duration need be, and vice versa.[88]

1.4(c)(ii) *Side Effects of Medication Still May Be Considered in the Disability Equation*

As noted in the sixth rule of construction above, side effects of medication must be taken into consideration in determining whether an individual has a disability under the ADA—even though the underlying condition for which the medication was prescribed may not.[89] Similarly, burdens associated with following a particular treatment regimen may also be considered when determining whether an individual's impairment substantially limits a major life activity. In *Sulima v. Tobyhanna Army Depot L.L.C.*, the Third Circuit Court of Appeals adopted the criteria used by the Seventh Circuit in determining whether the effects of a medication or treatment for a condition that is not necessarily itself disabling caused an individual to have a disability. These criteria include whether the plaintiff can show that:

- the medication is required "in the prudent judgment of the medical profession;"
- the medication is truly necessary with no other available, equally effective alternative that lacks similarly disabling side effects; and
- the medication is not required solely in anticipation of an impairment resulting from the plaintiff's voluntary choices.[90]

Thus, where the plaintiff cannot demonstrate that the problem-causing medications were medically necessary, their side effects cannot be considered as impairments or substantial limitations within the meaning of the ADA. In *Sulima*, the Third Circuit ultimately found that the plaintiff did not establish that

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[88] In its COVID-19 specific guidance, the EEOC addresses the circumstances under which Long COVID can be considered a disability. "The limitations from COVID-19 or Long COVID do not necessarily have to last any particular length of time to be substantially limiting. They also need not be long-term." EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers*, at N.2 (updated May 15, 2023), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[89] 29 C.F.R. § 1630.2(j)(4)(2); *see also Sulima v. Tobyhanna Army Depot L.L.C.*, 602 F.3d 177 (3d Cir. 2010); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999); *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1051-52 (7th Cir. 1997); *Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 912 (11th Cir. 1996).

[90] *Sulima*, 602 F.3d at 186.

the side effects of his medication caused a disability because his prescribed medication was not required in the prudent judgment of the medical profession. Significantly, once the plaintiff contacted his physician and informed him of the side effects, his physician recommended he stop taking the medication and ceased prescribing it for him.[91] Importantly, the immediate cessation of treatment indicated to the court that the medication was not "necessary" or "in the prudent judgment of the medical profession."[92]

1.4(c)(iii) *Temporary Impairments*

The seventh rule of construction notes that the ADAAA covers individuals with a disability that is episodic or in remission so long as the impairment would substantially limit a major life activity when active.[93] The ADAAA, however, did not change the principle that temporary, nonchronic impairments with little or no long term impact, such as broken limbs, sprained joints, concussions, appendicitis, pneumonia, and influenza usually are not viewed as disabilities.[94] For example, an individual with an on-the-job ankle sprain did not have a "disability."[95]

Today, these conditions would likely only qualify for disability protection if:

1. The short-term condition is deemed to be sufficiently severe.[96] The EEOC regulations provide the following example of when a short-term condition can constitute an actual disability: If an individual has a back impairment that results in a 20-pound lifting restriction that lasts for "several months," the EEOC would consider the individual substantially limited in the major life activity of lifting and, accordingly, to have a disability. This example persuaded the Fourth Circuit Court of Appeals in *Summers v. Altarun Institute, Corp.* to allow a plaintiff's claim to proceed where "broken bones and tendons" prevented him from walking for approximately seven months.[97] Looking to the EEOC's ninth rule of construction, the court held that a "sufficiently severe temporary impairment may constitute a disability" and that "an

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[91] 602 F.3d at 187. In making its determination that the plaintiff did not have a disability, the Third Circuit was also persuaded because there was no evidence showing that: (1) the relevant medication was the only effective medication for the plaintiff's condition; or (2) other possible medications for the condition would have caused similarly debilitating medical conditions. In addition, the plaintiff only experienced these side effects for two months.

[92] 602 F.3d at 187; *see also Russell v. Phillips 66 Co.*, 687 F. App'x 748 (10th Cir. 2017) (finding that doctor's treatment notes did not support claim that depression or related medication caused insomnia).

[93] 42 U.S.C. § 12102(4)(D).

[94] 42 U.S.C. § 12102(4)(3)(B); *see also Leone v. Alliance Foods, Inc.*, 2015 WL 4879406, at *6 (M.D. Fla. Aug. 14, 2015) (finding that an employee did not have a disability where any limitation on the major life activities of working, seeing, and standing "resulting from [the plaintiff's] eye injury was of short duration (just over two weeks)" and accordingly, "it cannot be said that they were *substantially* limited") (emphasis in original); *Clay v. Campbell Cnty. Sheriff's Office*, 2013 WL 3245153, at *3 (W.D. Va. June 26, 2013) (describing plaintiff's kidney stones as a "one-time issue that was resolved within two weeks" which therefore did not constitute a "physical impairment that 'substantially limits' any major life activity," even under the expanded coverage provided by the ADAAA).

[95] *Chen v. Ochsner Clinic Found.*, 630 F. App'x 218 (5th Cir. 2015).

[96] 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(viii); *see also Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1222-25 (9th Cir. 2022) (reversing district court's dismissal of ADA claim and confirming that, per the EEOC's rules of construction, "there is no categorial rule excluding short-term impairments" as long as they are sufficiently severe).

[97] 740 F.3d 325 (4th Cir. 2014).

impairment is not categorically excluded from being a disability simply because it is temporary."[98] *Summers* was the first published federal appellate court opinion to apply the expanded definition of disability in the ADAAA.

2. The residual impact of the temporary impairment (even with mitigating measures) would result in the substantial limitation of a major life activity.[99] Thus, an improperly healed broken leg, resulting in a permanent limp, might be considered a disability.[100]

Employers should know it may be risky to classify a condition as permanent or temporary before the employee has provided proper medical documentation. In addition, regardless of whether the condition is temporary or permanent, the employer may have overlapping obligations under the federal Family and Medical Leave Act (FMLA) and applicable state laws.

This issue may arise in instances involving COVID-19 complications or the phenomenon of "long COVID." The U.S. Department of Health and Human Services and the Department of Justice jointly issued guidance addressing when "long COVID" may rise to the level of a "disability" under the ADA and other statutes.[101] The memo clarifies that "long COVID" may be a disability "if it substantially limits one or more major life activities." The guidance further notes that "long COVID" is not always a disability and thus, as with other conditions, "[a]n individualized assessment is necessary to determine whether a person's long COVID condition or any of its symptoms substantially limits a major life activity."

1.4(c)(iv) *Voluntary Impairments*

The ADA also applies to what some commentators have called *voluntary impairments—i.e.*, conditions resulting from an employee's freely chosen activities. For example, studies indicate that smoking increases the risk of lung cancer and that multiple encounters of unprotected sexual activity may increase the risk of HIV-disease, but cancer and HIV-disease both are impairments protected under the ADA, regardless of how they developed.

1.4(d) *"Major Life Activities" Defined*

The ADA defines *major life activities* to include, without limitation, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[102] Additionally, *major life activities* include the "operation of a major bodily function," including, without limitation, the "functions of the

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[98] 740 F.3d at 327, 329, 333. The court also noted that the treatment of temporary impairments under the "regarded as" prong differs in that transitory or minor impairments—*i.e.*, those with an expected duration of six months or less—will not be considered a disability. See **1.4(f)(i)** for more information on this issue.

[99] 29 C.F.R. § 1630.2(j)(ix).

[100] EEOC TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.2(a)(iii).

[101] *See* U.S. Dep't of Health & Human Servs. and U.S. Dep't of Justice, *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, (July 26, 2021), *available at* https://www.ada.gov/long_covid_joint_guidance.pdf. The memo focuses on "long COVID" as an "actual disability," specifically as a physical or mental impairment. *See also* U.S. Dep't of Health & Human Servs., Report, *Services and Supports for Longer-Term Impacts of COVID-19*, (Aug. 2022), *available at* https://www.covid.gov/assets/files/Services-and-Supports-for-Longer-Term-Impacts-of-COVID-19-08012022.pdf.

[102] 42 U.S.C. § 12102(2)(A).

immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[103]

The EEOC regulations further expand the statutory list of *major life activities* to include sitting, reaching, and interacting with others.[104] Similarly, the regulations expand the list of *major bodily functions* to include the functioning of special sense organs and skin, and the genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems.[105]

The combined expansion by the ADAAA statutory language and the EEOC interpreting regulations result in a significant expansion of protection under the ADA. To illustrate, if a person is living with a suppressed immune system and "major bodily function" is the basis for determining ADA coverage, then the operation of that person's immune system represents the "major life activity." Given that the person's immune system functions below the level of the average person in the general population, the existence of the compromised "major bodily function" essentially ends the inquiry as to whether the person has a disability within the meaning of the ADA.

1.4(d)(i) *Caring for Oneself*

Caring for oneself is a major life activity.[106] In *Verhoff v. Time Warner Cable, Inc.*, a case decided pre-ADAAA, the plaintiff argued his eczema substantially limited his ability to care for himself because he could not take routine showers or clean around the house due to his skin's extreme sensitivity to soap.[107] He also claimed he could not wear clothes or shoes normally because of the constant contact with his skin. The Sixth Circuit Court of Appeals held he needed to meet a "high standard" and was not persuaded because his disease was not "life threatening."[108] Since Congress has instructed courts that the "definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals," facts similar to this case may be decided differently.[109]

The Fifth Circuit Court of Appeals in *EEOC v. Chevron Phillips Chemical Co.* also addressed the issue of caring for oneself and found that the employee had raised an issue of fact concerning her ability to care for herself because she was unable to shower for days; if she did shower, she needed to rest afterwards; and she was "unable to cook, shop for food, zip up her own clothes, or even use the bathroom without her sister's assistance."[110]

1.4(d)(ii) *Eating*

Before the ADAAA, it was unclear whether eating was a major life activity. Under the amendments, Congress identified eating as a major life activity.[111]

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[103] 42 U.S.C. § 12102(2)(B).

[104] 29 C.F.R. § 1630.2(i)(1)(i).

[105] 29 C.F.R. § 1630.2(i)(1)(ii).

[106] 29 C.F.R. § 1630.2(i).

[107] 299 F. App'x 488, 492 (6th Cir. 2008); *see also EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 616 (5th Cir. 2009) (same).

[108] *Verhoff*, 299 F. App'x at 493.

[109] 42 U.S.C. § 12102(4)(A).

[110] 570 F.3d at 606.

[111] 42 U.S.C. § 12102(2)(A).

Even prior to the ADAAA's enactment, a federal district court had concluded that eating "is unquestionably a major life activity because of its necessity in daily life and the ease with which most people can consume food and drink."[112] Noting that the plaintiff in *Fink v. Richmond* no longer had an esophagus and presented evidence her stomach was small, which often lead to excessive diarrhea, nausea, and vomiting, the court found her ability to eat was permanently and substantially limited.[113]

1.4(d)(iii) *Sleeping*

Sleeping is also a major life activity under the ADA, if it substantially limits one's ability to sleep. In *Simpson v. Vanderbilt University*, the Sixth Circuit Court of Appeals held that the plaintiff's sleep problems did not rise to the level of substantial impairment where he allegedly could sleep for only two-and-a-half to three hours per night during the workweek.[114]

The Fifth Circuit Court of Appeals reached a different result in *EEOC v. Chevron Phillips Chemical Co.*[115] In that case, the court believed that a reasonable jury could find that the employee's sleep impairment substantially limited her in the major life activity of sleeping because she got only one or two hours of sleep per night for six or seven days in a row, and then three or four hours of sleep per night on the remaining days, often waking up every hour. Once per month, the employee would sleep for up to 17 hours at a time; during the day she was often so tired that she fell asleep while driving, she needed to rest during lunch, and experienced fatigue and brain fog.

1.4(d)(iv) *Speaking*

Speaking constitutes a major life activity.[116] In a case predating the ADAAA, the plaintiff, a custodian, alleged that the defendant discriminated against him because of his cerebral palsy, which limited his ability to speak coherently.[117] In *Stalter v. Board of Cooperative Educational Services (BOCES)*, the plaintiff communicated through audible sounds, written signs, hand spelling, and directional movements. He alleged that the defendant discriminated against him by placing him at an undesirable location, giving him less overtime than other custodians, and denying a shift change even though a less senior custodian without a disability was assigned to a more desirable shift. The district court held that the plaintiff was substantially limited in the major life activity of speaking even though he communicated using gestures, sounds, and a special device. The court rejected the defendant's argument that the remedial device and techniques used by the plaintiff to communicate removed him from the ADA's coverage, holding he still could not speak and evidence existed that the employer regarded him as having a disability.

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[112] *Fink v. Richmond*, 2009 WL 3216117, at **5-6 (D. Md. Sept. 29, 2009).

[113] The district court was not persuaded by defendant's argument that the "addition of digestive impairments to the definition of major bodily functions in the ADA Amendments Act of 2008" demonstrated that the plaintiff's digestive system impairments were not previously covered under the pre-amendment ADA. 2014 WL 292348, at *6. The court noted that defendant's argument overlooked that eating was a major life activity under the ADA. 2009 WL 3216117, at *6.

[114] 359 F. App'x 562, 567 (6th Cir. 2009); *see also Gilreath v. Rock-Tenn Co.*, 2011 WL 672326, at **7 (E.D. Tenn. Feb. 17, 2011) (awarding employer summary judgment because the plaintiff's insomnia, which led to an average of three hours of sleep on work nights, was not substantially limiting).

[115] 570 F.3d 606 (5th Cir. 2009).

[116] 42 U.S.C. § 12102(2)(A).

[117] 235 F. Supp. 2d 323 (S.D.N.Y. 2002).

1.4(d)(v) *Reading*

The ADAAA included reading as a major life activity.[118] In *Head v. Glacier Northwest, Inc.*, a case decided before the ADAAA, the plaintiff was diagnosed as depressed or bipolar.[119] The plaintiff told the company about his illness and of his doctor's restrictions on the hours he could work. The company reduced his workload, but later fired him for allegedly violating its equipment abuse policy. The plaintiff sued, claiming retaliation for requesting an accommodation. The district court dismissed the plaintiff's claims, citing a lack of proof that his illness substantially impaired him in any major life activities. The Ninth Circuit Court of Appeals reached a different conclusion. In addition to finding a substantial impairment of the well-established major life activities of sleeping, interacting with others, and thinking, the court also held that reading qualifies as a major life activity because, although not "essential to survival," it is "of central importance to most people's daily lives."[120] Reading is often necessary to perform other major life activities, such as learning and working, and thus is crucial for most people. The plaintiff's allegations that he was unable to read for more than three to five minutes at any one time before becoming confused were sufficient to demonstrate that his ability to read was substantially impaired.[121]

1.4(d)(vi) *Thinking, Concentrating & Interacting with Others*

The ADAAA included thinking and concentrating in the definition of major life activities.[122] Cases involving depression or anxiety disorders may fall under this category. In *Mercer v. Arbor E&T, L.L.C.*, the plaintiff alleged her anxiety disorder caused memory loss and difficulty concentrating.[123] Denying summary judgment for the employer, the court found that the plaintiff could be substantially limited in concentrating based on her deposition testimony that her anxiety disorder caused her to take longer to get things done.[124]

The regulations implementing the ADAAA also included "interacting with others" as a major life activity.[125] Courts previously found that it constituted a major life activity.[126]

1.4(d)(vii) *Ability to Eliminate Bodily Waste*

With the ADAAA, Congress expanded the definition of *major life activity* to include the operation of major bodily functions, including bowel and bladder functions. Future cases may expectedly focus on whether, for example, plaintiffs who have Crohn's disease can demonstrate that their specific symptoms substantially limit this major life activity.

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[118] 42 U.S.C. §12102(2)(A).

[119] 413 F.3d 1053 (9th Cir. 2005), *overruled on other grounds*, *EEOC v. Placer ARC*, 114 F. Supp. 3d 1048 (E.D. Cal. 2015).

[120] *Head*, 413 F.3d at 1062.

[121] 413 F.3d at 1062.

[122] 42 U.S.C. § 12102(2)(A).

[123] 2013 WL 164107 (S.D. Tex. Jan. 15, 2013).

[124] 2013 WL 164107, at **13-14.

[125] *Jacobs v. N.C. Admin. Office of Courts*, 780 F.3d 562, 572-73 (4th Cir. 2015) (finding that the EEOC regulation identifying "interacting with others" as a major life activity was entitled to deference).

[126] *See, e.g.*, *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1060 (9th Cir. 2005), *overruled on other grounds*, *EEOC v. Placer ARC*, 114 F. Supp. 3d 1048, 1060 (E.D. Cal. 2015).

Prior to the passage of the ADAAA, the Fourth Circuit Court of Appeals in *Heiko v. Colombo Savings Bank* held that eliminating bodily waste was a major life activity within the meaning of the ADA.[127] In *Heiko*, the plaintiff alleged that the bank discriminated against him on the basis of his kidney failure by not promoting him and reducing his responsibilities with the bank. The parties did not dispute that end-stage renal disease constituted a physical impairment; rather, the dispute centered on whether the plaintiff's kidney failure and his body's inability to properly eliminate toxins constituted a major life activity within the meaning of the ADA.[128] In granting the bank's motion for summary judgment, the district court concluded that waste elimination was not a major life activity; it was merely a characteristic of the kidney failure.[129] The Fourth Circuit disagreed, reasoning that the "impairment" is "[the plaintiff's] kidney failure" while the "[t]he effect of this impairment is an inability to eliminate waste naturally."[130] The Fourth Circuit further reasoned that following the district court's rationale, "the ADA would not cover major life activities that are closely linked with a serious disability."[131]

1.4(d)(viii) *Reproduction & Sexual Functioning*

Reproduction is a major life activity. In *Bragdon v. Abbott*, the U.S. Supreme Court ruled that an asymptomatic individual with HIV infection was an individual with a disability because she suffered an impairment that interfered with the major life activity of reproduction.[132] The Court rejected the argument that coverage of the ADA was not intended to apply to activities that have no public or economic aspect. HIV is now officially defined as a disability under the ADAAA.[133]

In a line of cases following *Bragdon*, employees claimed to be substantially impaired in a private activity in no way related to work. For example, this issue has arisen in determining whether sexual intercourse is a major life activity. In *Adams v. Rice*, the District of Columbia Circuit Court of Appeals held that as "a basic physiological act practiced regularly by a vast portion of the population . . . and a crucial element in intimate relationships, sex easily qualifies as a 'major' life activity."[134] As a result of breast cancer treatment, including scarring from her mastectomy and breast reduction and the loss of libido accompanying her medication, the plaintiff claimed her ability to enter into relationships was "crippled indefinitely," if not permanently. Although the court noted that a jury could later decide differently, at the summary judgment stage, the plaintiff's breast cancer substantially limited her in the major life activity of sexual relations.[135]

1.4(d)(ix) *Working*

While the EEOC final regulations do not address the major life activity of working, the EEOC notes in the Appendix, "[i]n most instances, an individual with a disability will be able to establish coverage by showing

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[127] 434 F.3d 249 (4th Cir. 2006) (plaintiff filed suit alleging disability discrimination under the Montgomery County, Maryland Code, but the parties stipulated the code was to be interpreted consistent with the ADA).

[128] 434 F.3d at 254.

[129] 434 F.3d at 255.

[130] 434 F.3d at 255.

[131] 434 F.3d at 255-56.

[132] 524 U.S. 624 (1998).

[133] 29 C.F.R. § 1630.2(j)(3)(iii).

[134] 531 F.3d 936, 947 (D.C. Cir. 2008).

[135] 531 F.3d at 949.

substantial limitation of a major life activity other than working."[136] Therefore, if no other major life activity is affected by an individual's impairment, only then will the courts consider whether the impairment substantially limits an individual's ability to engage in the major life activity of working.

Generally, an impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform "a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills and abilities."[137] When evaluating the limitation, the EEOC maintains that "[d]emonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working."[138]

Many courts have addressed whether an inability to work overtime is a substantial limitation on the major life activity of working. Prior to passage of the ADAAA, at least three circuits rejected the contention.[139] The rationale behind this conclusion is that an employee does not have a disability for ADA purposes when the impairment merely requires that the hours worked by the employee are limited but does not limit the employee from working at jobs in which overtime is not a requirement. The First Circuit Court of Appeals supported this reasoning, noting that "there are vast employment opportunities available which require only 40-hour workweeks."[140] Following enactment of the ADAAA, however, courts have held that a restriction from working overtime is a substantial limitation on an individual's ability to work.[141] Yet, the inability to work overtime may also render an individual unqualified (*i.e.*, unable to perform the essential functions) if working overtime is an essential function of the job.[142]

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[136] 29 C.F.R. pt. 1630, app. § 1630.2(j)(5) and (6)(reasoning that "impairments that substantially limit a person's ability to work usual substantially limit one or more other major life activities").

[137] 29 C.F.R. pt. 1630, app. § 1630.2(j)(5) and (6) ("A class of jobs may be determined by reference to the nature of the work that an individual is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs) or by reference to job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels).").

[138] 29 C.F.R. pt. 1630.

[139] *See, e.g.*, *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593 (6th Cir. 2002), *rev'd on other grounds*, *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012); *Kellogg v. Union Pac. R.R.*, 233 F.3d 1083 (8th Cir. 2000); *Tardie v. Rehabilitation Hosp. of R.I.*, 168 F.3d 538 (1st Cir. 1999).

[140] *Tardie*, 168 F.3d at 542.

[141] *See, e.g.*, *Gonzalez v. Texas Health and Human Servs. Comm'n*, 2014 WL 6606629, at *8 (W.D. Tex. Nov. 19, 2014); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010).

[142] *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 417-20 (6th Cir. 2021) (affirming summary judgment of failure-to-accommodate claim because employer provided evidence that it was "essential that project managers be available to work more than forty hours a week"); *Gonzalez*, 2014 WL 6606629, at **10-11 (while acknowledging that the inability to work overtime may substantially limit the major life activity of working, the court found that the plaintiff was not capable of performing an essential function of her position because she was restricted from working overtime); *Hardwick v. Amsted Ry. Co.*, 929 F. Supp. 2d 1129, 1136-37 (D. Kan. 2013) (granting employer's motion for summary judgment and holding that the plaintiff was not qualified for a machinist position because working mandatory overtime was an essential function of the position); *EEOC v. AT&T Mobility Servs., L.L.C.*, 2011 WL 6309449 (E.D. Mich. 2011) (store manager unable to work over 40 hours was not qualified).

1.4(d)(x) *Driving is Not a Major Life Activity*

Congress, via the ADAAA, chose not to list "driving" as a major life activity. In agreement, prior to and after the enactment of the ADAAA, many courts also held that driving is not a major life activity.[143]

The Tenth Circuit Court of Appeals noted that while driving is an extremely important daily activity, the activities enumerated by the EEOC, *i.e.*, caring for oneself, performing manual tasks, walking, etc., "are all profoundly more important in and of themselves than is driving."[144] Moreover, the court found that, "the importance of the enumerated activities is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident."[145]

An impairment that substantially limits a major life activity may, however, manifest itself primarily as a limitation on an employee's ability to drive. For example, in *Livingston v. Fred Meyer Stores, Inc.*, the employee suffered from a vision impairment that prevented her from safely driving after dark.[146] The Ninth Circuit Court of Appeals held that the employee's vision impairment could substantially limit the major life activity of seeing given its effect on her ability to drive.[147]

1.4(e) *"Record of an Impairment" Covered by the ADA*

Individuals with a *record of an impairment* have a history of, or have been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities. This provision was included in the ADA, in part, to protect individuals who have recovered from an impairment that previously substantially limited them in a major life activity. Frequently occurring examples include persons with histories of mental or emotional illness, heart disease or cancer, past drug addiction, as well as persons misclassified as having intellectual disabilities.

Individuals who have a record of a disability may often be considered to have an "actual disability" as well given that the ADAAA now defines an actual disability to include an individual with an impairment that is episodic or in remission.[148] Unlike persons protected only under the "regarded as" prong of the statute, persons with a record of an impairment may be entitled to reasonable accommodations (most commonly, time off for periodic medical appointments).

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[143] *See Anderson v. National Grid, P.L.C.*, 93 F. Supp. 3d 120, 134-35 (E.D.N.Y. 2015) (collecting cases prior to and after enactment of the ADAAA); *see also Winsley v. Cook Cnty.*, 563 F.3d 598, 603-04 (7th Cir. 2009); *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Yindee v. Commerce Clearing House*, 2005 WL 1458210 (N.D. Ill. June 16, 2005), *aff'd by* 458 F.3d 599 (7th Cir. 2006); *Capobianco v. City of New York*, 422 F.3d 47 (2d Cir. 2005); *Chenoweth v. Hillsborough Cnty.*, 250 F.3d 1328 (11th Cir. 2001); *Acevedo-Lopez v. Police Dep't of P.R.*, 81 F. Supp. 2d 293, 296-97 (D.P.R. 1999), *aff'd on other grounds*, 247 F.3d 26 (1st Cir. 2001).

[144] *Kellogg*, 544 F.3d at 1125.

[145] 544 F.3d at 1125.

[146] 388 F. App'x 738 (9th Cir. 2010).

[147] 388 F. App'x at 740; *see also Colwell v. Rite Aid Corp.*, 602 F.3d 495, 502 (3d Cir. 2010) (holding that a reasonable jury could find that plaintiff with monocular blindness was substantially limited in her ability to see because she could not drive at night).

[148] 29 C.F.R. pt. 1630, app. § 1630.2(k).

1.4(f) *"Regarded As" Having an Impairment Covered by the ADA*

To establish a *prima facie* "regarded as" claim, persons need not show they have a substantial limitation on a major life activity,[149] but only that:

1. they were regarded by the employer as having a disability; and
2. because of that, they were subject to an adverse employment action.[150]

Under the amendments, plaintiffs no longer need to establish that the employer perceived the individual as being substantially limited in a major life activity—but rather, simply perceived the individual as being impaired.[151] Courts have confirmed that an employer's decision to reasonably accommodate an employee does not mean that the employer regards the individual as having a disability under the ADA.[152] Courts have recognized that to hold otherwise might result in employers being less inclined to volunteer to assist employees with performing the essential functions of the position. The EEOC rules incorporate the clarification provided by the ADAAA that persons regarded as having a disability, but who do not claim to have an actual disability or a record of disability, need not be provided with reasonable accommodations. Thus, there is no interactive-process duty with respect to these individuals.[153]

As a result, the EEOC rules explain that the "regarded as" prong should be the primary means of establishing coverage under the ADA in cases that do not involve the need for reasonable accommodations. Individuals who do not have the need for accommodation are better served asserting discrimination claims under the "regarded as" prong, as their burden of proof is minimal. Such claims are already standard in most disability lawsuits. In the future, this claim may become a more important focus for employee advocates in discrimination claims.

1.4(f)(i) *Exclusion of Transitory & Minor Impairments from "Regarded As" Disabilities*

The ADAAA excludes from its definition of *regarded as* having a disability those impairments that are "transitory and minor."[154] A *transitory impairment* is an impairment with an actual or expected duration of six months or less.[155] The EEOC rules make this exception an affirmative defense and place the burden

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[149] 29 C.F.R. pt. 1630, app. § 1630.2(l) ("The concepts of 'major life activities' and 'substantial limitation' simply are not relevant in evaluating whether an individual is 'regarded as having such an impairment.'").

[150] 42 U.S.C. § 12102(1)(C). For an individual to demonstrate they were "regarded as" having a disability, they must provide evidence of causation, *i.e.*, that the adverse action was because of the actual or perceived impairment, for both coverage under the ADAAA and ultimate liability. 29 C.F.R. pt. 1630, app. § 1630.2(l).

[151] *See Nelson v. City of N.Y.*, 2013 WL 4437224 (S.D.N.Y. Aug. 19, 2013) (concern over plaintiff's "extensive psychological history" and knowledge of diagnosis of psychological disorders meant that plaintiff was perceived as having a disability); *Wells v. Cincinnati Children's Hosp. Med. Ctr.*, 860 F. Supp. 2d 477 (S.D. Ohio 2012).

[152] *See, e.g.*, *Bell v. Mericle Dev. Corp.*, 2007 WL 431888 (M.D. Pa. Feb. 5, 2007) (merely relieving an employee of certain job duties after the employee suffers an on-the-job injury does not, by itself, equate to a finding that the employer regarded the employee as having a disability).

[153] 29 C.F.R. pt. 1630, app. § 1630.2(k) (stating "that individuals covered only under the 'regarded as' prong of the definition of disability are not entitled for reasonable accommodations"); *see also* 29 C.F.R. § 1630.2(g)(3).

[154] 42 U.S.C. § 12102(3)(B).

[155] 42 U.S.C. § 12102(3)(B); *see also White v. Interstate Distrib. Co.*, 438 F. App'x 415, 420 (6th Cir. 2011) (applying the "transitory and minor" exception to preclude a "regarded as" claim because the lifting and other restrictions following the plaintiff's leg injury from a motorcycle accident were expected to last for only a month or two); *Valdez v. Minnesota Quarries, Inc.*, 2012 WL 6112846 (D. Minn. Dec. 10, 2012) (fear that the plaintiff had H1N1 flu

of proof on the employer.[156] Whether the perceived impairment is transitory and minor must be determined objectively, not subjectively, by the employer.[157] As the employer has only limited access to medical information about candidates for employment and employees (and likely none about applicants), employers may have considerable difficulty using this defense.[158]

1.4(f)(ii) *Cases Analyzing "Regarded As" Disabilities*

In *Burton v. Freescale Semiconductor, Inc.*, the Fifth Circuit Court of Appeals noted that the ADAAA "overrules prior authority requiring a plaintiff to show that the employer regarded him or her as being substantially limited in a major life activity."[159] Other courts, however, have nonetheless looked beyond the regulations and reverted to the old ADA standard, rather than the expanded definition under the ADAAA.[160] As noted above and reiterated by the Fifth Circuit in *Burton*, to prevail on a "regarded as" claim, an employee must only establish that "she has been subject to an action prohibited under the ADA because of actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity."[161]

In *Cannon v. Jacobs Field Services North America, Inc.*, the plaintiff applied for and was conditionally offered employment as a field engineer for a construction company.[162] Years prior to his application, the plaintiff had surgery to repair a torn rotator cuff, which was unsuccessful and resulted in his inability to raise his arm above shoulder level or to push or pull with that arm. During his preemployment physical, these limitations came to light. The examining doctor cleared plaintiff for the position with certain accommodations. The employer did not agree to the proposed accommodations, determined the plaintiff was physically incapable of performing the job, and rescinded the offer. The district court granted summary judgment to the employer, finding the plaintiff had not established he was regarded as having a disability, among other things. In reversing this finding and remanding to the district court, the Fifth Circuit Court of Appeals held that the evidence, including the doctor's report from the physical and an e-mail detailing why the employer would not adopt the doctor's accommodations, demonstrated that the employer perceived the plaintiff's shoulder injury to be an impairment. The court also noted that the lower court applied the old ADA standard and that the revised standard reflects the view that "unfounded

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virus, which is transitory and minor in reality, is insufficient to show that plaintiff was perceived as having a disability); *Lewis v. Florida Default Law Grp., P.L.*, 2011 WL 4527456 (M.D. Fla. 2011) (flu).

[156] *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 435 (9th Cir. 2018).

[157] 29 C.F.R. pt. 1630, app. § 1630.2(l).

[158] The EEOC provided several examples where employees with COVID-19 may be regarded as individuals with a disability. EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers*, at N.6, N.7 (updated May 15, 2023), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[159] 798 F.3d 222, 230 (5th Cir. 2015).

[160] *See, e.g.*, *Fleishman v. Continental Cas. Co.*, 698 F.3d 598, 607 (7th Cir. 2012) (stating that to be regarded as having a disability, the plaintiff must establish that his employer mistakenly believed he had an impairment that substantially limits a major life activity); *see also Powers v. USF Holland, Inc.*, 667 F.3d 815 (7th Cir. 2011) (incorrectly stating that the plaintiff had a burden to demonstrate that his employer perceived him to have an impairment that substantially limited one or more major life activities).

[161] *Burton*, 798 F.3d at 230 (quoting 42 U.S.C. § 12102(3)(A)). *See also Sanders v. Union Pac. R.R. Co., 108 F.4th 1055 (8th Cir. 2024); Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 318-19 (6th Cir. 2019).

[162] 813 F.3d 586 (5th Cir. 2016).

concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments."[163]

1.4(g) *Occupational Injuries*

EEOC guidance has addressed whether an occupational injury is a disability as defined by the ADA.[164] The definition of *disability* under the ADA is applied no differently when the employee has claims under workers' compensation laws. Accordingly, whether a worker injured on the job is protected by the ADA will depend upon whether the worker meets the ADA's revised definition of an *individual with a disability*. While filing a workers' compensation claim may not automatically establish that the employee has a record of or is regarded as having a disability under the ADA,[165] under the ADAAA's expanded coverage, an employer's knowledge that a workers' compensation claim was filed and the nature of the injury allegedly suffered may assist an employee in establishing that the employer at least had the knowledge necessary to regard the individual as impaired.

In making hiring decisions, an employer cannot refuse to hire a person with a disability simply because the person sustained a prior occupational injury. Likewise, in making return-to-work decisions, an employer cannot refuse to return an employee with an occupational injury to work simply because there has been a workers' compensation determination that the person is totally disabled; workers' compensation laws and the ADA may utilize different standards for such determinations. Notably, the exclusive-remedy provisions in many workers' compensation laws do not bar employees from pursuing ADA claims.[166]

Employer policies, often referred to as "100% healed" policies, that prohibit employees from returning to work until they have no medical restrictions may also be problematic under the ADA. The EEOC has long taken the position that these policies violate the ADA because they bypass the individualized assessment process required by the ADA and discriminate against employees with disabilities who may be able to perform the essential functions of their position with reasonable accommodation.[167] There may be a greater risk that these policies will spur "regarded as" claims if the employer's presumption is that employees with medical restrictions cannot perform their job duties. The Seventh Circuit Court of Appeals, in a case applying pre-ADAAA law, held that a100% healed policy did not automatically establish a

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[163] 813 F.3d at 591 (citing 29 C.F.R. pt. 1630, app. § 1630.2(l)).

[164] EEOC, Enforcement Guidance, *Workers' Compensation and the ADA*, No. 915.002 (Sept. 3, 1996), *available at* https://www.eeoc.gov/policy/docs/workcomp.html.

[165] *See Baffoe v. W. H. Stewart Co.*, 211 F.3d 1277 (10th Cir. 2000) (an employee's workers' compensation records cannot serve as the basis for his claims that he was regarded as having a disability or that he had a record of a disability); *see also Jones v. UPS*, 214 F.3d 402 (3d Cir. 2000) (employee who was "fully recovered" from work-related injuries could still be considered to have a disability under the ADA because the ADA has different polices, goals, and definitions from the state workers' compensation statute).

[166] EEOC, Enforcement Guidance, *Workers' Compensation and the ADA*, No. 915.002 (Sept. 3, 1996).

[167] *See, e.g.*, *EEOC v. United Parcel Serv.*, 2014 WL 538577, at *2 (N.D. Ill. Feb. 11, 2014) (denying defendant's motion to dismiss because a policy providing that employees will be "administratively separated from employment" after 12 months of leave, which the EEOC framed as a 100% healed requirement, treated the return to work as a qualification standard and not an essential job function). After many years of litigation in this case, the EEOC and employer entered into a consent decree in 2017, which included, among other terms, both injunctive relief and payments of roughly $2 million to claimants. EEOC, Press Release, *UPS to Pay $2 Million to Resolve Nationwide EEOC Disability Discrimination Claims* (Aug. 8, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/8-8-17.cfm.

"regarded as" claim because it was not applied to a qualified person with a disability, but noted: "The risk of a [100% healed] policy is even greater (if not absolute) now that the ADAAA has changed the definition of 'regarded as' disabled."[168]

1.4(h) *Conditions Excluded from the Definition of Disability*

The text of the ADA sets forth a list of conditions or practices that are excluded from the definition of disability. These include homosexuality, bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments,[169] other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs. Environmental, cultural, and economic disadvantages are not in themselves covered.[170]

Further, federal courts have held with near unanimity that a normal pregnancy, without complications, is not a disability under the ADA. Conditions that cause or result in abnormal reproductive functioning, however, may substantially limit a major life activity and thus may meet the ADA's definition of disability. For further discussion, see **1.4(d)(viii)**. Employers should note that federal law protects against pregnancy discrimination in employment,[171] and a number of states have separate statutes covering pregnancy disability under which employers may be required to provide accommodation, leave, and reinstatement. The newly enacted Pregnant Workers Fairness Act (PWFA) provides similar protections as those available to qualified individuals under the ADA.[172] Effective in summer 2023, the act is modeled after the ADA and expands protections for pregnant employees and applicants by requiring employers with 15 or more employees to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions. The EEOC issued a final rule and interpretive guidance implementing the PWFA on April 19, 2024, that took effect June 19, 2024.[173] The final rule clarifies that the PWFA's use of the phrase "related medical conditions" can include not only new physical and mental conditions originating during pregnancy, but also pre-existing conditions that are exacerbated by pregnancy or childbirth. Employers must engage in an interactive process with a qualified employee or applicant covered by the PWFA to determine a reasonable accommodation. Additionally, an employer may not require an employee covered by the PWFA to take paid or unpaid leave if another reasonable accommodation is available. In the final rule, the EEOC confirms that under the PWFA, the physical or mental condition that leads an employee or applicant to request an accommodation can be modest, minor, or episodic. In addition, there is no requirement that conditions rise to a specific severity threshold.

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[168] *Powers v. USF Holland, Inc.*, 667 F.3d 815, 824 (7th Cir. 2011); *see also Kauffman v. Petersen Health Care VII, L.L.C.*, 769 F.3d 958, 962 (7th Cir. 2014) (an employer's acknowledgement that it will not retain an employee with a permanent restriction, known as a 100% healed policy, would read "reasonable accommodation" out of the ADA if accepted as a defense).

[169] In 2022, however, the U.S. Court of Appeals for the Fourth Circuit became the first court to hold that gender dysphoria is not a "gender identity disorder" within the statutory exclusion. *Williams v. Kincaid*, 45 F.4th 759, 766-70 (4th Cir. 2022). In reaching its conclusion, the court looked to the meaning of the term "gender identity disorder" at the time of the ADA's enactment, considered the "significant shift in medical understanding" that has taken place since that time, and declined to adopt a "unnecessarily restrictive reading of the ADA."

[170] 29 C.F.R. § 1630.3(d).

[171] 42 U.S.C. § 2000e(k).

[172] Pregnant Workers Fairness Act of 2022, H. R. 2617—1626, 117th Cong.

[173] EEOC, Publication and Policy Guidance, *Implementation of the Pregnant Workers Fairness Act* (Apr. 19, 2024) *available at* https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.

The PWFA is intended to cover conditions that do not rise to the level of disability applied under the ADA and its implementing regulations. The PWFA is intended to help maintain the individual's health and ability to work. The PWFA has a different framework for evaluating accommodation requests. An employee seeking a temporary suspension of an essential job function does not disqualify them from seeking a PWFA accommodation as long as that person is or is expected to be able to perform the essential duties within 40 weeks and the employer can reasonably accommodate the inability to perform that function. Such a person will be considered "qualified" to seek accommodation under the PWFA. If, on the other hand, there is no reasonable accommodation for the temporary suspension of an essential job function, then the individual is not "qualified." Similarly, if the temporary suspension of the essential function causes an undue hardship, then the employer need not provide a reasonable accommodation that includes the suspension of that job function. Under the final rule, the EEOC identifies specific modifications that will not impose an undue hardship "in virtually all cases," but employers may show in an individual case that they do create an undue hardship.

- allowing an employee to carry or keep water and drink, as needed, in or nearby the employee's work area;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit, and vice versa, as needed; and
- allowing an employee to take breaks, as needed, to eat and drink.

The final rule outlines the EEOC's interpretation of five prohibited practices under the PWFA: (1) failure to provide reasonable accommodations; (2) requiring an employee or applicant to accept an accommodation; (3) denying equal employment opportunities; (4) requiring the employee to take leave when other accommodations are available; and (5) taking adverse action against a worker for seeking or using a reasonable accommodation. Employees covered by the PWFA are protected from retaliation, coercion, intimidation, threats, and interference if they request or receive a reasonable accommodation. For more information on pregnancy protections, see **LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION**.

Alcohol and drug use may also be excluded from the definition of disability, depending upon the circumstances and the employee's current use of the substance. Issues surrounding the ADA's treatment of alcoholism and drug abuse are discussed more fully in **2.3**. While alcoholism is recognized as a disability,[174] an employer may establish rules and impose discipline for the use of alcohol during working hours provided the employer treats alcoholic employees the same as other employees regarding alcohol use and misuse. Yet, an employee who abuses alcohol away from the workplace may be entitled to protection under the law—particularly if the alcoholic employee has not violated a work rule or alcohol use rule.

Past drug addiction is also recognized as a disability, but employees and applicants "currently" engaging in the illegal use of drugs are not "qualified individuals with a disability."[175] It is not necessary for an employer to prove that an individual used the drug during working hours or at the employer's workplace; any illegal drug use disqualifies an individual from protection under the statute. Individuals who have successfully completed rehabilitation for the abuse of drugs or who are participating in a supervised

[174] 42 U.S.C. § 12114(c).

[175] 42 U.S.C. § 12114.

rehabilitation program and no longer using an illegal drug may, however, be protected under the law, as is any individual whom the employer erroneously regards as engaging in illegal drug use.[176]

Given the legal protections available to former drug abusers, the determination of what is "current" drug use can be difficult. The Tenth Circuit Court of Appeals has held that an employer's refusal to reinstate an employee to his former position after the employee had completed a one-month inpatient rehabilitation program did not violate the ADA because an individualized review of the employee's circumstances suggested the drug use was recent enough that the employer could consider him to be a "current" drug abuser.[177]

1.5 Who Is a "Qualified Individual with a Disability"?

To be protected by the ADA, a person must not only have a disability, but also must be *qualified* for the position in question. A *qualified individual with a disability* is a person who has the skill, experience, education, and other job-related requirements of the position and who, with or without reasonable accommodation, can perform the essential functions of the position.[178]

There are two basic steps in determining whether an individual is "qualified" under the ADA.[179] First, the individual must meet the necessary prerequisites or qualification standards for the job, such as education, work experience, training, skills, licenses, certificates, and other job-related requirements.[180] In an example used by the EEOC, an applicant who has cerebral palsy may be qualified for a certified public accountant position only if the person is a licensed certified public accountant. If the person is not a licensed accountant, then the person is not qualified for the position.[181]

Next, if the individual meets all of the job prerequisites except for those that the individual cannot meet because of a disability, an employer must determine whether a "reasonable accommodation" would permit the individual to perform the essential functions of the job.[182] For example, if the applicant who has cerebral palsy is a licensed accountant but cannot type their own reports because of the condition, the employer must consider whether the ability to type is an essential function of the job and whether the applicant can perform that function with reasonable accommodation. If the ability to type is not an

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[176] 42 U.S.C. § 12114(b).

[177] *Mauerhan v. Wagner Corp.*, 649 F.3d 1180 (10th Cir. 2011) (discussing the "currently engaging" exception to the ADA and noting that Congress intended to exclude from ADA protection an employee who used drugs in the weeks and months prior to discharge, even if the employee immediately seeks rehabilitation); *see also Maxson v. Baldwin*, 2024 WL 1282458, at *3 (6th Cir. Mar. 26, 2024) (collecting cases on "currently engaging"); *Quinones v. University of P.R.*, 2015 WL 631327, at **3-5 (D.P.R. Feb. 13, 2015).

[178] 29 C.F.R. § 1630.2(m).

[179] 29 C.F.R. pt. 1630, app. § 1630.2(m); *see also Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877, 887-88 (10th Cir. 2015).

[180] 29 C.F.R. pt. 1630, app. § 1630.2(m); *see also Williams v. MTA Bus Co.*, 44 F.4th 115, 130-32 (2d Cir. 2022) (rejecting plaintiff's argument that he was "qualified" in the "employment position" as a "test-taker" of the preemployment exam required as part of his application to be an assistant stock worker and concluding that he was required to show he was qualified for the position sought); *Budde v. Kane Cnty. Forest Preserve*, 597 F.3d 860, 862 (7th Cir. 2010) (plaintiff, a police officer, was not a qualified individual under the ADA because, even assuming he had a disability, he violated clearly established work rules when he drove drunk and caused a car accident resulting in injuries).

[181] 29 C.F.R. pt. 1630, app. § 1630.2(m).

[182] 29 C.F.R. pt. 1630, app. § 1630.2(m).

essential function of the job, or if the applicant can perform that writing function with a reasonable accommodation (by dictating the reports for example), then the applicant would be qualified for the position.

1.5(a) *Qualification Standards*

The ADA permits an employer to establish job-related qualification standards, including education, skills, work experience, and the physical and mental standards necessary for job performance, health, and safety. Those standards must not screen out, or tend to screen out, individuals on the basis of a disability unless they are job-related and consistent with business necessity.[183] For example, the Tenth Circuit Court of Appeals has held that an employer may require that a truck driver employee meet the safety guidelines of the Department of Transportation or have three years of certain mountain-driving experience.[184] At the same time, the ADA may preclude an employer from having a rule that bans all people with hearing impairments from the job of a bus driver. Such a rule would be invalid under the ADA because it would be based solely on a disability and on the misconception that hearing deficiencies cannot be sufficiently corrected by hearing aids to allow for safe driving. Thus, even a qualification standard related to an essential job function may not be used to exclude an individual with a disability if that individual could satisfy the qualification standard with a reasonable accommodation.

To be job-related, the qualification standard and selection criterion must be a legitimate measure of qualification for the specific job. To illustrate, an employer may insist on sighted candidates only if sight is an essential function of the position. For example, it might be more convenient to have sighted clerical employees with drivers' licenses who could occasionally run office errands, but unless driving is an essential requirement of the clerical position, the employer must consider visually impaired candidates if they are otherwise qualified to perform all essential functions of the job.[185] In another example, the ability to take shorthand dictation would not be a job-related qualification standard for a secretarial position if the person in the secretarial job actually transcribes taped dictation.

Notably, the ADA does not require that a qualification standard or selection criterion apply only to the essential functions of a job. Employers may evaluate and measure applicants on all functions of a job and may continue to select people who can perform all of these functions. When an individual's disability prevents or impedes performance of only marginal job functions, the ADA requires an employer to evaluate the individual's qualifications based solely on the individual's ability to perform the essential functions of the job, with or without an accommodation. For example, the position of administrative assistant will typically include essential administrative and organizational functions. Occasionally, typing has been part of the job, but other clerks are available to perform this marginal job function. If one applicant has a disability that makes typing difficult, but another has no disability, the employer may only refuse to hire the first applicant based on the relative ability of each applicant to perform the essential administrative and organizational job functions, with or without accommodation. The applicant's relevant disability cannot be considered in the decision to hire.

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[183] 29 C.F.R. § 1630.10.

[184] *Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214 (10th Cir. 2016); *Tate v. Farmland Indus., Inc.*, 268 F.3d 989 (10th Cir. 2001).

[185] 29 C.F.R. § 1630.15(b).

1.5(b) *Essential Functions of the Job*

Given that the determination of whether an individual is qualified for a job must take into account whether the individual can perform the essential functions of that job (with or without accommodation), the essential functions of a job must first be identified. The *essential functions of a job* are defined as the fundamental job duties of the employment position. A job function is essential if the job exists to perform that function. For example, for a position as a proofreader, the ability to review documents accurately is an essential function because that is the reason why the position exists. Additionally, a job function may be essential because of the limited number of employees available to perform the function, or among whom the function can be distributed. Thus, it may be an essential function for a file clerk to answer the telephone if there are only three employees in a busy office and each employee must perform many different tasks, including answering the telephone.

Factors considered in determining whether a particular job function is "essential" include:[186]

1. **Degree of Expertise or Skill Required.** A job function may be essential if the function is highly specialized so that the incumbent in the position is hired for their expertise or ability to perform the particular function. This factor requires an inquiry into the degree of expertise and skill required to perform the job.[187]
2. **Written Job Descriptions.** The ADA does not require an employer to develop or maintain job descriptions. However, a written job description prepared before advertising the position or interviewing applicants for a job will be considered as evidence, along with all other relevant factors in determining the essential functions of the position.[188] While the EEOC regulations state that a job description will be evidence that a function is essential, if individuals currently performing the job do not in fact perform this function, or perform it infrequently, a review of the actual work performed by those filling the position will have greater weight than the job description.[189] Therefore, the written job description should accurately reflect the actual functions of the job. Assuming that they are, in fact, essential to the job in question, employers should not forget to include such things as predictable and regular attendance, as well as the ability to work cooperatively with others, to deal politely with members of the public, to juggle several tasks at once, to arrive at work on time, or to work onsite.
3. **The Employer's Judgment as to What Functions Are Essential.** The ADA does not limit an employer's right to define the job and those functions that are required to perform it. The EEOC's regulations clarify that the analysis of the essential functions of the job is not to be used as a vehicle to second guess the employer or require a company to lower its standards.[190]

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[186] 29 C.F.R. pt. 1630, app. § 1630.2(n).

[187] 29 C.F.R. § 1630.2(n)(2); 29 C.F.R. pt. 1630, app. § 1630.2(n).

[188] *See, e.g.*, *Goosen v. Minn. Dep't of Transp*., 103 F.4th 159 (8th Cir. 2024) (concluding the plaintiff, a mechanic injured on the job, was not qualified to perform the essential functions of his former position based on the job description, the experiences and insight of the plaintiff's supervisors, the tasks required to complete each job function, and the amount of time mechanics spent accomplishing their job responsibilities); *Elledge v. Lowe's Home Ctrs., L.L.C.*, 979 F.3d 1004 (4th Cir. 2020) (official job description provided support for employer's position that walking and driving were essential functions of the Director of Stores position).

[189] 29 C.F.R. pt. 1630, app. § 1630.2(n); *see also* 42 U.S.C. § 12111(8).

[190] 29 C.F.R. pt. 1630, app. § 1630.2(n); *see also Scruggs v. Pulaski Cnty., Ark.*, 817 F.3d 1087, 1093 (8th Cir. 2016) ("Although not conclusive, we consider the employer's judgment of what constitutes an essential function 'highly probative.'"); *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 201 (6th Cir. 2010) (noting that the hospital identified

The ADA simply requires that a person's qualifications be evaluated in relation to the job's essential functions. Moreover, when an employer has arranged to accommodate an employee's disability, a court must evaluate the essential functions of the job without considering the effect of the special arrangements.[191]

4. **Terms of a Collective Bargaining Agreement.** When a collective bargaining agreement lists duties to be performed for particular jobs, the terms of the agreement may provide evidence of what the employer and employee representatives, together, have deemed to be essential functions. Similar to a written job description, however, the actual duties performed by individuals in these jobs would be considered along with this evidence.
5. **Work Experiences of Past Employees in the Same Job or of Current Employees in Similar Jobs.** The work experience of employees who have performed the job in the past, and the work experience of those currently performing similar jobs, can be evidence of the essential duties of a position. Other relevant factors include the nature of the work operation and the employer's organizational structure.[192]
6. **Time Spent Performing a Particular Function.** The time spent performing the function is also considered in determining whether a function is essential. For example, if an employee spends most of the time operating a machine, this fact would be evidence that operating the machine is an essential job function.
7. **The Consequences of Failing to Require the Employee to Perform the Function.** Even a job duty that is performed infrequently may be essential if there are serious consequences if that function is not performed. For example, a firefighter may only occasionally have to carry a person from a burning building, but the firefighter's inability to perform this task could have drastic, even fatal, consequences.[193]

Courts generally take these factors into consideration when determining whether a job function is essential. For example, in *Knutson v. Schwan's Home Service, Inc.*, an eye injury prevented a manager from driving a truck for a food delivery company. The Eighth Circuit Court of Appeals held that this task could be considered essential, although it was rarely performed.[194] The employee's specific personal experience was of no consequence in determining the essential functions of the job. Rather, the court noted that the

"communicating with professional colleagues and patients in ways that ensure patient safety" as an essential function of a resident's job, and that the hospital's identification of this essential function must be given consideration).

[191] *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147-48 (1st Cir. 2006); *see also Beasley v. O'Reilly Auto Parts*, 69 F. 4th 744 (11th Cir. 2023) (finding that attending pre-shift meetings, for which the employee had requested a sign language interpreter, was considered by the employer to be essential because attendance at the meetings was mandatory. Likewise, employee's ability to participate meaningfully in disciplinary meetings about his attendance was essential).

[192] For example, "the ability to delegate a task … does not necessarily render that task non-essential." *Tonyan v. Dunham's Athleisure Corp.*, 966 F.3d 681, 689 (7th Cir. 2020).

[193] 29 C.F.R. pt. 1630, app. § 1630.2(n); *see also Vargas v. DeJoy*, 980 F.3d 1184, 1189 (7th Cir. 2020) (referencing example of a firefighter needing to carry an unconscious adult from a burning building and holding that while a mail carrier, with a 15-pound weight restriction, "might not always have to carry 35 pounds does not preclude that function from being essential to his job.").

[194] 711 F.3d 911 (8th Cir. 2013).

written job description, the employer's judgment, and the experience and expectations of others in that position helped establish the essential functions of the job.

In *Jordan v. City of Union City*, the Eleventh Circuit Court of Appeals held that a police officer with anxiety disorder was not "qualified."[195] His unpredictable and uncontrollable, albeit infrequent, anxiety episodes and panic attacks rendered him unable to perform the essential functions of his police officer position because he was not reliable in high-stress emergency situations. The court explained that his essential functions "include the ability to exercise sound, independent judgment in emergency or stressful situations and to react quickly and calmly in emergencies."[196]

1.5(b)(i) *Employer's Burden to Produce Evidence of Essential Job Functions*

When an employee challenges an assertion that a task is an "essential function" of the job, the employer bears the initial burden of production to show that the task is, in fact, essential.[197] In a case analyzing the employer's burden to produce evidence of the essential functions of the job, the Ninth Circuit Court of Appeals vacated a lower court injunction against an employer, holding the trial court misapplied the ADA.[198] In *Bates v. United Parcel Service*, five deaf employees sued the defendant-company claiming it unfairly applied the Department of Transportation (DOT) hearing standard for all driving jobs (even when those standards were not required for the company vehicles). After the district court issued a permanent injunction ordering the company to perform an individualized assessment of each hearing-impaired employee's ability to drive a company vehicle with or without accommodations, the company appealed, arguing that the employees were not qualified individuals because they could not meet the company's requirement that all drivers satisfy the DOT hearing standard.

The Ninth Circuit held that it is the employer's burden of production to provide evidence of the essential functions of the job at issue.[199] Specifically, "the employer—not the employee—bears the burden of showing that the higher qualification standard is job related and consistent with business necessity, and that performance cannot be achieved through reasonable accommodation."[200] The Ninth Circuit found that the DOT certification was not an essential function and not consistent with business necessity. According to the court, employees were merely required to establish they met the essential function of safe driving.

1.5(b)(ii) *Attendance as an Essential Function*

Several federal courts have held an employee who cannot meet the attendance requirements of a job cannot be considered a qualified individual protected by the ADA. Indeed, courts have noted that "[a]n employee who does not come to work cannot perform any of his job functions, essential or otherwise."[201]

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[195] 646 F. App'x 736 (11th Cir. 2016).

[196] 646 F. App'x at 740.

[197] *Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877 (10th Cir. 2015) ("Courts require an employer to come forward with evidence concerning whether a job requirement is an essential function."), *cert. denied*, 577 U.S. 1049, 136 S. Ct. 690 (2015).

[198] *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007).

[199] 511 F.3d at 990-91.

[200] 511 F.3d at 993.

[201] *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1239 (9th Cir. 2012) (collecting cases); *EEOC v. Yellow Freight Sys.*, 253 F.3d 943, 948 (7th Cir. 2001) (citations omitted).

In *EEOC v. Ford Motor Company*, the Sixth Circuit Court of Appeals had to determine whether "regular and predictable on-site job attendance [was] an essential function (and a prerequisite to perform other essential functions) of [a] resale-buyer job" that required personal interaction with suppliers and group problem solving with other team members.[202] The case involved an employee with irritable bowel syndrome who requested to work from home for up to four days a week. This request far exceeded company policy. The company first tried a more limited telecommuting schedule, which did not work, and then offered her other accommodations, including moving her workstation closer to a restroom or looking for jobs better suited for telecommuting. The employee responded by filing an ADA claim. In an *en banc* decision, the Sixth Circuit concluded that on-site job attendance was an essential function of the resale-buyer position and, indeed, for most jobs: "Regular, in-person attendance is an essential function-and a prerequisite to essential functions—of most jobs, especially the interactive ones. That's the same rule that case law from around the country, the [ADA's] language, its regulations, and the EEOC's guidance all point toward."[203]

Similarly, in *Basden v. Professional Transport., Inc.*, the Seventh Circuit Court of Appeals found that employers are generally permitted to treat regular attendance as an essential job requirement and do not have to accommodate erratic or unreliable attendance.[204] Therefore, a plaintiff whose disability prevents the plaintiff from regularly attending work may not be "qualified" under the ADA. In *Basden*, the plaintiff claimed her former employer violated the ADA when it denied her leave request and fired her over absences she attributed to multiple sclerosis, saying she failed to show she would have been able to perform to expectations with the leave. The Seventh Circuit found that because the plaintiff failed to show she could attend work if she had received an accommodation, the employer's purported failure to consider a reasonable accommodation did not need to be examined.[205]

There are limits to the argument that attendance is an essential function. Three years after its decision in *EEOC v. Ford Motor Company*, the Sixth Circuit Court of Appeals affirmed a jury verdict holding that an employer violated the ADA when it denied an in-house attorney's request to telecommute.[206] The

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[202] 782 F.3d 753, 761 (6th Cir. 2015).

[203] 782 F.3d at 762-63; *see also Williams v. AT&T Mobility Servs. L.L.C.*, 847 F.3d 384 (6th Cir. 2017); *see also Crews-Sanchez v. Frito-Lay, Inc.*, 2022 WL 2792207 (W.D. Va. July 15, 2022) *aff'd by* 2024 WL 469306 (4th Cir. Feb. 7. 2024) (employer did not violate ADA when it refused compliance manager's request to work remotely as numerous essential job duties required her to be on-site).

[204] 714 F.3d 1034 (7th Cir. 2013).

[205] *See also Stelter v. Wisconsin Physicians Serv. Ins. Corp.*, 950 F.3d 488, 491 (7th Cir. 2020) (summary judgment granted for employer where plaintiff with a back injury was terminated for job absenteeism and work deficiencies, noting "[t]he ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability.") (citation omitted); *Starts v. Mars Chocolate N. Am., L.L.C.*, 633 F. App'x 221, 224 (5th Cir. 2015) (agreeing with lower court's determination that the plaintiff was "not a 'qualified individual' because even if [the company] had allowed [him] to return to a four-hour workday [as an accommodation], there was no evidence that [he] would have been able to work the entire four hours without having to leave due to his back pain—which could, and did, occur at unpredictable times, including within a four-hour shift"); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147-48 (1st Cir. 2006) (holding it was essential for engineers in the plaintiff's position to be physically present to see the machines and interact with the personnel at the plant, thus allowing the plaintiff to work via webcam was unreasonable because it would eliminate essential functions of the position); *Earl v. Mervyns, Inc.*, 213 F.3d 1361, 1366 (11th Cir. 2000) (punctuality is an essential job function for an employee suffering from obsessive-compulsive disorder, whose principal responsibilities include preparing for the retail store's opening each morning).

[206] *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595 (6th Cir. 2018).

attorney requested to work from home for 10 weeks after she was placed on modified bed rest during a difficult pregnancy. The employer denied this accommodation request and argued at trial that physical presence was an essential function of her job, demonstrated in part by her job description and testimony from former employees. While the court agreed that there was some evidence showing that in-person attendance was an essential function of the plaintiff's job, the plaintiff had also offered evidence at trial that for a limited period she could perform the essential functions of her job remotely. The evidence included testimony from outside counsel she worked with stating she could work effectively from home and information that the employer relied on a 20-year-old questionnaire (instead of a 2010 questionnaire the plaintiff completed prior to any of the events involved in the litigation) for its job description that did not reflect technological advancements. The court further distinguished *Ford* and a second case holding in-person attendance as an essential function by noting that the plaintiff's requested accommodation was for a limited time rather than an indefinite period.

Attendance is not a *per se* essential function of every job. In *McMillan v. City of New York*, the plaintiff's disability necessitated treatment that prevented him from arriving to work at a consistent time each day.[207] The Second Circuit Court of Appeals noted that, although in most contexts timely arrival at work is considered an essential function of the job, which could render futile any attempts to reasonably accommodate the situation, it was not clear whether timely arrival at work was an essential function of the plaintiff's particular job. Under the specific circumstances, he could offset the time missed with additional work hours to complete the essential functions of his job. In reversing dismissal of his claim for disability discrimination, the Second Circuit concluded that dismissal of the claims was premature and that a jury could find in the plaintiff's favor. As such, determining whether regular and predictable attendance is an essential function must be evaluated case by case.

Employer must also consider accommodations that would allow employees with disabilities to satisfy attendance requirements. For example, in *Valle-Arce v. Puerto Rico Ports Authority*, the First Circuit Court of Appeals ruled that a jury should determine whether the flexible work schedule requested by a human resources employee was a reasonable accommodation that would have allowed her to fulfill the attendance requirements of her job.[208] The Third Circuit Court of Appeals also addressed this issue in *Fogleman v. Greater Hazleton Health Alliance.*[209] A pharmacy technician was terminated for excessive absences and a failure to contact her employer. The court ruled that a leave of absence may be a reasonable accommodation, as long as the leave is likely to lead to the employee's ability to perform the essential functions of their job in the near future.

1.5(c) *Business Necessity Defense*

Employees with disabilities may be held to the same performance criteria as other employees, provided those criteria are job-related and consistent with business necessity, and the employee is afforded the opportunity to meet the employer's performance standards by reasonable accommodations (discussed in **1.6**).[210] Therefore, the ADA gives employers an affirmative defense against disparate treatment, disparate impact, and failure to accommodate claims if an employer can show that a qualification

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[207] 711 F.3d 120 (2d Cir. 2013).

[208] 651 F.3d 190, 200 (1st Cir. 2011) (citing *Rios-Jimenez v. Secretary of Veterans Affairs*, 520 F.3d 31 (1st Cir. 2008)).

[209] 122 F. App'x 581, 585-86 (3d Cir. 2004).

[210] 42 U.S.C. § 12113(a).

standard or criteria is: (1) job-related; (2) consistent with business necessity; and (3) that performance cannot be accomplished with any reasonable accommodation.[211]

The Fifth Circuit Court of Appeals, in *Atkins v. Salazar*, analyzed the business necessity defense in a Rehabilitation Act case involving diabetes.[212] The plaintiff contested his transfer to a staff ranger position based on the conclusion of a medical review board that his uncontrolled diabetes could prevent him from safely performing his duties as a law enforcement ranger. His employer, the National Park Service (NPS), initiated the transfer after new qualification standards established that certain medical conditions could disqualify an individual for safety reasons, including conditions affecting normal hormonal/metabolic functioning. In holding that the employer had established the business necessity defense, the court first defined some of the terms:

> For a qualification to be "job-related," the employer must demonstrate that the qualification standard is necessary and related to the specific skills and physical requirements of the sought-after position. Similarly, for a qualification standard to be "consistent with business necessity," the employer must show that it substantially promotes the business's needs.[213]

The Fifth Circuit held that the NPS standards were both job-related and promoted the NPS's needs because they were "designed to ensure that employees performing law enforcement are *physically able* to perform that duty and that their performance does not constitute a threat to the health and well-being of themselves, their fellow employees, and park visitors."[214]

To evaluate whether a safety-based standard is justified under the business necessity defense, the employer must consider the magnitude of possible harm as well as the probability of its occurrence. An acceptable probability of an incident involving a small risk, *e.g.*, breakdown of an assembly line, will generally be higher than the acceptable probability of an incident that would cause very serious harm, *e.g.*, a nuclear power plant explosion.

To exclude an individual with a disability from a job, a qualification standard generally must be incapable of modification through a reasonable accommodation that would permit an employee with a disability from meeting the standard. In *Fraterrigo v. Akal Security, Inc.*, the plaintiff failed the annual hearing test without an accommodation.[215] The plaintiff claimed he could have passed the test if the defendant had permitted him to use a hearing aid, and he alleged he should have been permitted to use the hearing aid as a reasonable accommodation of his hearing impairment. The employer looked to an outside expert who had recommended that having a minimum level of hearing proficiency was necessary for performing the essential job functions of the plaintiff's position. In granting summary judgment for the defendant, the court agreed that a minimum level of hearing proficiency without a hearing aid was necessary for the

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[211] *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 995, 998 (9th Cir. 2007) (overruling *Morton v. United Parcel Serv.*, 272 F.3d 1249 (9th Cir. 2001), to the extent it imposed a *bona fide* occupational qualification standard under the ADA and noting that the defendant's reliance on a government safety standard for all vehicles in its fleet is entitled to some consideration as a safety benchmark).

[212] 677 F.3d 667 (5th Cir. 2011).

[213] 677 F.3d at 682 (citations omitted).

[214] 677 F.3d at 682 (emphasis in original).

[215] 2008 WL 4787548 (S.D.N.Y. 2008), *aff'd*, 376 F. App'x 40 (2d Cir. 2010).

position. Therefore, the requested accommodation of a hearing aid for the test was not required and the employer successfully asserted the business necessity defense.

1.5(d) *Direct Threat Defense*

An individual with a disability is not "qualified" for a specific employment position if the individual poses a "direct threat" to their own health and safety or to others.[216] In such a situation, an employer has a defense against an ADA claim brought by that individual. Specifically, a *direct threat* is a situation presenting a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by a reasonable accommodation.[217] An "elevated risk of injury" is insufficient to support the direct threat defense. Moreover, the risk must be current, not speculative or remote.[218] An employer must raise the direct threat affirmative defense early in litigation. If the employer fails to do so, the employer is precluded from later raising the defense, and it will be considered waived.[219]

Four factors must be considered in a direct-threat analysis:

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.[220]

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[216] 42 U.S.C. § 12111(3); *see also Pontinen v. U.S. Steel Corp.*, 26 F.4th 401, 405-09 (7th Cir. 2022) (affirming dismissal of disability discrimination claim based on employer's withdrawal of job offer, which occurred after it learned the candidate had an uncontrolled seizure disorder that constituted a direct threat); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76 (2002) (statute's "direct threat" defense covers circumstances in which the threat posed by the individual does not run to third parties, but rather, to the applicant or employee).

[217] 29 C.F.R. § 1630.2(r).

[218] *See Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 661 (7th Cir. 2005) (plaintiff who was at risk of passing out at work due to diabetes was a direct threat where employees were required to climb tall ladders and operate dangerous machinery, even where plaintiff had worked for 10 months without incident); *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 894-95 (9th Cir. 2001) (employee with diabetes who experienced periodic seizures posed a direct threat to coworkers given the "catastrophic" effect of an accident involving chlorine, with which the employee worked); *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 672 (7th Cir. 2000) (a doctor that smelled of alcohol was not a qualified person with a disability under the ADA because she posed a direct threat to the health and safety of her patients); *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1294-95 (10th Cir. 2000) (a mine blaster who threatened suicide and displayed anxiety and depression posed a direct threat to others in the workplace and could not bring a claim against his employer under the ADA for firing him); *see also Olsen v. Capital Region Med. Ctr.*, 2012 WL 1232271 (W.D. Mo. Apr. 12, 2012), *aff'd on other grounds*, 713 F.3d 1149 (8th Cir. 2013) (granting summary judgment for employer where plaintiff, a mammography nurse, posed a direct threat to herself, patients, and others where she experienced 14 seizures at work over two years and suffered significant injuries as a result).

[219] *See Andresen v. Fuddruckers, Inc.*, 2004 WL 2931346, at *8 (D. Minn. Dec. 14, 2004) (holding that if an employer fails to raise the direct threat affirmative defense in its answer to an employee's ADA claim against it, Federal Rule of Civil Procedure 8(c) will operate to preclude the employer from raising it later).

[220] 29 C.F.R. § 1630.2(r).

The assessment of whether the individual poses a significant risk of substantial harm must be based on objective, scientific evidence, not on subjective perceptions, irrational fears, or stereotypes.[221] An employer, in other words, cannot simply assert that it believes an individual is a direct threat.[222] The determination must also be made on a case-by-case basis. Relevant evidence may include input from the employee and opinions of medical doctors, rehabilitation counselors, or physical therapists that have expertise in the disability or direct knowledge of the individual with a disability. In *Wurzel v. Whirlpool Corp.*, the Sixth Circuit Court of Appeals concluded that a forklift operator with a heart condition that could cause him to become incapacitated posed a direct threat to himself and his coworkers.[223] This decision "relied on the most current medical knowledge and best available objective evidence and reflected an individualized assessment of [the plaintiff's] abilities."[224] Acknowledging that the plaintiff worked close to dangerous automatic machinery and, at times, out of sight of other employees who could assist him in the event of an emergency, his work environment fell into the "potentially dangerous category."[225] The factors of likelihood and imminence of a potential harm were also met given that the plaintiff had once been found close to passing out and had required the assistance of a coworker in a medical emergency numerous times.[226]

Once the effects of a disability pose an actual threat to safety, the ADA does not require employers to give employees with disabilities a second or third chance that would not be offered to other employees. For example, in *Siefken v. Village of Arlington Heights*, an insulin-dependent police officer had a hypoglycemic reaction while driving his squad car; he began driving at high rates of speed in an erratic manner, and had to be stopped by police officers from neighboring towns.[227] The court held that the employee's inability to prevent the safety risk demonstrated an actual threat to safety and justified the employer's decision not to give him a second chance to control his disability.

An employee's threatening behavior is different from *posing* an inherent threat associated with the employee's medical condition. For example, in the instance of an employee threatening a supervisor, that threat should not be treated in the same manner as posing a direct threat under the ADA. The Second Circuit Court of Appeals addressed this issue when an employee was placed on paid leave after threatening a supervisor in *Sista v. CDC Ixis North America, Inc.*[228] The company did not allow the plaintiff to return to work after the leave and terminated the plaintiff because of the supervisor's concern for his own safety. The appellate court affirmed the district court's grant of summary judgment for the company on the plaintiff's ADA claim, but held that the district court should not have considered the plaintiff's actual threat against his supervisor at the *prima facie* stage of the case in determining whether the plaintiff was "otherwise qualified" for his managerial position. In doing so, the court distinguished between an employee "making" a physical threat versus "posing" a threat as contemplated by the ADA's direct threat defense. The court held that when a plaintiff makes an actual threat, that threat can be the basis for

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[221] *Bragdon v. Abbott*, 524 U.S. 624, 626, 649 (1998) (employer must rely on a "rigorous objective inquiry" based on medical or other objective evidence).

[222] *Stragapede v. City of Evanston, Ill.*, 865 F.3d 861 (7th Cir. 2017).

[223] 482 F. App'x 1 (6th Cir. 2012).

[224] 482 F. App'x at 20.

[225] 482 F. App'x at 19.

[226] 482 F. App'x at 19.

[227] 65 F.3d 664, 666 (7th Cir. 1995).

[228] 445 F.3d 161 (2d Cir. 2006); *see also Felix v. Wisconsin Dep't of Transp.*, 828 F.3d 560, 568-74 (7th Cir. 2016).

finding a legitimate, nondiscriminatory basis for the adverse employment action, not as a basis for finding that the employee posed a direct threat under the ADA.

1.5(e) *Determination of Social Security Disability*

An individual who is determined to be "totally disabled" under the Social Security Act may still be a qualified individual under the ADA if they can perform the job with reasonable accommodation. The U.S. Supreme Court has squarely addressed the proper approach to cases in which an ADA plaintiff has also applied for Social Security Disability Insurance benefits (SSDI). In *Cleveland v. Policy Management System Corp.*, the Court determined that the recipient of SSDI benefits is not automatically stopped from pursuing an ADA claim.[229] The Court examined the differences in the two remedial schemes. It noted that the Social Security Administration (SSA) deals with an extremely high volume of claims and does not consider the possibility of a reasonable accommodation when determining if the applicant can work, or perform the essential functions of a job. Thus, a claim for benefits asserting an applicant cannot perform their job, within the SSA's rules, is not necessarily inconsistent with a claim under the ADA that the plaintiff is a qualified individual with a disability (that is, able to perform the essential functions of the job with a reasonable accommodation). The Supreme Court nonetheless acknowledged that a claim for SSDI in which an applicant claims she cannot work *appears* to negate an essential element of her ADA claim. The Court held that an ADA plaintiff cannot ignore this apparent contradiction. Rather, plaintiffs must offer a "sufficient" explanation to avoid dismissal of their claims.[230]

In the *Cleveland* decision, the Court stressed that it was making no ruling concerning situations where a plaintiff has made inconsistent statements of pure fact (for example, claiming, with respect to the same time period, "I have no lifting restrictions" versus "I cannot lift more than ten pounds"). Such contradictory statements may lead to the dismissal of ADA claims.[231]

1.6 What Is a Reasonable Accommodation?

1.6(a) *Requests for Accommodation & the Interactive Process*

At the core of the ADA is the employer's obligation to provide reasonable accommodation to qualified individuals with disabilities. Individuals need not incant any magic words to request an accommodation

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[229] 526 U.S. 795 (1999).

[230] *EEOC v. Vicksburg Healthcare, L.L.C.*, 663 F. App'x 331 (5th Cir. 2016) (following the *Cleveland* decision, and permitting suit on behalf of employee who claimed a total temporarily disability after a rotator cuff injury but also asserted that she could have worked if provided light duty accommodations); *see also EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373 (4th Cir. 2000) (allowing suit as long as plaintiff "proffer[s] a sufficient explanation for any apparent contradiction between the [ADA and the SSDI] claims"). *But see Stallings v. Detroit Public Schs.*, 658 F. App'x 221 (6th Cir. 2016) (concluding that teacher's failure to explain discrepancy entitled employer to summary judgment); *Disanto v. McGraw-Hill, Inc.*, 220 F.3d 61 (2d Cir. 2000) (plaintiff who was unable to reconcile inconsistent statements to the SSA was not entitled to the $1.2 million verdict awarded to him by the jury); *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477 (5th Cir. 2000).

[231] *See Amerson v. Clark Cnty.*, 638 F. App'x 645 (9th Cir. 2016) (agreeing that plaintiff was judicially estopped from challenging employment decision where she had previously stipulated in disability benefits context that her employer could not accommodate her); *Kurzweg v. SCP Distribs., L.L.C.*, 424 F. App'x 840 (11th Cir. 2011) (affirming summary judgment for employer because plaintiff's statement to the SSA that he was unable to work because of his disability showed that he could not perform the essential functions of his job); *see also Keith v. Charter Commc'ns, Inc.*, 2020 WL 2394997, at *6 (W.D. Pa. May 12, 2020) (plaintiff did not "adequately reconcile" the conflicting positions in his SSDI application and ADA lawsuit).

and do not have to submit anything in writing.[232] Generally speaking, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."[233] Other people may also seek an accommodation on behalf of the individual, and employers may be obligated to initiate the accommodation process when the individual's need is obvious.[234]

Employers should begin the "interactive process" of determining if an accommodation is needed once employees provide sufficient information to let the employer know they are having difficulty performing their jobs because of a physical or mental impairment that may constitute a disability under the ADA. An employee does not have to request a specific accommodation to trigger the employer's obligation to accommodate.

On the other hand, an employer is only obligated to make accommodations to *known* limitations of an otherwise qualified individual with a disability.[235] In the leading case of *Hedberg v. Indiana Bell Telephone Co.*, an employee was terminated because his employer believed him to be lazy and lacking a work ethic.[236] The employee sued under the ADA, alleging that those characteristics were symptoms of primary amyloidosis, a frequently fatal disease. The employee claimed his employer was liable even though it was unaware of his impairment. The Seventh Circuit Court of Appeals rejected his argument, explaining that the ADA does not require employers to be "clairvoyant" or to retain unproductive employees because some of them may have a disability. Under this reasoning, employees who wait until after performance or attendance become a problem to reveal a condition and the need for an accommodation face difficulty in supporting discrimination or failure to accommodate claims.[237] In contrast, in *EEOC v. Convergys Customer Management Group*, the Eighth Circuit Court of Appeals affirmed a jury verdict against the employer because the company never developed a well-thought-out plan to address the plaintiff's needs despite its obvious awareness of the problems he encountered at work.[238]

Step-by-step guidance for conducting and documenting the interactive process is set forth in the Practical Guidelines for Employers in **3.1**. The process is inherently conducted on an individualized basis, taking into account the evolving nature of both the essential job functions and the individual's functional limitations. It involves:

- exchanging information with the individual about the individual's disability and work restrictions;

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[232] *Kelly v. Town of Abingdon, Va.*, 90 F.4th 158, 167–68 (4th Cir. 2024) (finding although an employee does not need to "formally invoke the magic words 'reasonable accommodation,'" those words alone do not trigger an employer's duty to initiate the interactive process; there must be a "logical bridge connecting the employee's disability to the workplace changes he requests").

[233] 29 C.F.R. pt. 1630, app. § 1630.9; *see also Graham v. Macy's Inc.*, 675 F. App'x 81 (2d Cir. 2017) (plaintiff's failure to allege that she informed employer of need for extra breaks doomed accommodation claim); *Judge v. Landscape Forms, Inc*., 592 F. App'x 403 (6th Cir. 2014) (incumbent on employee to request additional leave of absence to trigger interactive process).

[234] *See EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (stating that an accommodation request does not have to be made by the employee).

[235] 29 C.F.R. pt. 1630, app. § 1630.9.

[236] 47 F.3d 928, 934 (7th Cir. 1995).

[237] *See, e.g.*, *Green v. Medco Health Solutions of Tex., L.L.C.*, 947 F. Supp. 2d 712 (N.D. Tex. 2013).

[238] 491 F.3d 790 (8th Cir. 2007).

- identifying potential appropriate workplace accommodations; and
- reaching a mutually satisfactory decision about the reasonable accommodation to be provided.[239]

While employers are expected to take the lead role in this process, individuals who request an accommodation are obligated to cooperate in the accommodation process in a timely and responsible manner. As the Seventh Circuit Court of Appeals explained in *Beck v. University of Wisconsin Board of Regents*:

> [C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.[240]

Employees' failure to cooperate can negate their claim of disability discrimination.[241] For example, in *Haulbrook v. Michelin North America, Inc.*, the plaintiff, a chemical engineer, suffered from respiratory problems.[242] He contacted his employer regarding his condition, but repeatedly refused to speak with the appropriate individual and only provided requested information about his condition through a series of cryptic, late-night faxes. After repeated refusals to provide information, the plaintiff was eventually terminated. In affirming summary judgment for the employer, the court held that an employee may not refuse reasonable requests for information from the employer and then later claim that the employer's lack of information was evidence of "regarded as" discrimination.

The accommodation dialogue should be conducted promptly, although it does not have to take priority over all other legitimate business considerations. For example, a district court concluded that an employer's delay of 75 days in providing a reasonable accommodation did not show bad faith, where the employer "worked to resolve conflicting information about the [employee's] restrictions."[243] In *Selenke v. Medical Imaging of Colorado*, the Tenth Circuit Court of Appeals similarly rejected the plaintiff's argument that her employer violated the ADA by delaying office modifications for her sinus problems because there

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[239] 29 C.F.R. pt. 1630, app. § 1630.9.

[240] 75 F.3d 1130, 1135 (7th Cir. 1996).

[241] *See Smith v. Shelby Cnty. Bd. of Ed.*, 2024 WL 3622387 (6th Cir., Aug. 1, 2024) (collecting cases about employee withdrawal from the interactive process); *EEOC v. Methodist Hosps. of Dallas*, 62 F.4th 938 (5th Cir. 2023) (where the employer "worked with [plaintiff] for months" to accommodate her, the plaintiff was responsible for the breakdown of the interactive process); *Bellino v. Peters*, 530 F.3d 543 (7th Cir. 2008) (finding employee with knee injury who declined a transfer to a sit-down job could not bring claim under the Rehabilitation Act); *Allen v. Pacific Bell*, 353 F.3d 1113 (9th Cir. 2003) (because employee failed to cooperate in the "interactive process," the employer had "no further obligation" and could terminate employment).

[242] 252 F.3d 696 (4th Cir. 2001); *see also Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012); *McFarland v. City and Cnty. Of Denver*, 2017 WL 3872639 (D. Colo. Sept. 5, 2017).

[243] *Morris v. Ford Motor Co.*, 2016 WL 4991772 (W.D. Wis. Sept. 15, 2016) (noting that delays do not necessarily show lack of good faith depending on the circumstances, including the reasons for delay and whether interim accommodations were offered).

was no evidence that the delay was in bad faith. The employer had made several accommodations for the plaintiff but delayed further accommodations pending a move.[244]

In contrast, the Seventh Circuit Court of Appeals reversed a decision granting summary judgment to an employer in *Johns v. Laidlaw Education Services.*[245] In *Johns*, the plaintiff, a school bus driver, sought medical treatment after she was injured on the job. She was eventually released by her doctor to return to limited duty but was prohibited from operating a commercial vehicle. Her employer referred her for a second opinion, which concluded plaintiff could return to work without restriction. Based on that release, the employer informed plaintiff she was no longer eligible for light duty and required her to complete training for a commercial drivers' license by a specified date or face possible termination. The plaintiff did not complete the training because, during the same month as the second opinion, the plaintiff's physician performed an evaluation concluding that plaintiff needed to remain on light duty and stated his findings in a letter to the employer. The employer claimed that it never received the letter, so when the plaintiff did not comply with its terms, she was terminated. The court determined the plaintiff was not necessarily responsible for the breakdown in the interactive process; rather, it was the employer's responsibility to request further information based on the differing medical opinions before requiring the plaintiff to return to work.

Under certain circumstances, an employer's initial failure to engage in the interactive process can be overcome by the employer's eventual accommodation. In *Mobley v. Allstate Insurance Co.*, the Seventh Circuit Court of Appeals denied the plaintiff's failure to accommodate claim because, although it was "an admittedly laborious process," the employer ultimately provided her with a reasonable accommodation.[246] To accommodate the employee's sleep disorder, the employer eventually allowed the plaintiff to perform her work regularly in a private room rather than in a cubicle. When plaintiff's performance failed to reach the "meets expectations" level on her annual review, she was terminated as part of a reduction in force six months after the permanent accommodation was made. The Seventh Circuit held that the employer's initial failure to engage in the interactive process was by itself insufficient to establish a failure to accommodate claim when, in the end, a reasonable accommodation was provided.[247] The fact that the accommodation was less effective than it had been previously did not subject the employer to liability where the plaintiff never suggested that she required additional accommodations.

1.6(b) *Accommodation Principles*

The duty to make reasonable accommodations for a qualified individual with a disability applies to all aspects of employment. A *reasonable accommodation* is any accommodation that the employer can adopt without undue hardship that will enable the employee to perform the essential functions of the job either presently or in the immediate future.[248]

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[244] 248 F.3d 1249, 1262 (10th Cir. 2001); *see also Whelan v. Teledyne Metalworking Prods.*, 226 F. App'x 141 (3d Cir. 2007) (finding that employer lawfully terminated employee who discontinued the interactive process after the company refused to accept the employee's proposed accommodation).

[245] 199 F. App'x 568 (7th Cir. 2006).

[246] 531 F.3d 539, 546 (7th Cir. 2008).

[247] 531 F.3d at 546.

[248] 29 C.F.R. § 1630.2(o)(2); 29 C.F.R. § 1630.9(a).

A reasonable accommodation may include any of the following:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- job restructuring;
- part-time or modified work schedules;
- reassigning an individual with a disability to a vacant position;
- acquiring or modifying equipment or devices;
- appropriately adjusting or modifying examinations, training materials, or policies;
- providing qualified readers or interpreters;
- hiring a job coach to help the employee in the job for a temporary period of time; and
- other similar accommodations for individuals with disabilities.

The duty to make reasonable accommodations extends to: the application process; on the job training, whether offered directly by the employer or through a vendor or consultant; the employee's ability to enjoy employer-sponsored social activities; and other conditions of employment not strictly related to the ability to perform the job.[249] For example, an employer that offers an optional CPR training program to its employees must provide a sign language interpreter should a deaf employee wish to take advantage of the training.[250]

1.6(b)(i) *Accommodations Must Be Effective & Consider Employee Preference*

An accommodation must be effective.[251] If there are several effective accommodations, the employer should consider the preference of the individual and select the accommodation that best serves the needs of the individual and the employer. The employer is free, however, to choose among effective accommodations and may choose one that is less expensive or easier to provide than the one suggested by the employee. Employers are not required to provide employees with disabilities with the specific accommodation requested; rather, employers must provide them with an accommodation that allows them to perform the essential functions of their job.[252]

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[249] EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

[250] EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002).

[251] *See, e.g.*, *Service v. Union Pac. R.R. Co.*, 153 F. Supp. 2d 1187 (E.D. Cal. 2001) (finding a triable issue of whether the employer reasonably accommodated the asthmatic employee by providing an air freshener and banning smoking in his presence, where the plaintiff claimed that the measures did not alleviate his problems).

[252] *Brooks v. City of Pekin*, 95 F.4th 533, 538 (7th Cir. 2024) (finding the employer's failure to provide the plaintiff's preferred accommodation was "irrelevant" because it offered other accommodations); *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir. 2012) ("Although a public entity must make reasonable accommodations, it does not have to provide a disabled individual with every accommodation he requests or the accommodation of his choice." (internal quotation omitted)); *see also McKane v. UBS Fin. Servs., Inc.*, 363 F. App'x 679, 681 (11th Cir. 2010) (quoting *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000)) ("An employee with a disability is not entitled to the accommodation of his choice, but only to a reasonable accommodation."); *Murray v. Warren Pumps, L.L.C.*, 2013 WL 5202693, at *10- (D. Mass. Sept. 11, 2013) ("An employer is not required to provide an

1.6(b)(ii) *Accommodations Beyond the Essential Functions of the Job*

In *Feist v. Louisiana*, the Fifth Circuit Court of Appeals addressed whether an employer must provide only an accommodation designed to help the employee perform the essential functions of the job *or* must an employer do more and provide an accommodation that allows an employee to enjoy all privileges and benefits of employment as enjoyed by similarly-situated employees without a disability.[253] The Fifth Circuit held that an accommodation (in this case, a designated parking space for an employee with a knee injury) need not be directly tied to performance of essential job functions. As such, certain accommodations that help enable the individual to get to work or access the workplace may be required. Although the court expressly declined to rule on whether the requested accommodation was reasonable, the holding requires employers to consider accommodation requests that are not tied directly to performance of essential job functions.

1.6(b)(iii) *EEOC's Guidance on Reasonable Accommodation & Undue Hardship*

The EEOC's *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, updated in 2002, covers numerous basic principles and subjects of frequent inquiry from employers.[254] For example, employers need not lower standards of production, as to either quantity or quality, to accommodate individuals with a disability. Further, the Guidance discusses the complicated issues surrounding an employer's obligations to reasonably accommodate individuals with a disability by reassigning them to a vacant position. Employers should note, however, that analogous state laws may differ from the EEOC's position on transfers.

The EEOC's Guidance also discusses the interaction between the Family and Medical Leave Act (FMLA) and the ADA with respect to leaves of absence and the employee's right to return to the employee's former position (under the FMLA) or the same or an "equivalent" position (under the ADA). On a similar note, the Guidance repeats the EEOC's position that employers may not apply a "no fault" absenteeism policy to the detriment of individuals with a disability. It explains the EEOC's interpretation of the requirements regarding indefinite leaves of absence and the need to consider relaxing the requirements of collective bargaining agreements.

The EEOC issued a resource document in May 2016 addressing the rights of employees with disabilities who seek leave as a reasonable accommodation under the ADA. Although this document did not mark a change in course from existing EEOC positions, it shed some light on the priority that the EEOC places on leave issues. It explains, for example, that an employee who informs their employer that a disability may cause periodic unplanned absences from work is considered to have requested a reasonable accommodation.[255]

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employee's first choice of accommodation, but must provide reasonable accommodation to allow the employee to perform the essential functions of his job.").

[253] 730 F.3d 450 (5th Cir. 2013); *Frazier v. Donahoe*, 2016 WL 1045853, at **5-6 (D. Md. Mar. 15, 2016) (citing *Crawford v. Union Carbide Corp.*, 1999 WL 1142346, at *4 (4th Cir. Dec. 14, 1999)) ("[A]n employer is not obligated to provide an employee the accommodation he or she requests or prefers; the employer need only provide some reasonable accommodation."). *See also Bruno v. Wells-Armstrong*, 93 F.4th 1049, 1054 (7th Cir. 2024) (denial of requested accommodation, which was not required for essential job functions, did not violate the ADA).

[254] EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002), *available at* https://www.eeoc.gov/policy/docs/accommodation.html.

[255] EEOC, Publication, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), *available at* https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

In 2015, the EEOC also published two pieces addressing workplace rights for individuals with HIV: (1) *Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA*;[256] and (2) guidance intended for the health care providers of individuals with HIV, which discusses how these providers can support requests for reasonable accommodation.[257]

Finally, Executive Order No. 13164 requires federal agencies to establish effective written procedures for the processing of requests for reasonable accommodations. In October 2000, in response to Executive Order No. 13164, the EEOC issued its Guidance, *Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*, which provides further insight into the reasonable accommodation obligation.[258]

1.6(c) *Types of Accommodations*

1.6(c)(i) *Leaves, Indefinite Leaves & Inflexible or Maximum Leave Policies*

Leave is a unique accommodation because it does not immediately involve enabling an employee to perform the essential functions of a job. It involves absence from the job. As explained by the EEOC, leave qualifies as a reasonable accommodation "when it enables an employee to return to work following the period of leave." Employees with disabilities may need leave for a variety of reasons, including physical therapy, recuperation from an illness or the manifestation of a disability, obtaining repairs on wheelchairs or other assistive devices, or training a service animal.[259] As with the FMLA, leave may even be intermittent, depending on the circumstances.

According to the EEOC (and most federal courts), the ADA mandates that employers "consider providing unpaid leave to an employee with a disability . . . if the employee requires it."[260] An employer covered by the ADA must seriously explore leave requests even if: (1) the employer does not provide leave benefits; (2) the employee is not eligible for benefits under any company leave policy; or (3) the employee already exhausted available leaves of absence, including under a company policy or the FMLA. According to the EEOC, leave must be granted unless another reasonable accommodation option would be effective (*e.g.*, would enable the employee to perform their essential job functions). Furthermore, while an extended medical leave may be a reasonable accommodation, an employer generally does not have to provide a leave of indefinite duration where it would pose an undue hardship on the employer's

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[256] EEOC, Publication, *Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA*, *available at* https://www.eeoc.gov/eeoc/publications/hiv_individual.cfm.

[257] EEOC, Publication, *Helping Patients with HIV Infection Who Need Accommodations at Work*, *available at* https://www.eeoc.gov/eeoc/publications/hiv_doctors.cfm.

[258] EEOC, Policy Guidance, *Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*, No. 915.003 (Oct. 20, 2000), *available at* https://www.eeoc.gov/policy/docs/accommodation_procedures.html.

[259] EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the ADA*, No. 915.002, at Question 16 (Oct. 17, 2002), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

[260] EEOC, Publication, *Employer-Provided Leave and the Americans with Disabilities Act*, at Section on Granting Leave as a Reasonable Accommodation (May 9, 2016), *available at* https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act.

operations.[261] Repeated requests for an extension can also be construed to be a request for indefinite leave.[262]

In *Robert v. Board of County Commissioner of Brown County*, the Tenth Circuit Court of Appeals held that an employee on leave must provide an employer with a reasonable estimate of when they will be able to return and perform all essential functions for a leave of absence to be a reasonable accommodation.[263] The plaintiff's position as a county supervision officer required her to visit offenders at their homes or in jail, attend hearings, and supervise drug testing. Due to a sacroiliac joint dysfunction and two separate surgeries during the course of her employment, the plaintiff was unable to perform all of the essential functions of her job, including visiting offenders and supervising drug screenings. The court found that there are two limits on the bounds of reasonableness for leave as an accommodation. First, the employee must provide the employer with an estimated date when essential job duties can be resumed because without such an end date an employer cannot assess whether a temporary exemption from these duties is reasonable. Second, there is a durational limit, namely that "[a] leave request must assure an employer that an employee can perform the essential functions of her position in the 'near future.'"[264] The plaintiff's claim failed, according to the court, because there was no evidence that her employer had any estimation of when she would resume the fieldwork functions essential to her position. Moreover, because the plaintiff testified she would need near full mobility to ensure her safety during offender visits, the employer would have to provide her with an indefinite reprieve from those functions—an accommodation the court held was not reasonable as a matter of law.

Following the *Robert* opinion, the Tenth Circuit provided greater detail on the appropriate durational limit of a leave in *Hwang v. Kansas State University*.[265] The university denied a professor's request for additional time after she received a six-month paid leave of absence—attributing the denial to a school policy allowing no more than six months' sick leave under any circumstances (often referred to as an "inflexible" or "no-fault" leave policy). Stating that "reasonable accommodations . . . are all about enabling employees to work, not to not work,"[266] the court held that a six-month, inflexible leave policy is virtually always "more than sufficient" to comply with the Rehabilitation Act, and by implication, the ADA.[267] The court

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[261] EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002); *see also Sarkisian v. Austin Preparatory Sch*., 85 F.4th 670, 675–76 (1st Cir. 2023) (finding regular, in-person attendance was an essential function of the employee's job and therefore her request for additional extended leave without a specific end date was not a reasonable accommodation); *Larson v. United Natural Foods W. Inc.*, 518 F. App'x 589, 591 (9th Cir. 2013) ("an indefinite, but at least six-month long leave of absence . . . is not a reasonable accommodation").

[262] *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (employee's repeated requests for leave showed that disability was not improving and, therefore, his repeated requests had become an unreasonable request for indefinite leave); *Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000) (suggested accommodation of indefinite leave with no clear prospect for returning to work, after the employer had already provided 18 months of paid and unpaid leave, was not reasonable).

[263] 691 F.3d 1211 (10th Cir. 2012).

[264] 691 F.3d at 1218 (citing to an Eighth Circuit Court of Appeals case, *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003), which held that a six-month leave request was too long to be reasonable).

[265] 753 F.3d 1159 (10th Cir. 2014); *see also Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413 (5th Cir. 2017) (indefinite leave, or leave with no intention to return at all, is not reasonable).

[266] 753 F.3d at 1162.

[267] 753 F.3d at 1164; *see also Smithson v. Austin*, 86 F.4th 815, 822 (7th Cir. 2023) ("…requiring an employee to use sick leave for an absence due to illness for a job where in-person attendance is required is not prohibited under

found that, in nearly all cases, an employee who cannot return to work within six months (or potentially sooner) is not capable of performing the essential functions with a reasonable accommodation and, therefore, cannot sustain a claim for discrimination.

The Seventh Circuit Court of Appeals drew another line in the sand, clarifying that "a long-term leave of absence cannot be a reasonable accommodation."[268] There, the plaintiff had taken all 12 weeks of FMLA leave due to a back injury that aggravated a preexisting condition. While on leave, he informed his employer that he would require surgery and requested an extension of his medical leave for at least two more months. The plaintiff's employer responded that, while he would be welcome to reapply in the future, his employment would expire along with his FMLA leave period if he failed to return to work. On the final day of his FMLA leave, the plaintiff underwent surgery and later sued for his employer's alleged failure to accommodate. The parties agreed that the plaintiff had a disability but disputed whether the desired multi-month leave of absence constituted a reasonable accommodation. The plaintiff, supported by the EEOC as *amicus curiae*, argued that long-term medical leave should be considered a reasonable accommodation as long as it is of a fixed duration, is requested in advance, and is likely to enable the employee to perform the essential job functions upon return to the workplace.[269] The Seventh Circuit rejected this approach, however, because it would transform the ADA into an "open-ended extension of the FMLA."[270] In reaching this holding, the court emphasized that an extended leave does not provide an individual with disabilities with the "means to work; it excuses his not working."[271] The court relied on prior precedent, explaining that the inability of a person to work for months at a time actually removes that individual from ADA coverage.[272]

Just a few weeks after *Severson*, the Seventh Circuit reiterated this interpretation in *Golden v. Indianapolis Housing Agency*.[273] The plaintiff, a fifteen-year employee, requested and exhausted FMLA leave following a breast cancer diagnosis and surgery. Her employer granted her an additional four weeks of unpaid medical leave but required that she return to work on a specified date thereafter. The night before her scheduled return, she e-mailed human resources personnel to request a further, unspecified leave of absence pursuant to the employer's general unpaid leave policy, which permitted leave of up to six months when no other type of leave applied. The employer rejected that request (perhaps due to its untimeliness) and the employee sued, alleging that her employer unlawfully terminated her and failed to accommodate her disability by extending her leave for an additional six months. The Seventh Circuit

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the Rehabilitation Act or the ADA"). *But see Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000) (employer failed to illustrate that the employee's requested accommodation of more than one year of unpaid leave to receive cancer treatment was unreasonable where it had temporary help available at no additional cost).

[268] *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017).

[269] 872 F.3d at 482; *see also Larson v. United Natural Foods West, Inc*., 518 F. App'x 589, 591 (9th Cir. 2013) (leave of more than six months with only possibility that employee might one day be able to return was not reasonable); *Holt v. Kyocera Document Solutions Ala., L.L.C.*, 2020 WL 2747112 (N.D. Ala. May 27, 2020) (extending five-month leave by an additional four months was not reasonable, as such an accommodation would not enable the employee to perform his job duties in the present or in the immediate future) (*citing Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003)); *Brangman v. AstraZeneca, L.P.*, 952 F. Supp. 2d 710, 723 (E.D. Pa. 2013) (focus on evaluating reasonableness of leave request must be on enabling employee to perform essential job functions "in the near future").

[270] 872 F.3d at 482.

[271] 872 F.3d at 481.

[272] 872 F.3d at 481 (citing *Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir. 2003)).

[273] 698 F. App'x 835 (7th Cir. 2017).

readily concluded that "the 'qualified individual' requirement is fatal to [plaintiff's] case."[274] The court held that the request for six months' leave, in addition to the leave provided under the FMLA, removed the plaintiff from the class of individuals protected by the ADA. It thus affirmed judgment for the employer, because the plaintiff was "not a qualified individual." A dissenting judge questioned the wisdom of *Severson* and *Golden*, however, stressing that the court's "[h]olding that a long term medical leave can never be part of a reasonable accommodation does not reflect the flexible and individual nature of the protections granted employees" by the ADA.[275] According to the dissent, the court strayed from the text of the ADA, which requires reasonable accommodations of all kinds, unless undue hardship can be shown.[276]

Consistent with the dissent in *Golden*, the EEOC stands in opposition to the stance taken by these courts on inflexible or no-fault leave policies. According to the EEOC, these policies violate the ADA because an employer must modify its policy as a reasonable accommodation to provide an employee with additional leave unless: (1) there is another effective accommodation that would enable the employee to perform the essential functions of the position; or (2) granting additional leave would cause an undue hardship.[277] Employers with inflexible leave policies may face a risk of litigation by the EEOC, although the success and assessment of such claims may vary by jurisdiction.[278]

Demonstrating the EEOC's continued interest in no-fault leave or attendance policies, in *EEOC v. Austal USA, L.L.C.*, the EEOC sued on behalf of an employee with diabetes who was terminated when he exceeded the number of allowances he was allotted under an attendance policy.[279] The employer argued that the employee's position in logistics to inspect inventory and deliver materials necessitated his physical presence at the facility. The employee was therefore no longer a qualified individual with a disability because he could not perform the essential job function of attending work regularly. In response, the EEOC contended that the company should have provided additional medical leave to the employee as a reasonable accommodation. The court rejected this argument, explaining that additional leave would not resolve the issue. The employee's absences were unpredictable in nature, and he could not follow any work schedule on a regular basis. For that reason, modifying his hours or reducing them would not be effective in allowing him to perform the essential functions of the job. In addition, the employee's unpredictable absences were likely to be permanent. If he had been capable of returning to work on a regular basis after a definite amount of time, a different result may have occurred. Accordingly, the court granted summary judgment for the employer.

Ultimately, although no-fault attendance policies can simplify attendance discipline, employers should still engage in individualized assessment to determine if a modification to the policy would be a reasonable accommodation before discipline is assessed.

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[274] 698 F. App'x at 837.

[275] 698 F. App'x at 837 (Rovner, J., dissenting).

[276] 698 F. App'x at 837-38 (Rovner, J., dissenting).

[277] EEOC, Publication, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), *available at* https://www.eeoc.gov/eeoc/publications/ada-leave.cfm; EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002, Question 17 (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

[278] *See, e.g.*, *EEOC v. United Parcel Serv.*, No. 1:09-cv-05291 (N.D. Ill.) (filed Aug. 27, 2009 and concluded by consent decree in 2017, resulting in injunctive relief and payments of more than $1.7 million to claimants).

[279] 447 F. Supp. 3d 1252 (S.D. Ala. 2020).

1.6(c)(ii) *Transfers & Light-Duty Assignments*

The ADA lists transfers or "reassignment to a vacant position" as a possible accommodation. Employers have struggled with the extent of this obligation when an employee with a disability seeks reassignment to a vacant, lateral position—but other, more qualified employees in the workforce also seek the vacant position. Circuits are split on the issue. In *EEOC v. United Airlines, Inc.*, the Seventh Circuit Court of Appeals retreated from its previous position and held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."[280] This decision supports the EEOC's approach of bestowing favored status upon individuals with disabilities when compared to individuals without disabilities who are competing for the same vacant positions. It also leaves employers in the difficult position of handling competing requests for reassignment by more than one qualified employee with a disability or by employees who belong to another protected class.[281]

An employer need not create a position or transfer an employee to a position that would not have been available for similarly situated employees without disabilities to apply for and obtain. For example, the Fourth Circuit Court of Appeals held that an employee was not entitled to a requested job-sharing arrangement as a reasonable accommodation, where that position did not yet exist.[282] In *Duvall v. Georgia-Pacific Consumer Products*, the Tenth Circuit Court of Appeals considered when a position was "vacant" for purposes of reasonable accommodation under the ADA.[283] The plaintiff requested, as a reasonable accommodation, reassignment to his old position—then occupied by a temporary contract worker pending permanent outsourcing of the department. The court affirmed summary judgment for the employer because the plaintiff could not establish the position in question was a vacant position open to employees, rather than temporary workers.

Courts also have addressed the related (if somewhat converse) question of whether "reassignment to a vacant position is a *permissible* accommodation under the ADA when the employee wishes to stay in their current position and can perform the essential functions of that position with reasonable

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[280] 693 F.3d 760, 761 (7th Cir. 2012) (reversing *EEOC v. Humiston-Keeling*, 227 F.3d 1024, 1029 (7th Cir. 2000), which held the ADA did not require reassignment of an employee with a disability to a job for which there was a better applicant, provided the employer's policy consistently and honestly hired the best applicant), *cert. denied*, 569 U.S. 1004, 133 S. Ct. 2734 (2013).

[281] Note that there is a federal circuit split regarding how employers should handle reassignments as a reasonable accommodation. As discussed above, the Seventh Circuit, along with the Tenth and D.C. Circuits, agree with the EEOC's position that the ADA requires employers to provide employees with disabilities preference when reassigning an individual as a reasonable accommodation. In contrast, the Second, Fifth, Sixth, Eighth, and Eleventh Circuits have held that the ADA does not require an employer to reassign an employee with a disability to a vacant position, when a more qualified employee also seeks the same open position. *See Shannon v. New York City Transit Auth.*, 332 F. 3d 95 (2nd Cir. 2003); *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995); *Hedrick v. Western Rsrv. Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004); *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012); *Lors v. Dean*, 595 F.3d 831 (8th Cir. 2010); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1345 (11th Cir. 2016); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998).

[282] *Perdue v. Sanofi-Aventis U.S., L.L.C.*, 999 F.3d 954, 961 (4th Cir. 2021) (holding "that a part-time job-share position that requires managerial approval to create is not a reasonable accommodation in the ordinary run of cases because the ADA does not require companies to create new positions to accommodate their employees with disabilities").

[283] 607 F.3d 1255 (10th Cir. 2010).

accommodations." Consistent with other appellate courts, the U.S. Court of Appeals for the Fourth Circuit concluded that such a unilateral transfer to an unwanted position would constitute a failure to accommodate.[284]

Some appellate courts hold that employers may maintain a corporate succession system that selects the most qualified applicant for a position, even if that means an employee with disabilities is denied reassignment.[285] In *Elledge v. Lowe's Home Centers*, the plaintiff had multiple knee surgeries that resulted in permanent restrictions on his ability to drive to, and walk through, the various stores he managed in his position of Market Director of Stores (MDS).[286] The employer offered several accommodations—*e.g.*, the option of a motorized scooter, which the plaintiff ignored, and other accommodations such as a temporary light-work schedule, which the employer then extended. Ultimately, the employer concluded that the plaintiff was unable to perform the essential functions of his position even with the accommodations and offered him reassignment to a manager-level role, which would have paid less. The plaintiff refused, arguing that he be reassigned to one of two other director-level positions. After concluding that the plaintiff was not able to fulfill the essential functions of his job, the Fourth Circuit Court of Appeals held that employers are not required "to construct preferential accommodations that maximize workplace opportunities for their disabled employees."[287] In other words, while the plaintiff was able to apply for the vacant director-level positions, the employer was not required to forego its "best-qualified hiring system" and choose him over more qualified applicants. To do otherwise would:

> recast[] the ADA—a shield meant to guard disabled employees from unjust discrimination—into a sword that may be used to upend entirely reasonable, disability-neutral hiring policies and the equally reasonable expectations of other workers.[288]

Restrictions on reassignments set by company policy may be honored as noted above, but an employer's position against reassignment is weakened if it has deviated from or misrepresented its established policy in other cases. In *Tobin v. Liberty Mutual Insurance Co.*, an employee with bipolar disorder repeatedly requested that the company transfer him to a sales position with different accounts, after receiving several performance warnings for failing to meet quotas in his own department.[289] The plaintiff claimed this reassignment would have enabled him to meet his quotas. The defendant-company asserted it was not required to provide the accommodation because the accounts the plaintiff requested were assigned by merit. Since the plaintiff's performance did not meet company expectations, giving him new accounts would have "altered the nature of [his] job requirements and the essential functions of his employment."[290] The First Circuit Court of Appeals disagreed based on the plaintiff's argument that the accounts he requested were not solely assigned based on merit, but rather an analysis of several factors. As such, the court could not determine that reassignment was an unreasonable accommodation.

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[284] *Wirtes v. City of Newport News*, 996 F.3d 234, 240-43 (4th Cir. 2021) (collecting cases).

[285] *See, e.g.*, *Elledge v. Lowe's Home Ctrs.*, 979 F.3d 1004 (4th Cir. 2020); *EEOC v. St. Joseph's Hosp.*, 842 F.3d 1333 (11th Cir. 2016) (ADA does not require reassignment without competition for, or preferential treatment of, the disabled).

[286] 979 F.3d 1004.

[287] 979 F.3d at 1015.

[288] 979 F.3d at 1015.

[289] 433 F.3d 100 (1st Cir. 2005), *aff'd*, 553 F.3d 121 (1st Cir. 2009).

[290] *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 136 (1st Cir. 2009).

An employer has no legal obligation to create a new position for a worker with a disability.[291] This rule also means that if an employer does not have light-duty jobs, an employee who develops a disability during employment is not entitled to the creation of such a position.[292] *EEOC v. Womble Carlyle Sandridge & Rice* dealt with an employee who worked at law firm in an office services job in which many functions required heavy lifting.[293] Following a diagnosis of lymphedema, a condition caused by breast cancer, she had difficulties lifting and suffered a work-related injury while lifting. This led to a lifting restriction of no more than 10 pounds, which was accommodated by providing light-duty assignments for approximately six months. Some months later, the employee's restrictions became permanent, which led to reassessing the employee's capabilities. After the determination was made that there were no available alternative jobs, the employee was placed on medical leave and terminated after the permitted leave expired. In affirming summary judgment in favor of the employer, the Fourth Circuit Court of Appeals held the employer was not required to excuse the employee permanently from the lifting tasks "because doing so would force [the employer] to create a modified light-duty position, which the ADA does not require," nor was the employer required to permanently assign other employees to help the affected employee with all heavy lifting tasks because that "would in effect reallocate essential functions, which the ADA does not require."[294]

Similarly, if an employer's practice is to provide light-duty work solely as a temporary measure for employees recovering from temporary injuries, the employer may argue that no permanent light-duty position is available to an employee who cannot perform the essential functions of their regular job.[295] Indeed, the Tenth Circuit Court of Appeals has stated that an employee's "request for an indefinite extension of light-duty status [is] unreasonable as a matter of law."[296] Nonetheless, an employee's entitlement to regular light-duty work as a reasonable accommodation may depend upon the employer's past practice regarding such assignments, particularly assignments to employees without disabilities, and employers should know the risks associated with providing such assignments. In addition, the EEOC has found that where an employer reserves light-duty positions for employees with occupational injuries, the ADA requires the employer to consider reassigning an employee with a disability who is not occupationally injured to such a position as a reasonable accommodation.[297]

The principles articulated in the U.S. Supreme Court's decision in *Young v. United Parcel Service*, *Inc*.,[298] a pregnancy discrimination case, may also be instructive in the ADA realm. In *Young*, a part-time delivery

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[291] *Duvall v. Georgia-Pacific Consumer Prods., L.P.*, 607 F.3d 1255, 1261 (10th Cir. 2010) (employers are not required to create a new job for the purpose of reassigning an employee to that job); *see also EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) (holding that the ADA does not require reassignment "when it would mandate that the employer bump another employee out of a particular position").

[292] *Davidson v. Lagrange Fire Dist.*, 523 F. App'x 838 (2d Cir. 2013) (firefighter's failure to accommodate claim failed because her employer was not required to create a light-duty position where no such positions existed for career firefighters).

[293] 616 F. App'x 588 (4th Cir. 2015).

[294] 616 F. App'x at 592-93.

[295] *Wardia v. Justice & Public Safety Cabinet Dep't of Juvenile Justice*, 509 F. App'x 527 (6th Cir. 2013) (request for an accommodation by an individual with a disability was not reasonable because it would require employer to convert a temporary or rotating light-duty position to a permanent position).

[296] *Frazier-White v. Gee*, 818 F.3d 1249, 1256 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 592 (2016).

[297] EEOC, Enforcement Guidance, *Workers' Compensation and the ADA*, No. 915.002 (Sept. 3, 1996), *available at* https://www.eeoc.gov/policy/docs/workcomp.html.

[298] 135 S. Ct. 1338 (2015).

driver requested a light-duty assignment as an accommodation because her doctor recommended she lift no more than 20 pounds. Like many employers, the company offered light-duty assignments to employees who suffered on-the-job injuries and other categories of employees, such as those with disabilities recognized by the ADA. While laying out a framework for pregnancy discrimination claims involving light-duty assignments, the Court was not willing to go so far as to afford "most-favored-nation status" on pregnant women.[299] In other words, the Court did not agree with the plaintiff's argument that an employer must provide the same accommodation to pregnant employees, irrespective of any other criteria, every time it accommodates even a single non-pregnant employee. This same limitation may or may not be applicable to individuals with disabilities—on one hand, employers must provide reasonable accommodations to allow employees with disabilities to perform their jobs and this might well require temporary light-duty assignments, but, on the other hand, such individuals do not necessarily need to be granted "most-favored-nation status" over other individuals seeking light-duty assignments for various reasons.

1.6(c)(iii) *Job Restructuring & Working from Home*

The term *job restructuring* refers to modifying a job so a person with a disability can perform the essential functions of the position. Barriers to performance may be removed by eliminating nonessential elements of the job, reassigning nonessential tasks, exchanging assignments with other employees and redesigning procedures.[300]

Given that an employer is not required to reassign job functions that are essential to the position,[301] cases often hinge on whether certain tasks are deemed essential.[302] In *Filar v. Board of Education of the City of Chicago*, the Seventh Circuit Court of Appeals held unreasonable a request by a substitute teacher, who had osteoarthritis and could no longer drive, to only be assigned to vacancies at four schools close to public bus stops.[303] The employer argued that an essential function of a substitute teacher is to be available to accept any assignment in any school that becomes available. The court not only found that the teacher's request would have created an administrative burden and been outside of the school's authority under the collective bargaining agreement, but it also would have awarded the teacher preferential treatment (which the ADA does not require).

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[299] 135 S. Ct. at 1350.

[300] *See* 29 C.F.R. pt. 1630, app. § 1630.2(o); *see also Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894 (8th Cir. 2006) (although employees typically drove between customer locations, there was enough evidence for a jury to conclude that the ability to drive was not an essential function of a merchandiser—particularly where the plaintiff argued he could have arranged for his own transportation between locations).

[301] *See Stevens v. Rite Aid Corp.*, 851 F.3d 224 (2d Cir. 2017) (overturning verdict for pharmacist with needle phobia, who refused to give immunizations, because he could not perform an essential function of his job); *Lang v. Wal-Mart Stores E., L.P.*, 813 F.3d 447, 456 (1st Cir. 2016) ("But under the ADA, an employer is not required to accommodate an employee by exempting her from having to discharge an essential job function.").

[302] *Compare Turner v. Hershey Chocolate USA*, 440 F.3d 604 (3d Cir. 2006) (enough factual questions existed on whether the ability to rotate between positions was an essential function of a production line inspector to allow a jury to decide whether the request for job restructuring was reasonable), *with Watson v. Lithonia Lighting & Nat'l Serv. Indus., Inc.*, 304 F.3d 749 (7th Cir. 2002) (plaintiff's request for an exemption from the employer's task rotation system was not a reasonable accommodation because there was a business purpose to the rotation system and she could not show that exceptions had been made for other employees).

[303] 526 F.3d 1054 (7th Cir. 2008).

Requiring coworkers to assume the essential job functions of an employee with a disability or expecting coworkers to assist the employee continually are outside the scope of reasonable job restructuring. For example, the Ninth Circuit Court of Appeals, in *Dark v. Curry County*, held that an employer did not have to reassign the duty of transporting heavy machinery to a coworker where the plaintiff's epilepsy rendered him unable to drive.[304]

Job restructuring may be necessary where an employee has a disability because of a work-related injury. Although most workers' compensation laws do not require an employer to make a reasonable accommodation for a disability, an employee unable to perform their customary job duties because of an occupational injury might trigger the ADA's reasonable-accommodation obligation. An employer cannot refuse to return an employee with a disability to work before the employee is fully recovered from the work-related injury, unless the employer can show that the employee cannot perform the essential functions of that job with or without reasonable accommodation or that the employee would pose a direct threat. The EEOC has determined that an employer cannot always satisfy its ADA obligation to provide reasonable accommodation for an employee with an occupational injury by placing that person in a workers' compensation vocational rehabilitation program because an employee's rights under the ADA are separate from workers' compensation entitlements. Thus, the ADA requires an employer, absent undue hardship, to accommodate an employee in the employee's current position through job restructuring or some other modification. On the other hand, according to the EEOC, vocational rehabilitation services through the workers' compensation system can be a reasonable accommodation if all parties agree to proceed in that manner.

Employers also must determine whether working at home—also referred to as "telecommuting" or "teleworking"—is an option for an employee with a disability. This issue has taken on renewed significance and more sympathetic treatment by courts and the EEOC since the COVID-19 pandemic (discussed more fully in **2.2(d)**). The Ninth Circuit Court of Appeals held that working at home may be a reasonable accommodation when the essential functions of the position can be performed at home and the arrangement does not cause undue hardship for the employer.[305] In *Humphrey v. Memorial Hospitals Association*, a medical transcriptionist with a disability requested a work-at-home position to accommodate her obsessive compulsive disorder. The court held that the employer was not entitled to summary judgment because the plaintiff might have been able to perform the essential functions of her job with the accommodation of a work-at-home position—particularly where the employer allowed some of its transcriptionists to work from home.[306] The EEOC has also long supported telecommuting as a potential reasonable accommodation.[307]

Earlier cases suggested that telecommuting is not always a reasonable accommodation, and in many cases—including recent cases—courts took a more skeptical view of telecommuting.[308] In *Mulloy v.*

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[304] 451 F.3d 1078 (9th Cir. 2006).

[305] *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

[306] 239 F.3d at 1137.

[307] EEOC, *Work at Home/Telework as a Reasonable Accommodation*, Question 4 (Feb. 3, 2003), *available at* https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation.

[308] *See, e.g.*, *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 809 (6th Cir. 2020) (work-from-home accommodation not shown to be related to plaintiff's disability; further holding that, "The ADA is not a weapon that employees can wield to pressure employers into granting unnecessary accommodations or reconfiguring their business operations."); *Fisher v. Vizioncore, Inc.*, 429 F. App'x 613, 616 (7th Cir. 2011) (plaintiff's proposed accommodation to telecommute at will, with no advance notice, was unreasonable); *Gomez-Gonzalez v. Rural*

Acushnet Co., the First Circuit Court of Appeals held that an engineer's request to work via webcam from his home was unreasonable because it was essential for engineers in the plaintiff's position to be physically present to see the machines and interact with personnel at the plant.[309]

As discussed in **1.5(b)(ii)**, the Sixth Circuit Court of Appeals determined that a request to telecommute four days a week by an individual in a position that required personal interaction with suppliers and group problem solving with other team members was unreasonable.[310] After a three-judge panel first ruled that the plaintiff's request to telecommute *could* be a reasonable accommodation,[311] the full court reversed and held that on-site job attendance was an essential function of the position. The court concluded that its decision was not based on a "clean slate," rather the "general rule" is that "an employee who does not come to work cannot perform any of his job functions, essential or otherwise."[312] The court also determined that the employee's proposal of up to four days of telecommuting, which removed the essential function of being on the job site, was unreasonable. In this pre-COVID-19 case, the court rejected the EEOC's view that technology created a genuine dispute of fact as to whether regular on-site attendance is essential.[313] Specifically, the court held that the technologies identified by the plaintiff—e-mail, computers, telephone, and limited video conference—were "equally available when courts around the country uniformly held that on-site attendance is essential for interactive jobs."[314]

A more recent decision by the Sixth Circuit may have weakened the position against telecommuting. In *Hostettler v. College of Wooster*, the Sixth Circuit held that an employee's full-time presence at the workplace is not always an essential job function.[315] Consequently, the decision undermines the deference often afforded to employers in determining whether a particular function is an "essential" job function. The court's decision also appears to eliminate—at least within the Sixth Circuit—the argument that an accommodation permitting an employee to work less than full-time hours in a full-time position is *per se* unreasonable.

One decision from a federal district court provides perhaps a new perspective on telework, based on experiences during the COVID-19 pandemic. In *Peeples v. Clinical Support Options, Inc.*, a plaintiff obtained

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Opportunities, 626 F.3d 654 (1st Cir. 2010) (unreasonable to request increased allowance of work from home for individual in management position responsible for supervising others); *Rauen v. United States Tobacco Mfg.*, 324 F.3d 891 (7th Cir. 2003) (discretion sought by individual who wanted to telecommute was not reasonable); *Kvorjak v. Maine*, 259 F.3d 48 (1st Cir. 2001) (individual would not be able to perform all of the job's essential functions at home); *Heaser v. Toro Co.*, 247 F.3d 826 (8th Cir. 2001) (same); *McEnroe v. Microsoft*, 2010 WL 4806864 (E.D. Wash. Nov. 18, 2010) (previous accommodation of telecommuting was not required for a new position sought by the employee as a promotion because in-person attendance was determined to be an essential function of that job).

309 460 F.3d 141, 152 (1st Cir. 2006).

310 *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).

311 752 F.3d 634 (6th Cir. 2014), *vacated and en banc hearing granted*, 2014 U.S. App. LEXIS 17252 (6th Cir. Aug. 29, 2014).

312 782 F.3d at 761 (citations omitted).

313 782 F.3d at 765.

314 782 F.3d at 765.

315 895 F.3d 844 (6th Cir. 2018).

a rare preliminary injunction to allow continued teleworking.[316] There, a managerial employee was directed to return to the physical workplace but requested to resume teleworking—based on his physician's recommendation—as an accommodation for his asthma condition and increased vulnerability to COVID-19 during the pandemic. The employer refused this accommodation and threatened to terminate the employee if he continued teleworking. The court accepted evidence that the employee could perform his essential functions (even citing an admission from his supervisor) and held that the employee demonstrated that he was likely to succeed on the merits of his failure to accommodate claim. It rejected the argument that masks and other safety barriers were a sufficient alternative in this instance. The court enjoined the employer from terminating his employment and ordered the employer to permit the plaintiff to continue teleworking.

1.6(c)(iv) *Assistance with Commuting to and from Work*

Although some circuit courts have held that commuting to and from work falls outside the scope of employers' accommodation obligations under the ADA,[317] in *Nixon-Tinkelman v. N.Y. City Department of Health & Mental Hygiene*, the Second Circuit Court of Appeals reiterated that an employer may be required to assist with an employee's commute to work because "'there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work.'"[318] The plaintiff, who was hearing-impaired and had cancer, heart problems and asthma, requested assistance with her commute when her duty station was reassigned to Manhattan, rather than Queens, where she previously worked for some time. In remanding the case to the district court, the Second Circuit instructed that several factors should be considered when determining the reasonableness of a possible accommodation, including the number and location of the employer's offices and whether plaintiff could be transferred to a more convenient office without unduly burdening the employer. The court stated that while determining whether a particular commuting accommodation is reasonable is a fact-specific inquiry, in this case, accommodations to consider included transferring plaintiff to a location closer to her home, allowing plaintiff to work from home, or providing plaintiff with a car or parking permit.

Other circuit courts have also been willing to remand cases where district courts have "erred in requiring a nexus between the requested accommodation and the essential functions of [the plaintiff's] position."[319]

In *Feist v. Louisiana*, discussed in **1.6(b)(ii)**, the Fifth Circuit Court of Appeals looked to both the text of the statute and the EEOC's regulations to note that a reasonable accommodation does not need to relate to the performance of essential job functions.[320] It then held that providing a designated parking space for

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[316] 487 F. Supp. 3d 56 (D. Mass. 2020); *see also* EEOC, Press Release, *ISS Facility Services to Pay $47,500 to Settle Disability Discrimination Lawsuit* (Dec. 20, 2022), *available at* https://www.eeoc.gov/newsroom/iss-facility-services-pay-47500-settle-disability-discrimination-lawsuit.

[317] *See, e.g.*, *Kimble v. Potter*, 390 F. App'x 601 (7th Cir. 2010) (plaintiff whose vertigo prevented her from driving to work was not protected by the ADA because she could access other jobs in Chicago by foot or public transportation); *Carlson v. Liberty Mut. Ins. Co.*, 237 F. App'x 446 (11th Cir. 2007) (plaintiff whose epilepsy interfered with her ability to drive to work but had no impact on her ability to perform her job duties was not protected by the ADA); *EEOC v. Charter Comms., L.L.C.*, 2021 WL 5988637 (E.D. Wis. Dec. 7, 2021), *appeal filed* No. 22-1231 (7th Cir. 2022) (employer need not accommodate an employee's inability to drive at night, as the employee was capable of completing the functions of their job without the requested accommodation).

[318] 434 F. App'x 17 (2d Cir. 2011) (quoting *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1517 (2d Cir. 1995)).

[319] *Feist v. Louisiana*, 730 F.3d 458, 462 (5th Cir. 2013).

[320] 730 F.3d at 453.

an employee with a knee injury could be reasonable, particularly where the EEOC regulations provide that "reserved parking spaces" may constitute a reasonable accommodation.[321]

Similarly, in *Colwell v. Rite Aid Corp.*, the Third Circuit Court of Appeals ruled that the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work if the request is reasonable.[322] In *Colwell*, the plaintiff, whose vision impairment prevented her from driving at night, requested she only be scheduled for day shifts. In reversing summary judgment for the employee, the Third Circuit held that changing the plaintiff's work schedule to assist with her commute to work is an accommodation contemplated by the ADA. On similar facts, the Ninth Circuit Court of Appeals also ruled that shift changes that accommodate an employee's ability to commute to and from work can be reasonable accommodations.[323]

1.6(c)(v) *Modification of Worksite or Work Location*

An employer may be required to modify an employee's desk, workstation, or other equipment as a form of reasonable accommodation. Courts have held that an employer may also have the obligation to accommodate an employee by changing their work location within a facility. For example, in *Ekstrand v. School District of Somerset*, the Seventh Circuit Court of Appeals found that there was sufficient evidence for a jury to decide that the employer failed to accommodate a teacher with seasonal affective disorder, a form of depression, when it refused her repeated requests to change from a classroom with no exterior windows to one with natural light.[324] Critically, at trial, the teacher's doctor testified that: (1) natural light was crucial to her recovery; (2) her classroom without windows had been a major cause of her condition; and (3) she would have been capable of returning to work if she had been provided a classroom with natural light. This testimony, along with other evidence, led the appellate court to affirm the district court's denial of the school district's motion for judgment as a matter of law and to allow the jury verdict in favor of the teacher to stand.

1.6(c)(vi) *Use of Job Coaches*

According to the EEOC, an employer may be required to allow a temporary job coach to assist with training as a reasonable accommodation, barring undue hardship to the employer. A New York federal district court approved the use of a job coach to help an employee with a disability perform her job.[325] A developmentally impaired sales associate sued her retail employer, claiming it discriminated against her in violation of the ADA. Specifically, the employee claimed her employer denied her request for an accommodation in the form of a state-paid job coach to help her perform her job successfully. The parties reached a novel settlement. The employer agreed to implement a national policy of using job coaches to help employees with disabilities "go about their daily routines in [the] store." The intended role of the job coach is to "spend just enough time (and no more)" to support the employee. The job coach's presence at the store is planned to decrease gradually as the employee becomes more proficient.

Although other cases have seemed to approve the use of a job coach to help employees with disabilities adjust to a job, employers should know the job coach's role must not extend beyond training or teaching.

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[321] 29 C.F.R. pt. 1630, app. § 1630.2(o).

[322] 602 F.3d 495 (3d Cir. 2010).

[323] *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738 (9th Cir. 2010).

[324] 683 F.3d 826 (7th Cir. 2012).

[325] *EEOC v. Home Depot USA, Inc.*, No. 03-4860 (E.D.N.Y. Oct. 17, 2005).

A coach who essentially performs the employee's job can no longer be considered a reasonable accommodation.[326]

1.6(c)(vii) *Use of Service & Emotional Support Animals*

Another trend of which employers should be aware is using emotional support animals to aid individuals with mental or other impairments. Animals trained to provide emotional support have been proven to help alleviate symptoms of depression, social anxiety, and post-traumatic stress disorder.[327] Title I of the ADA, which governs employers' obligations to its employees, does not specifically define, or even mention, the term "service animal." The regulations under Title III of the ADA, which governs places of public accommodations, defines *service animal* as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability."[328] But there are no such bright-line tests under Title I. The restrictive definition of a service animal in the Title III regulations does not automatically translate to the Title I (employment) context, yet some of its principles—such as the need for the individual to keep the service animal under control–are persuasive.[329]

Before the COVID-19 pandemic, employee requests for assistance via both service and support animals in the workplace as an accommodation under the ADA had been rising precipitously. Given the pandemic's toll on the physical and mental health of the country, these requests can only be expected to rise as more people return to work. Employers are tasked with the challenge of separating and vetting legitimate requests by employees truly in need of an accommodation from cynical attempts by employees to self-diagnose themselves with questionable online "certifications" for support animals or simply by their desire to bring their pets to work.[330]

In *Edwards v. U.S. Environmental Protection Agency*, the court held that an employer did not have to allow an employee with partial paralysis and colitis to bring his 10-week-old puppy to work as a reasonable accommodation.[331] The court recognized the "consequences that would flow from requiring employers to grant such accommodations" and, while recognizing the value of canine companionship, "decline[d] to

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[326] *See, e.g.*, *EEOC v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277 (M.D.N.C. 2003) (temporary job coach who helped an employee learn to perform a job by herself would be a reasonable accommodation, but one who performed all job tasks for the employee would not).

[327] *See, e.g.*, *Wells v. State Manufactured Homes, Inc.*, 2005 WL 758463(D. Me. Mar. 11, 2005).

[328] 28 C.F.R. § 36.104. Effective January 1, 2021, the U.S. Department of Transportation tightened its rules related to service animals allowed on passenger flights. *See* U.S. Dep't of Transp., *Traveling by Air with Service Animals*, *available at* https://www.transportation.gov/sites/dot.gov/files/2020-12/Service%20Animal%20Final%20Rule.pdf.

[329] In *Bennett v. Hurley Med. Ctr.*, 86 F. 4th 314, 327-28 (6th Cir. 2023), the court analyzed a student's service animal-related claim under Title II of the ADA. The defendant, a public hospital, did not intentionally discriminate against the student due to her disability when it prevented her from bringing her service dog on her rotation, as the dog caused several allergic reactions among people on the floor. On the student's failure to accommodate claim, the court noted that service animals need not be accommodated "under every circumstance." The court examined whether the dog was a direct threat to the health or safety of others in the workplace "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities." After concluding that the accommodations necessary to mitigate the threat that the dog posed due to allergic reactions were unreasonable, the court found for the hospital.

[330] Littler has produced a training video in cooperation with Canine Companions for Independence, entitled "The Deal With Dogs: Unleashing Workplace Solutions to Service and Assistance Animals." *See* https://www.littler.com/innovation/workplace-training.

[331] 456 F. Supp. 2d 72 (D.D.C. 2006).

breach new ground and start down the slippery slope implicated by plaintiff's claim."[332] The court also noted the lack of case law in this area and, consequently, analyzed cases arising under the Fair Housing Act. In those cases, courts have been asked to resolve disputes between landlords and tenants that seek to avoid "no pet" policies by demonstrating that the animal is more like a disability aid (thus, required as a reasonable accommodation for a tenant with a disability) than a mere pet.[333]

In other cases, courts have held that employees may be entitled to the accommodation of an emotional support animal. For example, in *Assaturian v. Hertz Corp*., a federal court held that an employee who sought to bring his dog to work to aid with his depression and adjustment disorder could support a denial of an accommodation claim.[334]

1.6(d) *Undue Hardship Defense*

An employer is not required to undergo "undue hardship" to make reasonable accommodations. The employer bears the burden of showing undue hardship;[335] it cannot be assumed, and it is not enough for the employer simply to assert it will suffer undue hardship.[336] The ADA defines an *undue hardship* as an action that would require significant difficulty or expense to the employer when considered in light of the following factors:[337]

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility or facilities involved, the number of persons employed at the facility, and the effect on expenses and resources;
- the overall financial resources of the covered entity, the overall size and number of employees of the business, and the number, type, and location of its facilities;
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities to the covered entity; and

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[332] 456 F. Supp. 2d at 101-02; *see also Howard v. City of Sedalia,* 103 F.4th 536 (8th Cir. 2024) (finding for employer where employer refused to allow plaintiff's service dog as a reasonable accommodation, because the plaintiff did not identify an employer-sponsored benefit or privilege of employment that the proposed accommodation would enable her to access); *Hopman v. Union Pac. R.R*., 68 F.4th 394 (8th Cir. 2023) *cert. filed* Oct. 4, 2023 (where employer refused to allow plaintiff's service dog as a reasonable accommodation to ameliorate the effects of plaintiff's post-traumatic stress disorder and migraine headaches, the court sided with the employer finding that "mitigating pain is not an employer sponsored program or service," and therefore the employer's duty to provide equal benefits and privileges of employment did not extend to the service animal).

[333] *See* JoAnne Nesta Burnett, *Prescription Pets: Medical Necessity or Personal Preference*, 36 NOVA L. REV. 451 (2012).

[334] 2014 WL 4374430 (D. Haw. Sept. 2, 2014).

[335] *Roetter v. Michigan Dep't of Corr.*, 456 F. App'x 566, 569 (6th Cir. 2012).

[336] 29 C.F.R. pt. 1630, app. § 1630.15(d).

[337] 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(2). One appellate court, in an unpublished opinion, suggested that an employer may be found to have "failed to carry its burden of showing undue hardship, because [d]efendant was silent" as to certain undue hardship factors. *See Cleveland v. Federal Express Corp.*, 83 F. App'x 74, 80 (6th Cir. 2003).

- 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 facility's ability to conduct business.

Whether a particular accommodation will impose an undue hardship is determined on a case-by-case basis. In general, a larger employer will be expected to undertake greater efforts and expense to make accommodations than a smaller employer.[338] When cost is the grounds for a claim of undue hardship, the EEOC states that undue hardship is determined based on the net cost to the employer—taking into account, for example, the availability of funding to cover some of the expense from an outside source, such as a state rehabilitation agency, the employer's eligibility for certain tax credits or deductions to offset the cost, and the possibility that the individual with a disability will pay the difference.[339] When cost-based undue hardship is raised by the employer, courts have also looked to expense in the context of the organization's overall operations, rather than to the operational department or unit in question.[340] This helps to explain why supporting the affirmative defense of "undue hardship" can be difficult.

When an employer has already made exceptions to its policies, it is difficult for the employer to claim it would be an undue hardship to do the same for an individual with a disability. In *Taylor v. Rice*, the State Department claimed it would cause an undue hardship for it to waive its "worldwide availability" requirement for a U.S. Foreign Service applicant with HIV.[341] The District of Columbia Circuit Court of Appeals disagreed and reversed the award of summary judgment to the State Department because, among other things, it previously waived this requirement for twelve employees with asthma and it was the State Department's "day-to-day practice" to allow Foreign Service Officers to travel a few times a year for routine medical monitoring.[342] The court also disagreed with the lower court's finding that the applicant would experience "significantly-beneficial treatment" over other officers who would have to serve in the "least desirable and most-dangerous locations in [the plaintiff's] stead," and thus create undue hardship for the State Department, because the State Department had presented no evidence to support this proposition.[343]

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[338] *See* EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002, Question 45 (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html ("Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (*e.g.*, full-time versus part-time, salary versus hourly wage, permanent versus temporary).").

[339] *See* EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002).

[340] *See Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427(D. Md. 2016) (holding economic "undue hardship" associated with full-time sign language interpreter for nurse must be viewed in context of hospital's overall budget); *see also Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407 (4th Cir. 2015) (employer's reasonable accommodation budget is irrelevant).

[341] 451 F.3d 898 (D.C. Cir. 2006).

[342] 451 F.3d at 909-11; *see also Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004) (employer had not shown undue hardship by asserting that allowing a customer service supervisor to delegate accounting duties would "lower production and increase costs," particularly where the employer had permitted other supervisors to delegate this task).

[343] *Taylor*, 451 F.3d at 909 n.20.

1.6(e) *Seniority Systems*

An accommodation is presumed to be unreasonable if it conflicts with an employer's seniority system. Thus, an employer is not required to prove that violating the seniority system would pose an undue hardship. In *U.S. Airways v. Barnett*, the U.S. Supreme Court held that when a request by an employee with a disability for assignment to a particular job as a reasonable accommodation conflicts with employees with superior bidding rights under the employer's seniority system, the "seniority system will prevail in the run of cases."[344] The Court's decision negated the Ninth Circuit Court's reasoning that a seniority system is merely "a factor" in the undue hardship analysis. While the rules of a seniority system will generally entitle an employer to summary judgment because the requested accommodation is not *reasonable*, a plaintiff may defeat the employer's request for summary judgment if the plaintiff "present[s] evidence of special circumstances that make 'reasonable' a seniority rule exception in the particular case"—*e.g.*, the employer "fairly frequently" changes the seniority system or the system already contains "exceptions."[345] Only then will the employer need to show special, case-specific circumstances that demonstrate undue hardship.[346]

In *Medrano v. City of San Antonio*, the Fifth Circuit Court of Appeals relied on *Barnett* to uphold an employer's decision denying a request made by an applicant with cerebral palsy for assignment to a particular shift, as doing so would have violated an established seniority system.[347] When the plaintiff, a part-time parking attendant, applied for a position as a full-time attendant, he requested that he continue to be reasonably accommodated by working the first shift so that he could commute using an alternative mode of public transportation (which was only available at certain times of the day). In response, the city argued that permitting the applicant to work on the preferred first shift would circumvent its seniority system. Absent any of the "special circumstances" to trump an otherwise valid seniority system identified in *Barnett* were present in *Medrano*, the Fifth Circuit affirmed the lower court's determination that a reasonable jury could not find in favor of the applicant's failure to accommodate claim.

1.7 What Remedies Are Available Under the ADA?

The remedies available to a plaintiff who successfully proves a violation of the ADA are many and varied -- and are consistent with remedies available to Title VII plaintiffs. Courts have broad authority to remedy violations of the Act, and have awarded injunctive relief, back pay, reinstatement, and promotion. Courts can also order affirmative relief, for example, directing the offending employer to change or abolish certain employment policies or practices. Courts may also award reasonable attorneys' fees and costs to a successful or prevailing plaintiff. An employer should also know that the EEOC has the authority to seek similar relief for an individual plaintiff even if the individual does not wish to pursue the claim, and even if the individual is bound by an arbitration agreement.[348]

The Civil Rights Act of 1991 amended Title VII, the Rehabilitation Act, and the ADA to allow for awards of compensatory and punitive damages. Punitive damages are limited, however, to cases in which the employer has violated the ADA and the plaintiff proves by clear and convincing evidence that the employer acted "with malice or with reckless indifference" to the rights protected by federal law. In determining whether an employer has acted with malice or reckless indifference, courts must focus on an

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[344] 535 U.S. 391, 394 (2002).

[345] 535 U.S. at 394, 405.

[346] 535 U.S. at 402; *see also Kempter v. Michigan Bell Tel. Co.*, 534 F. App'x 487 (6th Cir. 2013).

[347] 179 F. App'x 897 (5th Cir. 2006).

[348] *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

individual's state of mind, determining whether the employer knew it might be acting in violation of federal law.[349] In *Battle v. United Parcel Service, Inc.*, the Eighth Circuit Court of Appeals affirmed the jury's award of lost wages and compensatory damages to the employee, but denied the employee's requests for punitive damages on his failure to accommodate claim.[350] The court refused to reverse the denial of punitive damages to the plaintiff, reasoning there was sufficient evidence for the district court to determine that the employer did not have a maliciously discriminatory policy of requiring employees to be fully healed before returning to work. For more information regarding defenses to punitive damages claims, see **LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION** and **LITTLER ON HARASSMENT IN THE WORKPLACE**.

Employers should also note that under the Civil Rights Act of 1991, pursuing accommodation negotiations earnestly and in good faith provides a defense against claims for compensatory and punitive damages in failure to accommodate claims. Compensatory and punitive damages may not be awarded against an employer successfully demonstrating "good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make reasonable accommodation."[351] Courts consider a variety of factors to determine whether an employer met its burden of demonstrating good faith.[352] On the other hand, an employer may not avoid punitive damages based upon a perfunctory effort to provide reasonable accommodation.[353]

2. ADDITIONAL ISSUES UNDER THE ADA

2.1 Medical Inquiries

2.1(a) *The Hiring & Interview Process*

Although an applicant's race, sex, and even age may be apparent, this is not true of many disabilities. Before the enactment of the ADA, job seekers were often asked about their medical conditions when they applied for work and were often required to submit to medical examinations to verify fitness and health before an employer made an offer of employment. Medical information revealing the existence of a hidden disability might then result in a decision not to extend an offer of employment to an otherwise qualified applicant.

The ADA prohibits an employer from making certain inquiries and conducting medical examinations before making an offer of employment, reflecting Congress's concern about employer efforts to uncover

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[349] *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *see also EEOC v. Heart of CarDon, L.L.C.*, 2021 WL 5039565, at *2 (S.D. Ind. Oct. 29, 2021).

[350] 438 F.3d 856 (8th Cir. 2006).

[351] 42 U.S.C. § 1981a(a)(3).

[352] *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010) (finding that a trier of fact could conclude that the defendant failed to explore possible accommodations in good faith because, where an employee requested a sign language interpreter to be present at meetings, the defendant did not consider the nature of the information being communicated in a particular meeting or the length of the meeting, but instead relied on relatively arbitrary considerations); *Lee v. Harrah's New Orleans*, 2013 WL 3899895 (E.D. La. July 29, 2013) (unpublished) (employee was not entitled to recover punitive damages on a failure to accommodate claim where the employer demonstrated good-faith efforts to consult, identify, and provide a reasonable accommodation).

[353] *EEOC v. Autozone, Inc.*, 707 F.3d 824 (7th Cir. 2013) (court upheld award of punitive damages where employer stated it had a process for handling disability accommodations but failed to accommodate employee despite his repeated requests).

hidden disabilities. Notably, an individual may maintain an ADA claim based upon an unlawful prehire medical inquiry regardless of whether the individual has a disability within the meaning of the law.[354] A job offer may be conditioned, however, upon successful completion of a medical examination[355]—though defending the retraction of an offer based on the individual's medical information can be difficult, as the employer is faced with showing that rescinding an offer was job-related and consistent with business necessity (*i.e.*, the individual's restrictions prevent the individual from performing the job with reasonable accommodations or create a threat to safety and health that cannot be eliminated through reasonable accommodations).[356]

The EEOC has devoted substantial attention to the ADA's restrictions on medical inquiries, having brought a number of lawsuits and entered into various settlements surrounding preemployment medical exams and inquiries.[357]

2.1(a)(i) *EEOC Guidance on Preemployment Inquiries Under the ADA*

According to guidance from the EEOC on preemployment inquiries under the ADA,[358] an employer may ask an applicant, "How many days were you absent from work last year?" but may not follow up this inquiry by asking, "How many of those days were you sick?" Nor may an employer ask an applicant how much time off the applicant needs on account of a disability or medical treatment for a disability. An employer may ask, "How well can you handle stress?" The employer cannot follow up that inquiry by asking, "Have you sought treatment for your inability to handle stress?" The prohibited follow-up questions may elicit information about disabilities.

At the initial interview stage employers may ask limited questions concerning reasonable accommodation if:

- the employer reasonably believes the applicant will need a reasonable accommodation because of an obvious disability;
- the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or

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354 *See Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014) (prohibitions apply whether or not employee has a disability); *Owusu-Ansah v. Coca-Cola Co*., 715 F.3d 1306 (11th Cir. 2013), *cert denied*, 134 S. Ct. 655 (2013).

355 *See, e.g.*, *EEOC v. BNSF Ry. Co.*, 902 F.3d 916 (9th Cir. 2018) (employer cannot place burden on individuals with perceived impairments to pay for follow-up tests, here an MRI, to show they are qualified for the job).

356 *See Wetherbee v. The Southern Co.*, 754 F.3d 901 (11th Cir. 2014) (individual claiming discrimination based on rescission of offer following post-offer medical exam must still prove he has a disability).

357 *See* Barry A. Hartstein et al., *Annual Report on EEOC Developments – Fiscal Year 2015*, Littler Report (Jan. 16, 2016), *available at* https://www.littler.com/publication-press/publication/annual-report-eeoc-developments-%E2%80%93-fiscal-year-2015 (describing $1.2 million settlement stemming from allegations of 5,000 applicants subjected to preemployment medical inquiries); *see also EEOC v. All Star Seed*, No. 2:13-cv-07196 (C.D. Cal. Nov. 7, 2014) (consent decree over alleged requests for medical and genetic information to applicants).

358 EEOC, Enforcement Guidance, *Preemployment Disability-Related Questions and Medical Examinations*, No. 915.002 (Oct. 10, 1995), *available at* https://www.eeoc.gov/policy/docs/preemp.html; *see also* EEOC, Enforcement Guidance, *Disability-Related Inquiries & Medical Examinations of Employees Under the Americans with Disabilities Act*, No. 915.002 (July 27, 2000), *available at* https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

- the applicant has voluntarily disclosed to the employer that the applicant needs reasonable accommodation to perform the job.

Employers must be careful to avoid asking questions concerning disability on employment applications. In general, the application form may not ask whether an employee will require reasonable accommodation to perform a job. Given that questions on employment applications usually apply to all applicants as opposed to a specific individual, the inquiry would not fall within the three exceptions delineated by the EEOC.

2.1(a)(ii) *Pre-Offer Job Performance Testing*

As part of the pre-offer hiring process, an employer may ask all applicants applying for a particular job to demonstrate or describe how they would perform a job-related function. For example, an employer may ask applicants to demonstrate their ability to lift 25-pound buckets of paint, if such lifting is an actual job duty. If applicants respond by saying they need a reasonable accommodation to perform the function, the employer must provide such accommodation for the testing process. Alternatively, the employer may allow the applicants to describe how they would perform the job function.

Employers that make demonstration a part of the job interview process should adhere to the following:

- the advertisement for the position and/or the application itself should advise applicants they will be required, as part of the interview, to perform the particular job function as a test;
- the notice should ask applicants to alert the employer in advance of any applicable safety restrictions or accommodation necessary to perform the job function or test;
- the demonstration test must be required of all applicants for the particular job, without exception; and
- the demonstration should not be coupled with any medical examination.

In addition to demonstrations, employers may require applicants to take physical fitness or psychological tests designed to measure an individual's capacity to perform a job successfully. For example, a police department may require applicants to run through an obstacle course designed to simulate a suspect chase in an urban setting. A messenger service may require an applicant to ride a bicycle a certain distance in a certain length of time. In each case, the employer must reasonably accommodate an applicant taking the test.

Similarly, psychological examinations designed to test IQ, aptitude, personality, and/or honesty are permissible under the ADA so long as the psychological examination is not likely to provide evidence concerning an applicant's mental disorder or impairment, as categorized in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM). Such tests may raise a host of other concerns, such as invasion of privacy or job-relatedness under other discrimination laws.[359]

2.1(a)(iii) *Discretion Retained to Hire Applicant Without a Disability*

An employer may hire an applicant who does not have a disability over one with a disability if the former is more qualified for the job, and if the determination of superior qualifications was not based on criteria

[359] *See Staples v. Rent-A-Center, Inc.*, 2000 U.S. Dist. LEXIS 11394 (N.D. Cal. July 7, 2000) (approving settlement of a class action lawsuit where applicants and current employees were required to pass a written psychological test which included invasive personal questions about the test-takers' sexual and religious beliefs).

that stereotype or discriminate on the basis of a disability. For example, if a job requires a minimum of three years of experience and the applicant with a disability meets this minimum requirement, but another applicant has more relevant experience, the selection of the more experienced candidate would not be discriminatory. An employer cannot, however, reject an applicant who requires a reasonable accommodation in favor of one who does not because of the first applicant's need for the reasonable accommodation. For example, an employer cannot refuse to hire a typist who requires a special chair in favor of another equally qualified typist who does not require such an accommodation.

An employer does not have the same discretion with regard to current employees if the employer is making a job reassignment as part of an accommodation for a qualifying disability. In this case, the employee with a disability does not need to be the best qualified individual for the open position in order to be reassigned.[360]An employer's discretion in hiring may also be reduced if the employer is a federal contractor or subcontractor subject to rules enforced by the Office of Federal Contract Compliance Programs (OFCCP). Section 503 of the Rehabilitation Act of 1973 prohibits discrimination by covered contractors against individuals on the basis of disability and requires affirmative action on behalf of qualified individuals with disabilities. Revised OFCCP rules require, among other things, that a covered employer:

- invite applicants and employees to self-identify as an individual with a disability;[361]
- document on an annual basis computations or comparisons pertaining to applicants and hires who self-identify, or are otherwise known to be individuals with disabilities;[362]
- survey current employees at least once every five years to determine the current utilization of individuals with disabilities, and remind employees at least once between the surveys that they may voluntarily update their disability status at any time;[363]
- periodically compare the employment of qualified individuals with disabilities against a utilization goal established by the OFCCP (OFCCP has initially set this goal at 7% for all job groups, while indicating an intention to review this number periodically);[364] and
- engage in outreach efforts and action-oriented programs designed to correct impediments to equal employment opportunity on behalf of those job groups where the 7% goal is not met.[365]

For more information on the OFCCP requirements requiring affirmative action for qualified individuals with disabilities, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

Artificial Intelligence (AI) in Hiring. The EEOC launched an initiative relating to the use of Artificial Intelligence (AI) in employment decision-making. As stated by the EEOC, the initiative is intended to

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[360] EEOC, Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html; *see also EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012) (the ADA mandates that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided the accommodation would be ordinarily reasonable and not present an undue hardship).

[361] 41 C.F.R. § 60-741.42.

[362] 41 C.F.R. § 60-741.44(k).

[363] 41 C.F.R. § 60-741.42(c).

[364] 41 C.F.R. § 60-741.45(a).

[365] 41 C.F.R. § 60-741.45(f).

examine how technology impacts the way employment decisions are made, and give applicants, employees, employers, and technology vendors guidance to ensure that these technologies are used lawfully under federal equal employment opportunity laws.[366] In May 2022, the agency published "technical assistance" relating to compliance with Americans with Disabilities Act requirements when using AI and other software to hire and assess employees. The agency also published a short "Tips for Workers" summary of this guidance. Neither of these documents has the force or effect of law, nor are they binding on employers. They are, however, informative in determining where the EEOC will likely focus their regulatory actions.[367] The EEOC further highlighted its intent to focus on the use of AI in employment decisions in its strategic enforcement plan for 2024-2028.[368] In its plan, the EEOC outlines its desire to focus on recruitment and hiring practices where the use of AI intentionally excludes or adversely impacts protected groups.

Throughout, the EEOC uses various illustrative examples of the tools they aim to regulate. These range from résumé scanners and virtual assistants/chatbots to video-interviewing software and software that tests an individual's personality, aptitude, skills, and "perceived 'cultural fit.'" Employers using any of these tools in their recruiting, hiring, and review of applicants and employees should take careful note of the EEOC's position as to where these tools may run afoul of the ADA and other laws.

Further, in May 2023, the agency published a technical assistance document aimed at assessing the adverse impact of artificial intelligence in hiring. It defines artificial intelligence as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments," and notes that in the employment context, this has typically meant reliance on an automated tool's own analysis of data to determine which criteria to use when making decisions. On September 24, 2024, the U.S. Department of Labor (DOL) announced publication of its "AI & Inclusive Hiring Framework" website, described as "a new tool designed to support the inclusive use of artificial intelligence in employers' hiring technology and increase benefits to disabled job seekers." However, under the second Trump administration, the fate of the tool and guidance is unclear.[369] Employers may still be liable for an adverse impact even when using AI tools issued by a vendor or third party. Employers should self-audit their tools and explore this issue closely with counsel.[370]

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[366] EEOC, Press Release, *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness* (Oct. 28, 2021), *available at* https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.

[367] EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, *available at* https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence; EEOC, *Tips for Workers: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence*, *available at* https://www.eeoc.gov/tips-workers-americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

[368] EEOC, *Strategic Enforcement Plan Fiscal Years 2024 – 2028*, *available at* https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028#:~:text=Eliminating%20Barriers%20in%20Recruitment%20and,religion%2C%20age%2C%20and%20disability.

[370] EEOC, SELECT ISSUES: ASSESSING ADVERSE IMPACT IN SOFTWARE, ALGORITHMS, AND ARTIFICIAL INTELLIGENCE USED IN EMPLOYMENT SELECTION PROCEDURES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (May 18, 2023), *available at* https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial.

2.1(b) *Reemployment of Former Employee With a Disability*

When an individual with a disability applies for reemployment, an employer is not required to ignore information already known about the applicant's disability. In *Harris v. Harris & Hart, Inc.*, while working as a journeyman sheet metal worker for the defendant, the plaintiff filed a grievance alleging the failure to accommodate his disability.[371] A union representative identified two job functions the plaintiff could not perform. A short time later, the plaintiff applied for the same position. The Ninth Circuit Court of Appeals held that an employer is not required to feign "amnesia" about a former employee's disabilities but may undertake the "logical and legal" inquiry to determine what accommodation, if any, the applicant may require, and to request a medical release from the applicant's treating physician.[372]

In *Raytheon Co. v. Hernandez*, an employee sued alleging that the company violated the ADA by refusing to rehire him after he successfully rehabilitated himself from drug use.[373] The company said its decision was based on an unwritten company policy against rehiring employees who were fired for misconduct. The U.S. Supreme Court held that a neutral no-rehire policy could be a legitimate, nondiscriminatory reason sufficient to defeat a *prima facie* case of discrimination. The Court remanded the case to the Ninth Circuit Court of Appeals for a determination of whether the employee could present sufficient evidence to demonstrate that the company's stated reason for rejecting him was pretext.

2.1(c) *Post-Offer Inquiries & Medical Examinations*

Under the ADA, post-offer questions and/or medical examinations do not have to be related to the specific job and may cover prior work history. The EEOC's guidance also addresses questions that employers may ask after a conditional job offer is made. According to the EEOC, at the post-offer stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illnesses, diseases, impairments, and general physical and mental health. That position does not necessarily mean that eliciting and having this information is advisable, however. Many states have disability discrimination statutes that limit such inquiries, and employers should be cautious in asking such questions.

EEOC guidelines state that, under certain circumstances, an employer may ask questions during an interview and require either an initial or follow-up medical examination concerning prior workers' compensation claims and occupational injuries.[374] The same questions and medical examination requests must be asked of all entering employees in the same job category.

During a post-offer medical examination, a physician may make disability-related inquiries. But if the medical examination discloses a disability and if the employer fails to hire the applicant because of that

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[371] 206 F.3d 838 (9th Cir. 2000).

[372] 206 F.3d at 844; *see also Grenier v. Cyanamid Plastics, Inc.*, 70F.3d 667 (1st Cir. 1995) (upon application for reemployment, an employer could request medical certification from a former employee's psychiatrist to determine whether the plaintiff, who had been placed on an indefinite disability leave due to psychological problems and eventually terminated at the expiration of the leave, was fit to return).

[373] 540 U.S. 44 (2003); *see also Smith v. Miami-Dade Cnty.*, 621 F. App'x 955 (11th Cir. 2015) (ADA claim failed where employer followed its no-rehire policy, which precluded former employees with a history of long-term absences from returning).

[374] EEOC, Enforcement Guidance, *Workers' Compensation and the ADA*, No. 915.002 (Sept. 3, 1996), *available at* https://www.eeoc.gov/policy/docs/workcomp.html.

disability, the employer must show that the disability cannot be reasonably accommodated or that the individual is not qualified by virtue of the individual's limitations.[375]

2.1(d) *Disability Inquiries & Medical Examinations of Current Employees*

Under the ADA, a medical examination procedure, inquiry, or test directed to a current employee must be job-related and consistent with business necessity. In *Kroll v. White Lake Ambulance Authority* ("*Kroll I*"), a case involving an employer's request that an employee obtain psychological counseling, the Sixth Circuit Court of Appeals held that a *medical examination* is "a procedure or test that seeks information about an individual's physical or mental impairments or health."[376] In arriving at the conclusion that the psychological counseling was a medical examination, the court relied on the EEOC's seven-factor test, which evaluates:

1. whether the test is administered by a health care professional;
2. whether the test is interpreted by a health care professional;
3. whether the test is designed to reveal an impairment or physical or mental health;
4. whether the test is invasive;
5. whether the test measures an employee's performance of a task or measures the employee's psychological responses to performing the task;
6. whether the test normally is given in a medical setting; and
7. whether medical equipment is used.[377]

The court noted that not all psychological tests will be medical examinations under the ADA because "psychological tests that measure personality traits such as honesty, preferences, and habits" are not medical examinations, while "psychological tests that are designed to identify a mental disorder or impairment" are medical examinations.[378] Thus, the court explained that whether a particular test "is likely to elicit information about a disability, providing a basis for discriminatory treatment" is key to the inquiry.[379] The court further explained that the employer's intent in requiring the examination, test, or procedure is not dispositive.

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[375] EEOC, Enforcement Guidance, *Disability-Related Inquiries & Medical Examinations of Employees Under the Americans with Disabilities Act*, No. 915.002 (July 27, 2000), *available at* https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[376] 691 F.3d 809, 815 (6th Cir. 2012) ("*Kroll I*"). The Sixth Circuit considered this case again in 2014 on the issue of whether the request to attend counseling was job-related and consistent with business necessity. *See Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619 (6th Cir. 2014) ("*Kroll II*").

[377] *Kroll I*, 691 F.3d at 816.

[378] 691 F.3d at 816.

[379] 691 F.3d at 816; *see also Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (examination administered by an occupational therapist that measured plaintiff's heart rate, breathing and aerobic fitness, which was unnecessary to determine if she was physically capable of performing the task at hand, was a medical examination under the ADA).

The EEOC guidelines discussed in *Kroll I* also indicate that questions likely to elicit information regarding a medical condition or disability are prohibited under the ADA, even if such questioning could also elicit information regarding non-disability related issues.[380]

2.1(d)(i) *Inquiries Must Be Job-Related & Consistent With Business Necessity*

An employer's disability-related inquiries of its employees must be job-related and consistent with business necessity.[381] See **1.5** for a discussion of these concepts. An employer may ask questions and/or require a medical examination if it has reason to question whether an employee's ability to perform essential job functions will be impaired by a medical condition or whether the employee can perform the job without posing a direct threat of harm.[382] As discussed in more detail below, in **2.2(a)**, the exigencies from the COVID-19 pandemic affected the approach to medical testing and inquires. The legal fundamentals, however, remain intact.

The employer's concerns must be reasonable and supported by objective evidence.[383] The *Kroll* case, discussed above, again reached the Sixth Circuit Court of Appeals on the question of whether the employer's request that an emergency medical technician (EMT) attend counseling was job-related and consistent with business necessity.[384] In *Kroll II*, the court noted that a medical examination is job-related and consistent with business necessity if there is significant evidence to cause a reasonable person to inquire whether the employee is still capable of performing the job.[385] The court determined, however, that the decision maker did not have "sufficient objective knowledge" to conclude that the plaintiff's job performance was impaired when he knew of only two isolated incidents involving use of a cell phone while driving an ambulance and the refusal to administer oxygen to a patient.[386] In contrast, "had [the decision maker] been aware of a pattern of behavior that showed [the plaintiff's] emotional or psychological problems were interfering with her ability to drive an ambulance safely, he might have been justified in ordering a medical examination."[387] A similar analysis applied to the court's decision that there

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[380] *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (impermissible inquiry under the ADA where the plaintiff alleged his supervisor demanded to know whether something medical was going on and continued to insist there was something physical or mental affecting plaintiff, eventually compelling plaintiff to disclose he was HIV positive).

[381] 42 U.S.C. § 12112(d)(4)(A).

[382] EEOC, Enforcement Guidance, *Disability-Related Inquiries & Medical Examinations Under the Americans with Disabilities Act*, No. 915.002, Questions 11-12 (July 27, 2000), *available at* https://www.eeoc.gov/policy/docs/guidance-inquiries.html; *see also Parker v. Crete Carrier Corp.*, 839 F.3d 717 (8th Cir. 2016) (condoning employer's requirement that a class of employees—truck drivers with a BMI of 35 or higher—submit to an in-lab sleep study to diagnosis potential sleep apnea, which impairs driving ability and can result in an increased risk of accidents).

[383] *See, e.g.*, *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1311-12 (11th Cir. 2013) (the employer had a reasonable, objective concern about the plaintiff's mental state because it had information suggesting he was unstable, including a work meeting where he banged his fist on the table and said someone was "going to pay for this"); *see also Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 12 (6th Cir. 2012); *Pence v. Tenneco Auto. Operating Co.*, 169 F. App'x 808, 812 (4th Cir. 2006).

[384] *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619 (6th Cir. 2014) ("*Kroll II*").

[385] 763 F.3d at 624.

[386] 763 F.3d at 625.

[387] 763 F.3d at 625; *see also Barnum v. Ohio State Univ. Med. Ctr.*, 642 F. App'x 525, 532-33 (6th Cir. 2016) (mental health evaluations were job-related and consistent with business necessity because numerous concerns were

was insufficient evidence to support the conclusion that the plaintiff posed a direct threat to the health or safety of others.[388]

The EEOC has taken the position that medical inquiries of employees must be based on an individualized assessment, but in *EEOC v. United States Steel Corp*., a federal court ruled that a random alcohol testing program for newer employees in safety-sensitive positions was job-related and consistent with business necessity.[389] The court reasoned that the breath alcohol testing served the company's interest in eliminating hazards in a dangerous workplace. It rejected the EEOC's argument that random across-the-board testing was *per se* invalid because it did not stem from an individualized reasonable suspicion of alcohol use, or of imminent danger. Declining to defer to EEOC enforcement guidance calling for an individualized inquiry, the court explained that the statute mentions nothing about individualized inquiries in this instance.[390]

The employer may also seek medical information to follow up on a request for accommodation when the disability or need for accommodation is not known or obvious, or when an employee is returning to work and the employer has a reasonable belief that the employee's present ability to perform essential job functions will be affected by a medical condition. Although the employer should ask the employee to supply such medical information voluntarily, the employer can require an examination at its own expense if the employee fails to do so or, having provided incomplete information, fails to cure a deficiency in the information required. When requesting medical information incident to an employee's reasonable accommodation request, the inquiries and exams should be tailored to the condition for which the employee is requesting an accommodation. It is not a license to request information on the employee's full medical history.[391]

2.1(d)(ii) *Fitness-for-Duty Examinations*

In *Ward v. Merck & Co.*, the plaintiff, a former employee, was terminated for refusing to submit to a medical evaluation.[392] The plaintiff engaged in strange behavior in the company cafeteria, which led to the plaintiff being taken to a hospital where he was diagnosed with schizophrenia. Based upon employee observations and a review of his conduct by a doctor with the company's health services, the company requested that the plaintiff make an appointment for an evaluation. After the plaintiff ignored several verbal and written requests to make an appointment for a medical evaluation, he was suspended and then terminated. The plaintiff then claimed he was terminated because of his disability with no effort at accommodation. The Third Circuit Court of Appeals upheld the district court's judgment for the company, finding that the plaintiff's behavior and performance sufficiently supported its decision to require him to submit to a fitness-for-duty examination.

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expressed about the plaintiff's inability to concentrate and a coworker reported that the plaintiff had made a comment suggesting suicidal thoughts).

388 *Kroll II*, 763 F.3d at 626.

389 2013 WL 625315 (W.D. Pa. Feb. 20, 2013).

390 2013 WL 625315, at *22.

391 29 C.F.R. § 1630.14(c); EEOC, Enforcement Guidance, *Disability-Related Inquiries & Medical Examinations of Employees Under the Americans with Disabilities Act*, No. 915.002, Questions 7 and 10 (July 27, 2000), *available at* https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

392 226 F. App'x 131 (3d Cir. 2007); *see also See v. Illinois Gaming Bd.*, 29 F.4th 363, 369-70 (7th Cir. 2022) (holding that employer's fitness-for-duty exam requirement was job related and consistent with business necessity, where the employee was an armed public safety officer and had been on leave after experiencing paranoia).

2.1(d)(iii) *Job Changes Within a Company*

Employees who apply for new jobs under a competitive hiring process within the company must be treated like regular job applicants. An employer may not ask any disability-related questions and may not require a medical examination unless it makes a conditional job offer. This rule does not apply to situations where an employee is automatically entitled to another position because of seniority or satisfactory job performance.

2.1(e) *Inquiries Associated with Wellness Programs*

Many employers use wellness programs to improve the health of their workforce and reduce healthcare costs by promoting healthy lifestyles and preventing disease. These programs often involve medical questionnaires or health risk assessments, and/or biometric screenings, to determine an employee's health risk factors. In so doing, wellness programs implicate the ADA, as well as the Genetic Information Nondiscrimination Act (GINA). Both laws generally prohibit employers from obtaining and using information about an employee's (or family member's) health conditions but permit health-related questions if services are provided as part of a voluntary wellness program.[393] Thus, for example, these laws can operate to allow employers to require employees to participate in a health risk assessment to receive a discount on healthcare coverage premiums. Employers implementing wellness programs must also be sure to comply with other applicable laws, including the Patient Protection and Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA), along with their regulations.

As wellness programs gained popularity, they caught the EEOC's attention. The EEOC began to scrutinize employer wellness plans, beginning with several lawsuits in 2014. The EEOC argued, for example, that an employer's wellness program is not truly "voluntary" within the meaning of the ADA, such that all associated medical inquiries are unlawful.[394]

Given the growing concerns in this area, the EEOC has tried several times to issue rules under the ADA and GINA, but has met legal and administrative challenges.[395]

2.1(f) *Staffing Agencies & Their Clients*

Staffing firms and their employer clients must employ nondiscriminatory job standards, testing, and selection processes that follow business necessity. To the extent that each controls the hiring environment, they must make reasonable accommodations for applicants with disabilities, unless doing so would create an undue hardship. For example, an agency might easily provide a reader to assist a blind applicant in completing necessary employment application forms. A client might reasonably accommodate a prospective worker by removing a nonessential function from the job duties assigned to that position. Furthermore, a staffing agency may have a duty as an individual's employer to shield that individual from disability bias by its employer clients.[396]

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[393] 42 U.S.C. § 12112(d)(4)(B).

[394] *See, e.g.*, *EEOC v. Orion Energy Sys., Inc.*, 208 F. Supp. 3d 989 (E.D. Wis. 2016) (ruling in favor of the employer because the program was optional, even though refusal to take the health risk assessment resulted in a 100% shifting of the premium cost to the employee—a cost that would have been eliminated with acquiescence).

[395] *See, e.g., AARP v. EEOC*, 267 F. Supp. 3d 15 (D.D.C. 2017).

[396] *See EEOC v. Olsten Staffing Servs. Corp.*, 657 F. Supp. 2d 1029 (W.D. Wis. 2009) (denying staffing agency's motion for summary judgment where staffing agency told employer that plaintiff's deafness was an area of

Post-offer, the agency or the client may ask questions or require a medical examination if it does so for all individuals in the same job category. Medical inquiries and physical requirements must be job-related and consistent with business necessity. As with regular, full-time employment offers, the offer of a temporary work assignment may be conditioned on the results of such inquiries or medical examination. An offer may also be withdrawn for safety reasons, provided the employer can show that the individual poses a "direct threat" to the safety of others.

The performance of job functions is implicitly included among the factors that demonstrate that an employment relationship exists. Once the qualified applicant has received and accepted an offer of work from the agency and is engaged at the client's facility, a "joint" employer relationship may exist. While the agency generally provides compensation and benefits to the worker, the client normally controls the hours and methods of work. The agency and the client are responsible for providing a reasonable accommodation to a worker who is otherwise qualified for the position; and both may be liable for violations of the ADA. If it is unclear which party must provide a necessary accommodation, the agency and the client may need to engage jointly in the interactive process with the worker in making that determination. They may then have joint financial responsibility for providing the reasonable accommodation, provided it does not impose an undue hardship. To avoid any uncertainty, the parties may specify in their contract which entity will be responsible for making necessary accommodations. This step may help ultimately to limit liability as a matter of contract but will not eliminate either party's obligations under the ADA.

The nature of temporary assignments often requires the availability of a worker on short notice and for a limited time. A worker with a disability may need an accommodation that requires time to implement, or an adaptive device not readily obtainable, to perform the essential functions of the job. In this situation, joint employers may argue that the accommodation is not reasonable or may attempt to establish undue hardship by showing the work assignment had to be filled on short notice and that the accommodation could not be provided quickly enough to enable the prospective worker to begin the assignment in a timely manner. Yet, having a short period of time to provide the accommodation alone is not an undue hardship. For instance, it is often possible to provide sign language interpreters or auxiliary aids quickly for persons who are deaf. Staffing agencies and their clients should anticipate and plan for these types of situations and accommodation requests so that they can comply with their obligations under the ADA in regard to contingent workers.

2.2 Special Issues Related to the COVID-19 Pandemic

The Equal Employment Opportunity Commission (EEOC) first issued guidance on *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* in October 2009 after then President Barack Obama declared a national emergency in response to the H1N1 influenza pandemic.[397] The EEOC explained that its guidance could be modified depending on the severity and pervasiveness of a pandemic, and that a future pandemic might become so severe that employers' interests in protecting themselves and their businesses from the spread of disease could outweigh employees' rights under the ADA and other discrimination laws. It appears that the COVID-19 pandemic reached the required level. Based on

hesitation and concern and where employer then rejected plaintiff for a job; reasonable jury could find that both the agency's statements regarding plaintiff's deafness and the agency's failure to take corrective action when employer failed to hire plaintiff without explanation constituted discrimination pursuant to the ADA).

[397] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (originally issued Oct. 9, 2009; updated Mar. 21, 2020), *available at* https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

the 2009 guidance, it is apparent that the EEOC granted more leeway for employers in handling COVID-19 concerns than they did in response to the H1N1 virus. The EEOC has made clear that it views the revised rules as a temporary measure based on extraordinary circumstances.

The EEOC's position on whether COVID-19 qualifies as a "disability" under the ADA has evolved over the course of the pandemic. The EEOC directly addressed whether and how a COVID-19 infection might qualify as an "actual" disability, a "record of" disability, or a "regarded as" disability, noting that all three are possible depending on the facts.[398] The guidance further explains that "regardless of whether an individual's initial case of COVID-19 itself constitutes an actual disability, an individual's COVID-19 may end up causing impairments that are themselves disabilities under the ADA."[399]

Additionally, employees with medical conditions that are not typically covered by the ADA may be able to claim its protections in the context of the COVID-19 pandemic. In *Milteer v. Navarro County, Texas*, the court permitted the disability discrimination claims of an employee with medically controlled diabetes and hypertension to proceed after his request for remote work was denied. The court recognized the impact of the pandemic: "[w]ithout suggesting that, under more normal circumstances (*i.e.*, outside the context of a global pandemic), medically controlled cases of diabetes or hypertension would constitute 'disabilities' under the ADA," the employee plausibly alleged disability discrimination.[400]

2.2(a) *COVID-19 Testing & the ADA*

As employers looked to develop infection control strategies to help stop the spread of COVID-19, the EEOC's primary focus has been on compliance under the ADA.

Regardless, in relying on the findings of the U.S. Centers for Disease Control and Prevent ("CDC") and others public health authorities, the EEOC determined that "an employer may bar an employee with the disease from entering the workplace" because the COVID-19 pandemic meets the "direct threat" standard under the ADA—that is, "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."[401] This determination granted employers significant leeway in developing infection control strategies without violating the ADA that would not be permitted in the absence of a pandemic. These temporary new rules apply to day-to-day employment for both current employees and applicants, and allow employers to take actions that are normally not permitted, including:

- asking employees who report feeling ill at work, or who call in sick, questions about their symptoms (*e.g.*, fever, chills, cough, shortness of breath, sore throat, loss of smell or taste) to

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[398] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions N.2 through N.8 (updated July 12, 2022); *see* EEOC, Press Release, *EEOC Adds New Section Clarifying When COVID-19 May Be a Disability, Updating Technical Assistance*, (Dec. 14, 2021).

[399] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question N.9 (updated July 12, 2022) (noting, too, that COVID-19 may worsen a preexisting condition to the point that the impairment becomes substantially limiting).; *see also Brown v. Roanoke Rehab. & Healthcare Ctr.*, 586 F. Supp. 3d 1171 (M.D. Ala. 2022) (plaintiff's specific symptoms were sufficient to allege that she had an actual disability).

[400] *Milteer v. Navarro Cnty., Tex.*, 2023 WL 415154 (N.D. Tex. Jan. 25, 2023).

[401] *See* EEOC, *Transcript of March 27, 2020 Outreach Webinar*; *see also* EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, at Section II.B (updated Mar. 21, 2020).

determine if they have or may have COVID-19, and barring them from the workplace if they refuse to answer;[402]

- permitting employers to send employees home or requiring employees to stay home if they have symptoms of COVID-19;[403] and
- measuring an employee's body temperature (despite that some individuals with COVID-19 do not have a fever), and barring the employee if they refuse to have their temperature taken.[404]

The EEOC has underscored that employers are permitted to take similar actions involving applicants after making a conditional job offer so long as the process is done for all employees in the same type of job.[405] Employers may delay a start date for an applicant who has COVID-19 or symptoms associated with it, and withdraw a job offer when it needs an applicant to start immediately.[406]

One of the most notable aspects of the EEOC's COVID-19 guidance was its initial allowance of across-the-board administration of tests to detect the presence of the virus. "EEOC's assessment at the outset of the pandemic was that the ADA standard for conducting medical examinations was, at that time, always met for employers to conduct worksite COVID-19 viral screening testing." In July 2022, however, the agency backtracked, making "clear that going forward employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19."[407] Pursuant to the updated guidance, employers may require testing as a screening measure only if "it is job-related and consistent with business necessity."

Employers wishing to implement a testing protocol are thus left to evaluate whether mandatory testing meets those criteria, as circumstances change. The EEOC states that "use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the 'business necessity' standard when it is consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing."[408] The guidance also identifies possible factors that may be relevant to the "business necessity" assessment, including:

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[402] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions A.1 through A.4, A.12 (updated May 15, 2023); EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, at Section II.B, Question 6 (updated Mar. 21, 2020).

[403] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question A.4 (updated July 12, 2022); EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, at Section III.B, Question 5 (updated Mar. 21, 2020).

[404] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions A.3, A.9 & A.11 (updated July 12, 2022); EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, at Section III.B, Question 7 (updated Mar. 21, 2020); .

[405] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions C.1, C.2 (updated July 12, 2022).

[406] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions C.3, C.4 (updated July 12, 2022).

[407] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, (updated July 12, 2022) (describing that initial position in the preamble, announcing the updated guidance).

[408] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question A.6 (updated July 12, 2022).

- the level of community transmission;
- the vaccination status of employees;
- the accuracy and speed of processing for different types of COVID-19 viral tests;
- the degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;
- the ease of transmissibility of the current variant(s);
- the possible severity of illness from the current variant(s);
- what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (*e.g.*, working with medically vulnerable individuals); and
- the potential impact on operations if an employee enters the workplace with COVID-19.[409]

Employers should note that a different framework applies if they wish to ask only a specific employee (rather than all employees) if the employee has COVID-19 or to undergo temperature or testing screening.[410]

2.2(b) *COVID-19 & Reasonable Accommodations*

An employer's obligations to make reasonable accommodations and engage in the interactive process remain in place based on the EEOC's current guidance. The EEOC's guidance seeks to balance ADA reasonable accommodation obligations with an employer's concern about the "direct threat" to the employee's health and others by returning an employee to the workplace. The EEOC has addressed numerous issues involving reasonable accommodation in a COVID-19 work environment, including the following:

- If a job can be performed at the workplace only, the EEOC has recommended some accommodations on a temporary basis without causing an undue hardship, such as minor "low cost" physical alterations of the workplace (*e.g.*, one-way aisles, using Plexiglas barriers) or temporary job restrictions on marginal duties, temporary transfers or modified work schedules.[411]
- For employees required to telework, an employer should give "high priority" to reasonable accommodation requests needed while teleworking, but the employer can be proactive and discuss – with all employees – anticipated accommodations that may be needed when returning to work.[412]

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[409] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question A.6 (updated July 12, 2022); *see also Bobnar v. AstraZeneca*, 2023 WL 3340466 (N.D. Ohio May 9, 2023).

[410] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question A.9 (updated July 12, 2022) ("If an employer wishes to ask only a particular employee to answer such questions, or to have a temperature reading or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease.").

[411] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.1 (updated July 12, 2022).

[412] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions D.3, D.8 & G.6 (updated July 12, 2022).

- Employers are encouraged to be flexible in terms of requesting medical documentation and/or and engaging in the interactive process. This could include providing accommodations on a temporary basis, and even placing an "end date" on the accommodation.[413] With respect to medical documentation, the EEOC also noted that at times during the pandemic, employees seeking documentation from a health care provider could not secure a doctor's appointment because of the health crisis. Consequently, "there may be other ways to verify the existence of a disability. For example, a health insurance record or a prescription may document the existence of the disability."[414]
- In making reasonable accommodations, the EEOC also has taken a more realistic view of undue hardship based on today's economic climate, explaining that "an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now,"[415] and "the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration."[416] The EEOC's technical guidance underscores that an employer can look to "current circumstances" in determining whether there may be "significant difficulty" in acquiring or providing certain accommodations, particularly for employees who may be teleworking. If a particular accommodation creates an undue hardship, employers and employees are encouraged to work together to determine whether an alternative "could be provided that does not pose such problems."[417]
- In 2022, the EEOC also acknowledged that employers may "may face new challenges that interfere with responding expeditiously to a request for accommodation."[418] For example, "reopening a workplace may bring a higher number of requests for reasonable accommodation." As a result, employers and employees may experience excusable delays as they engage in the interactive process. The EEOC instructs that in such situations, "an employer must show specific pandemic-related circumstances justified the delay in providing a reasonable accommodation to which the employee was legally entitled." Interim measures are encouraged "to enable employees to keep working as much as possible."[419]

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[413] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions D.6, D.7 (updated July 12, 2022); *see also* EEOC, *Transcript of March 27, 2020 Outreach Webinar*, at Question 17, *available at* https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar.

[414] EEOC, *Transcript of March 27, 2020 Outreach Webinar*, at Question 17.

[415] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.9 (updated July 12, 2022), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[416] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.11 (updated July 12, 2022).

[417] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.10 (updated July 12, 2022).

[418] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.17 (updated July 12, 2022).

[419] Nonetheless, at the motion to dismiss stage, a federal district court held that the plaintiff – the wife of a deceased police officer – could pursue a failure to accommodate claim based on the employer's 10-day delay in responding to the officer's ADA accommodation request in the earliest days of the COVID-19 pandemic. *DiFranco v. City of Chi.*, 589 F. Supp. 3d 909, 915-16 (N.D. Ill. 2022).

The EEOC's guidance on reasonable accommodation also addresses concerns involving individuals with "higher risk of severe illness."[420] The agency made a distinction in its approach depending on whether an employee is making a request for an accommodation based on being part of this higher risk pool as contrasted with an employer deciding to exclude such employees from the workforce.[421]

Assuming an employee in the higher risk group makes an accommodation request, the employer should follow the same approach, discussed above, regarding accommodation requests, whether it comes from the employee or a third party, such as the employee's physician. After receiving a request, an employer can engage in the interactive process with the employee, which may include: (1) how the disability creates a limitation; (2) how the requested accommodation will effectively address the limitation; (3) whether another form of accommodation could effectively address the issue; and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of their position (that is, the fundamental job duties).[422] The issue of undue hardship can then play a role in the equation regarding the employer's approach to the requested accommodation.

On the other hand, in the event an employer is considering keeping an employee out of the workplace because the employee is part of the higher risk group, the rules are far stricter. In short, the EEOC requires: (1) application of the "direct threat" standard; and (2) there must be an "individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or the best available objective evidence."[423]

Even assuming that an employee's disability "poses a 'significant risk of substantial harm' to the employee's own health or safety," the EEOC expects employers to explore potential reasonable accommodations absent an undue hardship. The first goal is to find a way, through the interactive process, to return an employee to work while still performing the position's essential functions. When those options are not available, an employer needs to consider other types of accommodations, such as telework, leave, or reassignment.[424] Barring an employee from the workplace must be viewed as a last resort, only when "the facts support the conclusion that the employee poses a significant risk of harm to himself that cannot be reduced or eliminated by reasonable accommodation."[425]

The EEOC has provided examples of potential accommodation to eliminate a potential "direct threat" to the affected employee in the higher risk group, which may include protective gowns, masks, gloves, and other protective gear, erecting barriers that provide separation, elimination, or substitution of particular

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[420] The CDC has provided guidance on people who are at a higher risk for severe illness under COVID-19. These include such categories of people who are 65 years and older and those with particular underlying medical conditions. *See* CDC, *Understanding Risk* (updated Aug. 11, 2022), *available at* https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/your-health/understanding-risk.html.

[421] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Questions G.3, G.4, and G.5 (updated July 12, 2022).

[422] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.6 (updated July 12, 2022).

[423] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question G.4 (updated July 12, 2022).

[424] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question G.4 (updated July 12, 2022).

[425] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question G.4 (updated July 12, 2022).

marginal functions, enhanced air filtration measures, modification of work schedules, or moving the location where the employee performs work.[426]

2.2(c) *COVID-19 & Vaccination*

The discussion surrounding employee vaccinations is a delicate one that raises many potential issues that may implicate employer liability under the ADA, among other laws.

The *Pandemic Preparedness Guidance*, re-issued on March 21, 2020, contains a question on whether an employer covered by the ADA and Title VII may compel all of its employees to take the influenza vaccine "regardless of their medical conditions or religious beliefs." The EEOC directly responded, "No."[427] The EEOC's apparent rationale was that, under the ADA, an employee with a qualified disability may be entitled to an exemption from a mandatory vaccination requirement if the qualified disability prevents the employee from safely taking the vaccine. According to the EEOC, allowing an exception to such a requirement would be considered a reasonable accommodation, barring any undue hardship to the employer, such as significant difficulty or expense to the employer.[428]

Since that time, however, the EEOC has taken more nuanced positions on questions related to employer vaccination programs. In its current COVID-19 guidance, updated July 12, 2022, the EEOC discusses how a COVID-19 vaccination program interacts with the legal requirements of the ADA, Title VII, and the Genetic Information Nondiscrimination Act (GINA), noting that these "federal EEO laws do not prevent an employer from requiring all employees to be vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA."[429]

Importantly, the guidance reminds employers that "other EEO considerations" are also relevant. For example, "employers that have a vaccination requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act [40+])." The vaccination section of the guidance addresses numerous questions about appropriate accommodations for employees who do not get vaccinated, how employers should handle accommodation requirements, and the confidentiality of employee vaccination information.

2.2(d) *Remote Work as a Reasonable Accommodation*

One area in which the COVID-19 pandemic may have a lasting effect on discrimination law long after workplaces begin to return to pre-pandemic models of operations is in the area of remote work. The EEOC has long taken the position that allowing an employee with a disability to work from home may be a form of reasonable accommodation under the ADA. In 2003, the agency issued guidance on its views regarding

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[426] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question G.5 (updated July 12, 2022).

[427] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, at Section III.B, Question 13 (originally issued Oct. 9, 2009; updated Mar. 21, 2020), *available at* https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

[428] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, at Section III.B, Question 13 (updated Mar. 21, 2020).

[429] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Section K (updated July 12, 2022); *see also Sharikov v. Philips Med. Sys. MR*, 103 F.4th 159 (2d Cir. 2024)(holding that "discharging an employee for failing to comply with generally applicable safety policies does not, without more, equate to impermissible discrimination under the ADA").

whether and when working from home (or otherwise remotely) can be a reasonable accommodation under the ADA.[430] At the same time, courts have grappled with the question of whether physical "attendance" is an essential function of any particular job, often coming to different conclusions based on the different facts presented (see discussion in **1.6(c)(iii)**). While an employer is able to require that an employee is able to perform—and does perform—the essential functions of their job, the ability to require physical attendance (versus, say, virtual "attendance to the work") has not been as clear.

In general, the ADA requires an employer to provide reasonable accommodation to a worker's disability, if doing so would allow the worker to perform the essential functions of their job, and not cause undue hardship to the employer. *Undue hardship* is generally viewed by the EEOC to mean significant difficulty or expense, with the focus on the resources and circumstances of the specific employer and the specific accommodation requested. While it is obvious that for many employees remote work is simply not feasible (*e.g.*, a worker in the manufacturing sector whose job is hands-on on the plant floor, a hospital nurse, or a flight crew member), it is anticipated that employees will increasingly request to perform their work from home otherwise remotely. As a result of the work arrangements made during the COVID-19 pandemic, it may be increasingly difficult for an employer to argue that remote work for a given worker is not reasonable, or an undue hardship—particularly where, during the course of the pandemic, that worker may have performed all of the essential functions of their job in a satisfactory manner off-site. Put another way, an employer's preference for workers "in their seats" may carry less weight as a justification to deny a remote work option. As the EEOC's guidance notes, for example, that an employee's "temporary telework experience [during the pandemic] could be relevant to considering [their] renewed request" for telework as an accommodation for a disability, even if that request had been previously denied.[431]

Of course, there are myriad other considerations that may support an employer's position, and the EEOC acknowledges that the reasonableness of the accommodation sought and its potential hardship are "fact-specific determinations."[432] Allowing an employee to telework from a state or locality in which the employer does not otherwise conduct business may raise a host of concerns that could support an employer's position to deny a remote work accommodation, for example. But employers should be prepared with very specific reasons (and evidence to support them) with respect to specific requests, rather than a broad "one size fits all" telework accommodation policy.[433]

The degree to which telework or other remote work accommodations become more prevalent is also likely to raise issues of equity and potential disparate impact. Workers whose jobs require them to be physically "on site" may tend be clustered in lower-wage occupations, such as retail, hospitality, or food service. Historically, women and people of color have been overrepresented in these industries and jobs, suggesting these workers may face a structural disadvantage with respect to the ability to work remotely.

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[430] EEOC, *Work at Home/Telework as a Reasonable Accommodation*, Question 4 (Feb. 3, 2003), *available at* https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation.

[431] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.16 (updated July 12, 2022).

[432] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at Question D.15 (updated July 12, 2022).

[433] *See also*, *Kinney v. St. Mary's Health, Inc*., 76 F.4th 635 (7th Cir. 2023) (holding that permitting employee to work remotely would have allowed the plaintiff to avoid tasks essential to her job rather than help her accomplish them).

Employers will want to make certain their remote work policies, and requests for off-site work as a potential accommodation, are addressed consistently and in a nondiscriminatory fashion.

2.3 Special Issues Related to Alcoholism & Drug Addiction

One of the ADA's most difficult areas of application concerns alcoholism and drug addiction. The ADA recognizes alcoholism and *past* drug addiction as disabilities, but also recognizes an employer's legitimate interest in preventing illegal drug use by its employees. Although employers tend to treat alcohol and drug abuse under a single employment policy, the ADA treats alcoholism and drug addiction slightly differently.

In addition, recognizing that both alcoholism and drug addiction are "serious health conditions" under the federal Family and Medical Leave Act, an employer must be aware of the dual responsibilities under both laws.[434]

2.3(a) *Use of Alcohol*

An employer may implement rules and regulations establishing discipline, up to and including termination, for the use of alcohol during working hours or in the workplace, provided the employer treats alcoholic employees the same as any other employees regarding alcohol use and misuse.[435] Notably, an employee who abuses alcohol away from the workplace may still be entitled to protection under the law.

The employer's duty of reasonable accommodation applies to alcoholism in the same manner as with any disability. One such accommodation may be a leave of absence to attend a rehabilitation program or undergo rehabilitation treatments. Although there is no automatic requirement that an employer permit leave in these circumstances, the employer may deny the request for leave only if it can show that the leave of absence will cause an undue hardship on its business or operations.[436]

Employers are allowed, however, to impose additional requirements on recovering alcoholics upon their return from a rehabilitative leave. For example, a federal court rejected an employee's failure to accommodate claim when he refused to take a drug test after completing a rehabilitation program. In *Sechler v. Modular Space Corp.*, the employee had a history of receiving treatment for alcohol dependence but remained sober from 1998 to 2008.[437] In late 2008, the employee began drinking alcohol again, and his job performance declined. In 2009, the employee sought leave to obtain outpatient treatment for alcoholism, which the employer approved. Upon completing outpatient treatment, the employee

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[434] *See, e.g.*, *Moorer v. Baptist Mem'l Health Care Sys.*, 406 F.3d 477 (6th Cir. 2005) (although employee has substantive right to reinstatement upon completion of treatment at a recovery center under the FMLA, the employee gets no greater protection against termination for reasons not related to FMLA-approved treatment); *Picarazzi v. John Crane, Inc.*, 2011 WL 486211 (S.D. Tex. Feb. 7, 2011) (employer denied summary judgment on former employee's ADA claim that company discriminated against him in disciplining him for absences from work as a result of his FMLA-approved treatment for alcoholism).

[435] 42 U.S.C. § 12114(c); *see also Jarvela v. Crete Carrier Corp.*, 776 F.3d 822 (11th Cir. 2015) (employer did not violate the ADA where plaintiff had a current clinical diagnosis of alcoholism, which rendered him unqualified as a commercial motor vehicle driver under Department of Transportation regulations); *Ames v. Home Depot USA, Inc.*, 629 F.3d 665 (7th Cir. 2011) (granting employer summary judgment on employee's ADA claim where employee signed an employee assistance agreement that subjected her to immediate termination if she "refuse[d] to take a required drug and/or alcohol test or fail a drug and/or alcohol test at any time during the course of [her] employment" and then subsequently reported to work under the influence of alcohol).

[436] 42 U.S.C. § 12112(b); *see also Mueck v. La Grange Acquisitions, L.P.*, 75 F.4th 469 (5th Cir. 2023).

[437] 2012 WL 1355586 (S.D. Tex. Apr. 18, 2012).

returned to work and signed a return-to-work agreement. The agreement required the employee to submit to unannounced drug and alcohol tests. The employer denied his request for intermittent leave to attend follow-up meetings with Alcoholics Anonymous, and instead directed him to attend such meetings on his own time. On two days, the employee's coworkers reported to company officials that he was behaving oddly and appeared to be intoxicated. The employer then required the employee to take a drug and alcohol test and directed him not to drive to the testing location. Declining the offer of a taxi, the employee refused to go to the testing location unless he could drive himself, and the employer subsequently terminated his employment. The employee brought a failure to accommodate claim, but the court held that the employee's claim failed because the employer had granted his accommodation request for leave to obtain treatment. Yet, his claim that the employer had violated the FMLA by failing to permit him intermittent leave so he could attend Alcoholics Anonymous meetings could go forward to trial.

2.3(b) *Use of Illegal Drugs*

The ADA also addresses the illegal use of drugs directly.[438] Employees and applicants "currently" engaging in the illegal use of drugs are not "qualified individuals with a disability" when the employer acts on the basis of that illegal drug use. Any illegal drug use disqualifies an individual from protection under the statute. Thus, the ADA permits an employer to discipline or terminate an employee or refuse to hire an applicant currently engaging in the illegal use of drugs. [439] Individuals who have successfully completed rehabilitation for the abuse of drugs or who are participating in a supervised rehabilitation program and no longer using an illegal drug may, however, be protected under the law, as is any individual whom the employer erroneously regards as engaging in illegal drug use.[440]

2.3(c) *Employees Held to Heightened Standards or Last Chance Agreements*

Under the ADA, an employer may hold an alcoholic or recovering drug addict to the same qualification standards for employment, or job performance and behavioral standards, as other employees, even if unsatisfactory performance or behavior is related to the employee's drug addiction or alcoholism.[441] For example, if an individual with alcoholism is repeatedly late to work or cannot perform the responsibilities of the job, an employer can take disciplinary action on the basis of poor job performance or behavioral problems.[442]

The same holds true for an employee discharged for insubordination, disruptive behavior, and/or illegal conduct. In *Newland v. Dalton*, a civilian employee of the Navy was fired for "notoriously disgraceful

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[438] 42 U.S.C. § 12114.

[439] *See e.g., Anderson v. Diamondback Inv. Grp. L.L.C.,* 117 F.4th 165 (4th Cir. 2024) (concluding a company's policy conditioning employment on the prospective employee's testing negative for drugs and alcohol was not discriminatory so long as the goal of the policy was not targeting "the intentional exclusion of any individual taking a lawfully prescribed drug to treat a disability").

[440] 42 U.S.C. § 12114(b).

[441] 42 U.S.C. § 12114(c)(4).

[442] *See, e.g.*, *Blazek v. City of Lakewood, Ohio*, 576 F. App'x 512 (6th Cir. 2014) (driver fired after drinking on the job could not support failure to accommodate claim; plaintiff did not request any accommodation for drinking problem prior to his terminable offense); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665 (7th Cir. 2011) (employer is not required to overlook workplace rule violations by employee with alcoholism); *Clark v. Boyd Tunica, Inc.*, 2016 WL 853529 (N.D. Miss. Mar. 1, 2016) (denying claim of employee terminated after testing positive for alcohol incident to post-accident testing).

conduct" after he attempted to fire an assault rifle at individuals in a bar.[443] The employee sued under the Rehabilitation Act of 1973, alleging his "drunken rampage" resulted directly from being an alcoholic. The Ninth Circuit Court of Appeals affirmed the trial court's dismissal of the action, concluding the termination did not violate the Rehabilitation Act because it was based on the employee's misconduct, not his disability. Similarly, in *Sista v. CDC Ixis North America, Inc.*, the Second Circuit Court of Appeals held that the ADA does not require an employer to retain a potentially violent employee who makes threats against supervisors or coworkers: "this Court, like every other court to have taken up this issue, does not read the ADA to require that employers countenance dangerous misconduct, even if that misconduct is the result of a disability."[444]

Further, the Second Circuit has also confirmed an employer's ability to impose special conditions on employees identified as substance abusers without violating the ADA. In *Clifford v. County of Rockland*, the plaintiff claimed her employer discriminated against her and failed to make reasonable accommodations for her alcoholism.[445] After the plaintiff had an incident of intoxication while on duty, she and her employer entered into a disciplinary stipulation, which included a provision that, for a year following the plaintiff's return to work, no level of alcohol in her blood would be tolerated. The Second Circuit affirmed summary judgment for the defendant, finding that the disciplinary stipulation was not discriminatory even though it imposed conditions on the plaintiff that were not imposed on other employees.

2.3(d) *Drug & Alcohol Testing*

The ADA does not prohibit an employer from conducting drug testing to determine whether an employee is illegally using drugs, and such tests are not considered to be medical examinations subject to the restrictions described above.[446] If an employer wishes to conduct drug tests even before a conditional offer is made to an applicant, it may do so (subject to state law restrictions).[447] Moreover, the employer may adopt or administer reasonable policies or procedures, including drug testing, designed to ensure that the applicant or employee who has successfully completed a supervised drug rehabilitation program, or is participating in such a program, is refraining from the illegal use of drugs.[448] In contrast, however, alcohol tests are generally considered "medical examinations" and therefore can be required and used only to the extent they are both job-related and consistent with business necessity, as with any medical examination.[449]

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[443] 81 F.3d 904 (9th Cir. 1996).

[444] 445 F.3d 161, 172 (2d Cir. 2006); *see also Pernice v. City of Chi.*, 237 F.3d 783, 786 (7th Cir. 2001) (holding ADA does not prohibit an employer from disciplining for employee misconduct because a contrary rule would "require an employer to accept egregious behavior by an alcoholic [or drug addict] employee when that same behavior, exhibited by a nondisabled employee, would require termination").

[445] 528 F. App'x 6 (2d Cir. 2013).

[446] 42 U.S.C. § 12114(d).

[447] Please note, however, that state and local laws may permit prehire drug testing only after the applicant is extended a conditional offer of employment and may impose other restrictions.

[448] *See Clifford*, 528 F. App'x 6; *Buckley v. Consolidated Edison Co.*, 155 F.3d 150 (2d Cir. 1998) (holding that an employer's practice of randomly testing former substance abusers more frequently than those employees not previously identified as substance abusers did not constitute discrimination under the ADA).

[449] *EEOC v. U.S. Steel Corp.*, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013).

Any information obtained from a drug test about an individual's medical condition must be treated as a confidential medical record. For example, if a drug test reveals the use of a drug prescribed to treat a medical condition, that information must be maintained separately and treated as confidential.[450]

2.3(d)(i) *Abuse of Prescription Drugs*

Generally, employers may not discriminate against employees who lawfully use prescription drugs, although they may require that the use of such drugs not negatively affect the employees' ability to perform safely. Abuse of a prescription drug is illegal, however, as is the use of a medicine not prescribed for that person; such usages are not protected and need not be accommodated under the ADA.[451]

If an employer requires its employees to undergo medical testing for prescription medications because of legitimate business or safety concerns, a judge or jury may question those concerns if the employer deviates from its policy or asks questions that elicit information on an employee's disability or underlying condition. In *Bates v. Dura Automotive Systems, Inc.*, the Seventh Circuit Court of Appeals held that, because of inconsistencies between a company's written and actual drug-testing policies and its disparate treatment of individual employees, a jury could reject the company's explanations as a pretext for screening out employees who may have disabilities.[452] The disparate treatment of employees occurred when the company terminated one employee after asking her directly about her prescription medications, while allowing another to stay employed until he completed a project.[453]

2.3(d)(ii) *Medical Use of Marijuana*

More than half of the states have enacted medical marijuana laws. Although many of the states' laws specifically forbid employers from taking adverse employment action against an employee on the basis of their obtaining an authorization to use medical marijuana, those same laws typically permit employers to enforce their drug-free workplace programs even-handedly. Thus, for example, employers with such programs may be able to refuse to hire, or to terminate, individuals who violate drug-free policies by testing positive, possessing marijuana while at work, or working under the influence of marijuana. For more information on this topic, including discussion of employer policies in states that permit adult recreational marijuana use, see **LITTLER ON EMPLOYMENT TESTING**.

2.4 Disability-Based Harassment

Workplace harassment is a form of discrimination. Federal courts have extended the protections against workplace harassment developed under Title VII to the Americans with Disabilities Act (ADA).[454] These courts have held that a harassment claim is supported by identical language in the ADA and Title VII, as well as the ADA's purpose and remedial framework.[455] To establish a claim of disability harassment, an individual therefore must prove:

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[450] 42 U.S.C. § 12112(d)(3).

[451] 42 U.S.C. § 12111(6).

[452] 767 F.3d 566, 577 (6th Cir. 2014), *pet. for en banc review denied*, 2014 U.S. App. LEXIS 22311 (6th Cir. Nov. 17, 2014).

[453] 767 F.3d at 571.

[454] *See, e.g.*, *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003); *Flowers v. Southern Reg'l Physician Servs.*, *Inc.*, 247 F.3d 229, 232-35 (5th Cir. 2001); *Fox v. GMC*, 247 F.3d 169, 175-77 (4th Cir. 2001).

[455] *See, e.g.*, *Flowers*, 247 F.3d 229.

1. the individual is a member of the class of people protected by the statute;
2. the individual was subjected to unwelcome harassment;
3. the harassment resulted from the individual's membership in the protected class; and
4. the harassment was severe enough to affect the terms, conditions, or privileges of employment.[456]

2.4(a) *Disability-Based Harassment: Case Illustrations*

In *Ryan v. Capital Contractors, Inc.*, the plaintiff alleged he was the subject of a hostile work environment because of his low cognitive functioning.[457] The plaintiff based his hostile work environment claim on testimony that his foremen frequently called him "f--king dummy," "f--king retard," "stupid," "idiot," and "numb nuts" and his supervisor asked him if his mother had dropped him on his head when he was little.[458] Despite the conduct of the supervisor, the Eighth Circuit Court of Appeals found that the plaintiff's claim failed because the conduct was not unwelcomed—particularly where the plaintiff referred to his foreman as "fatty," "Shrek," "giant," and "bitch."[459] The court also affirmed the grant of summary judgment on the plaintiff's hostile environment claim because the plaintiff failed to establish that the alleged harassing conduct impacted the terms, conditions, or privileges of the plaintiff's employment or that the employer knew of should have known of the harassment and failed to address it.[460]

In contrast, in *Horne v. Dickinson Independent School District*, the court denied the employer's motion for summary judgment on plaintiff's hostile work environment claim based on his learning disability—characterized by the plaintiff as "borderline mental retardation."[461] The court accepted the plaintiff's characterization that employees' references to the plaintiff as "Forrest Gump" had a negative connotation intended to bring to mind the fictional character's naïve and slow-witted nature rather than other positive attributes.[462] The court held that the plaintiff met his burden at the summary judgment stage of setting forth sufficient evidence of a hostile work environment that affected the form and nature of his work assignments.[463]

Plaintiffs may also try to base a hostile environment claim on the denial of a reasonable accommodation. In *Bellino v. Peters*, the Seventh Circuit Court of Appeals affirmed summary judgment in favor of the defendant, holding that the plaintiff could not prove the alleged harassing conduct was because of his disability.[464] The plaintiff based his disability harassment claim on allegations that the defendant refused to provide him with a position description, failed to accommodate him, denied his request for administrative duties, withdrew his medical clearance, and did not accurately pay him. The court found that the plaintiff's allegations were not supported by the evidence because the defendant provided the plaintiff with a description of job duties and offered him a reasonable accommodation (even though the

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[456] *Credeur v. Louisiana*, 860 F.3d 785, 795-96 (11th Cir. 2017); *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 634 (8th Cir. 2016).

[457] 679 F.3d 772, 775, 778-80 (8th Cir. 2012).

[458] 679 F.3d at 775.

[459] 679 F.3d at 775, 779.

[460] 679 F.3d at 779-80.

[461] 2012 WL 2935157, at *1 (S.D. Tex. July 17, 2012).

[462] 2012 WL 2935157, at *4.

[463] 2012 WL 2935157, at **4-5.

[464] 530 F.3d 543 (7th Cir. 2008).

plaintiff did not desire the proposed accommodation); the denial of the plaintiff's medical clearance was based on the plaintiff's belief he could not safely perform his duties; the defendant was justified in denying his request for administrative duties because no such duties were available at the time of the request; and the inaccurate pay was based on administrative missteps. Ultimately, the court held that the defendant's actions toward the plaintiff, even if proven, were not because of his disability.

Whether the alleged harassing conduct is sufficiently "severe and pervasive" will depend on the context in which the conduct occurred. For example, the plaintiff in *Shalbert v. Marcincin* had anorexia and depression, conditions known to the employer and discussed openly in the work environment by both parties.[465] The court found that the statements cited by the plaintiff as objectionable were not severe or pervasive enough to create a hostile work environment. The employer commented that the plaintiff "looked pale," "looked horrible," "looked like she was going to pass out," "had blue lips," and that the employer "wanted her old [plaintiff] back."[466] The statements occurred over the course of 15 months. Given the open office environment and the personal relationship between the plaintiff and her employer, the court found that the employer's comments were more likely expressions of concern rather than statements of hostility.

2.5 Retaliation Under the ADA

As with virtually all other antidiscrimination laws, the ADA has a separate provision making it unlawful for an employer to penalize an employee for invoking the employee's rights under the ADA. To make out a retaliation claim, a plaintiff must show:

1. the plaintiff engaged in protected activity;
2. an adverse action was taken against the plaintiff; and
3. a causal connection between the adverse action and the protected activity.[467]

In *University of Texas Southwestern Medical Center v. Nassar*, the U.S. Supreme Court adopted the stricter "but for" causation standard used in ADEA claims for retaliation claims under Title VII.[468] In *Nassar*, the Court reversed a decision by the Fifth Circuit Court of Appeals that a Title VII retaliation plaintiff could prevail if the plaintiff showed retaliation was a "motivating factor," among others, for an employer taking adverse action. The Court held that the "mixed-motive" analysis (where the defendant is shown to have both a discriminatory and a legitimate nondiscriminatory motive for the adverse employment action) pertains only to "status discrimination," such as race and gender, and that retaliation claims are treated differently under Title VII.

Whether the Supreme Court's Title VII analysis in *Nassar* extends to cases under the ADA is not fully settled. The federal courts of appeal are still grappling with that question and not all have yet had the opportunity to chime in conclusively. Thus far, the Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have concluded that *Nassar* applies to ADA retaliation claims.[469] Accordingly, in these jurisdictions,

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[465] 2005 WL 1941317 (E.D. Pa. Aug. 9, 2005).

[466] 2005 WL 1941317, at *7.

[467] *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2013).

[468] 570 U.S. 338 (2013).

[469] *Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1192 (11th Cir. 2024) (acknowledging the switch from "because of" to "on the basis of" in the 2008 amendment to the ADA did not change or affect its but-for causation standard); *Sharp v. Profitt*, 674 F. App'x 440, 450 (6th Cir. 2016); *Oehmke v. Medtronic, Inc.*, 844 F.3d 748 (8th Cir. 2016); T.*B.*

an ADA retaliation plaintiff must establish that the protected activity under the ADA was the "but for" cause of the adverse action. In other words, the plaintiff must show that the employer would not have taken the adverse action absent plaintiff's protected conduct. That being said, this issue is unresolved in other jurisdictions, including the Third and Tenth Circuits.[470]

Relatedly, a number of federal appellate courts have also now addressed whether the holding in *Nassar* applies to *discrimination* claims (as opposed to retaliation claims) brought under the ADA. The Second, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeal—have held that ADA discrimination claims require "but for" causation under *Nassar*.[471] By contrast, three courts have continued to allow a mixed-motive analysis for ADA discrimination claims.[472] Two additional appellate courts, meanwhile, have acknowledged the open question but declined to answer it.[473]

Regardless of the causal standard applied, employers should be aware that employees *without* disabilities can sue for retaliation. Plaintiffs claiming retaliation over an accommodation request have to show only that they had a good faith belief of an entitlement to a reasonable accommodation based on what they thought was a disability (not that they had an actual disability). As such, the class of individuals withstanding to assert retaliation claims is broader.[474] Yet, not every subjective belief in entitlement to an accommodation enables an individual to claim retaliation. The Tenth Circuit Court of Appeals held that a plaintiff failed to set forth a valid ADA retaliation claim because no reasonable jury could find that the

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ex rel. Brenneise v. San Diego Unified Sch. Dist., 806 F.3d 451, 472-73 (9th Cir. 2015); *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016).

[470] *Proudfoot v. Arnold Logistics, L.L.C.*, 629 F. App'x 303, 308 n.5 (3d Cir. 2015) ("We have not yet decided whether *Nassar*'s 'but for' causation standard also applies to retaliation claims under the ADA, and need not do so here."); *Aman v. Dillon Cos., Inc.*, 645 F. App'x 719, 727 n.5 (10th Cir. 2016) ("It not clear whether an ADA retaliation claim requires 'but for' or 'motivating factor' causation.").

[471] *Natofsky v. City of N.Y.*, 921 F.3d 337 (2d Cir. 2019); *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019); *Gentry v. East W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235-36 (4th Cir. 2016); *Gohl v. Livonia Pub. Sch. Dist.*, 836 F.3d 672, 682 (6th Cir. 2016) (citing *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 317 (6th Cir. 2012)); *Serwatka v. Rockwell Automation Inc.*, 591 F.3d 957 (7th Cir. 2010).

[472] *Fiorentini v. William Penn Sch. Dist.*, 665 F. App'x 229, 236-38 (3d Cir. 2016) ("To establish causation in a pretext case, a plaintiff must show that consideration of a protected characteristic was a 'determinative factor' in the plaintiff's adverse employment action."); *Oehmke*, 844 F.3d at 756 ("We apply a mixed-motive causation standard."); *Hoffman v. Baylor Health Care Sys.*, 597 F. App'x 231, 235 n.12 (5th Cir. 2015) (explaining that, unlike with age discrimination claims, the ADA calls for a "motivating factor" test); *see also Hernandez-Echevarria v. Walgreens De P.R., Inc.*, 121 F. Supp. 3d 296 (D.P.R. 2015) (refusing to apply *Nassar* to ADA disability claims and noting that while the language of the ADA is similar to Title VII's retaliation provision, the ADA's text and legislative history demonstrate that Congress intended the ADA's discrimination provision to operate in a similar manner as Title VII's status-based discrimination provision); *Siring v. Oregon State Bd. of Higher Ed.*, 977 F. Supp. 2d 1058 (D. Or. 2013) (holding that, in the absence of clear precedent from the Supreme Court or Ninth Circuit to the contrary, the court would continue to apply the motivating factor standard).

[473] *Forrester v. Prison Health Servs., Inc.*, 651 F. App'x 27, 28-29 (2d Cir. 2016) (noting that "[i]t is questionable whether ADA discrimination claims may proceed on a mixed-motive theory" but avoiding the question where the plaintiff's claims failed regardless of the standard utilized); *Silk v. Board of Trs., Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 705-06 (7th Cir. 2015) (reserving judgment and stating that "it is an open question whether the but-for standard we announced in *Serwatka* survived the amendment to the ADA") (discussing *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010)).

[474] *Keating v. Gaffney*, 182 F. Supp. 2d 279 (E.D.N.Y. 2001) (holding that an employee's request for an accommodation was a protected activity because his request for an accommodation was made in good faith).

plaintiff had a reasonable, good faith belief that his inability to descend a ladder constituted a disability under the ADA.[475]

The antiretaliation provisions of the ADA also grant standing to "any individual" who "has opposed any act or practice made unlawful" by the ADA, not solely to persons with disabilities. In *Barker v. Riverside County Office of Education*, the Ninth Circuit Court of Appeals ruled that a teacher who expressed concerns to the county that its special education services did not comply with state or federal law could pursue retaliation claims under both the ADA and section 504 of the Rehabilitation Act.[476] Although the teacher did not have a disability and did not have a "close relationship to a disabled person," she had standing because she was opposing an act or practice under the ADA.

There is ongoing controversy as to the types of damages available under the ADA retaliation provisions. In *Kramer v. Banc of American Securities., L.L.C.*, the Seventh Circuit Court of Appeals held that only equitable remedies, not compensatory or punitive damages, are available as remedies for claims of retaliation under the ADA.[477] The court further noted that with only equitable remedies available, plaintiffs have no right to a jury trial. The court's reasoning was later adopted by the Ninth Circuit Court of Appeals in *Alvarado v. Cajun Operating Co.*[478] The Second, Eighth, and Tenth Circuits, however, have affirmed compensatory damage awards for ADA retaliation claims, although these opinions did not directly discuss the issue as to whether such damages were permitted by the statute.[479] Various federal district courts have continued to reach conflicting decisions.[480]

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[475] *Wehrley v. American Family Mut. Ins. Co.*, 513 F. App'x 733 (10th Cir. 2013); *see also Tabatchnik v. Continental Airlines*, 262 F. App'x 674, 676-77 (5th Cir. 2008) (plaintiff could not show that his company regarded him as having a disability and plaintiff did not believe he had a disability; as such, he could not show a good faith belief that he had a disability and, therefore, his request for an accommodation cannot be considered to be protected activity); *see also Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168 (4th Cir. 2023) (no retaliation when decision-makers did not know of the employee's ADA claims and employee did not return ADA accommodations paperwork. The court rejected employee's claim that the statement that she was not a "good fit" for the college "is itself compelling evidence of retaliatory animus." Finding "[t]his is too broad an assertion," the court noted that "[t]hough there may be circumstances where evidence reveals that 'good fit' is a subterfuge for discrimination or retaliation, it is also a perfectly innocuous comment that an organization's collaborative goals would not be furthered, and in fact might be retarded, by a particular employee").

[476] 584 F.3d 821 (9th Cir. 2009).

[477] 355 F.3d 961 (7th Cir. 2004); *see also Bowles v. Carolina Cargo, Inc.*, 100 F. App'x 889 (4th Cir. 2004) (adopting the decision in *Kramer* without analysis); *Rhoads v. Federal Deposit Ins. Corp.*, 94 F. App'x 187 (4th Cir. 2004) (same); *Dalton v. Lewis-Gale Med. Ctr., L.L.C.*, 2019 WL 4394757, at *2 (W.D. Va. Sept. 13, 2019) (listing district court cases in the Fourth Circuit Court of Appeals that have adopted the reasoning in *Kramer*).

[478] 588 F.3d 1261 (9th Cir. 2009); *see also Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 863 n.2 (9th Cir. 2017) (commenting that while "no other circuit has expressly held to the contrary, we note the Eighth Circuit appears to have twice assumed without deciding that damages constitute an available remedy for claims brought under § 12203").

[479] *See Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1196-98 (8th Cir. 2001); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-45 (10th Cir. 1999); *see also Salitros v. Chrysler Corp.*, 206 F.3d 562, 575 (8th Cir. 2002) (upholding an award of punitive damages).

[480] *See, e.g.*, *Lavalle-Cervantes v. Int'l Hosp. Assocs.*, 261 F. Supp. 3d 197, 199 (D.P.R. 2016) (rejecting plaintiff's reliance on contrary authority and concluding that her "ADA retaliation claim may be remedied only by equitable relief"); *Wilkie v. Luzerne Cnty.*, 2014 WL 4977418, at **3-4 (M.D. Pa. Oct. 6, 2014) (finding that ADA's remedial structure allows only equitable relief, and not compensatory damages, for retaliation claims); *Pacheco v. Park South Hotel, L.L.C.*, 2014 WL 292348, at *4 (S.D.N.Y. Jan. 27, 2014) (noting division within the Second Circuit and

The EEOC acknowledged this dispute in its 2016 guidance on retaliation. For its part, the EEOC asserts that compensatory and punitive damages are available for retaliation claims under the ADA.[481] Overall, the 2016 guidance interprets the retaliation provisions of various antidiscrimination statutes, explains the EEOC's position as to numerous related issues (including, for example, what type of activity is protected), provides examples of ADA interference, and offers "promising practice" tips for employers.

3. Practical Guidelines for Employers

3.1 The Interactive Process

Since the passage of the ADAAA, the "interactive process" has taken on greater importance for employers because more cases have focused on whether discrimination or a failure to accommodate took place, rather than on the threshold issue of whether an individual is protected and eligible for an accommodation under the law. The accommodation process encourages an interactive dialogue and exchange of information between an employer and a qualified employee with a disability in connection with efforts to reasonably accommodate the employee's limitations. The process envisions meaningful participation and timely cooperation by both parties. Unreasonable delay by the worker, or refusal to provide information, in response to management's legitimate requests for pertinent information can undermine the individual's accommodation claim. Detailed documentation of the employer's and employee's efforts related to the interactive process is essential.

Even though accommodations are very individualized and evaluated on a case-by-case basis, employers can structure the accommodation analysis and standardize some of the paperwork. Managers and supervisors should be trained to recognize when to commence the interactive process to avoid inadvertent oversights and unnecessary delays. Suggested steps for the basic interactive process are summarized below.

Unless the employee's disability is obvious or known to management, the first stage in this process usually involves determining whether the employee has a disability within the meaning of the ADA. This determination should be made by the human resources manager (HR Manager) in consultation with the other members of the management team, as appropriate. Under the ADAAA, any doubts should be resolved in favor of assuming that the individual has a disability and is therefore entitled to a reasonable accommodation. The accommodation dialogue should be pursued, rather than refused altogether in these instances.

comparing *Infantolino v. Joint Indus. Bd. of Elec. Indus.*, 582 F. Supp. 2d 351, 364 (E.D.N.Y. 2008), which held compensatory and punitive damages are unavailable, with *Edwards v. Brookhaven Sci. Assocs.*, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005), which found that compensatory damages may be awarded on ADA retaliation claims).

[481] EEOC, Enforcement Guidance, *Retaliation and Related Issues*, No. 915.004 (Aug. 25, 2016), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

Key Concepts

A request for accommodation can be made at any time.
Legal words (*e.g.*, "reasonable accommodation," the "Americans with Disabilities Act," etc.) are not necessary to request accommodation.
The request can be written or oral.
Other people may seek accommodation for the worker.
No request may be needed in some extraordinary circumstances.

Possible steps in the interactive process and important consideration at each step are discussed below.

1. **Acknowledge the Request in Writing.** When an accommodation is requested (whether written or verbal), the HR Manager should document the initial contact (*e.g.*, date and substance of conversation) and acknowledge the worker's request for the accommodation in writing. Note that the individual is not legally required to make an accommodation request in writing.

2. **Disability Status Determination.** Making an accurate disability status determination is important. The HR Manager should make every effort to collect the pertinent information. Also, it is important for the HR Manager to document efforts to collect the pertinent information.

   There are essentially three possible outcomes in a disability status determination: (1) a finding of a disability; (2) a finding of a possible disability, but further investigation is needed; or (3) a determination that there is no disability.

   - **Disability.** Management should accommodate qualified workers with disabilities that request accommodations unless doing so would impose an undue hardship or create a direct threat. Proceed directly to the next step.
   - **Possible Disability / Further Investigation Needed.** If further investigation is needed, the HR Manager may consider:
     - requesting additional medical information from the worker, such as documentation regarding the worker's impairment and work restrictions;
     - seeking clarification of doctor's notes and work restrictions; or
     - arranging a medical examination.

   Medical information is highly confidential. If additional medical information is needed from the employee's health care provider, the employee should sign an appropriate medical release authorizing release of needed medical information. When requesting medical information from the employee's health care provider, provide the health care provider with information identifying the employee's essential job functions and, where applicable, a description of the work environment.

   It is unlawful to place documents with medical information in a regular personnel file. It belongs in a separate file, preferably one with restricted access (*i.e.*, under lock and key). A nonexhaustive list of confidential documents includes:

□	Doctors' notes, charts, reports, and billing statements	□	X-rays or other medical records
□	Counselors' (therapists; psychologists; psychiatrists) notes, charts, reports, and billing statements	□	Correspondence with the employee regarding the employee's medical condition or limitations
□	Correspondence with doctors or counselors	□	Workers' compensation claims, reports, and related forms
□	Statements from the employee (*e.g.*, requests for accommodation)	□	Insurance forms

Managers who gain knowledge of any medical information of an employee should be trained to understand the sensitive nature of this information and be instructed to treat the information as personal and confidential.

Gathering medical information should not be a boundless free-for-all into the employee's medical history. Requests for information should be narrowly focused on the employee's impairment and the employee's ability to perform the essential functions of the job.

- **No Disability.** A reasonable accommodation is only available to qualified individuals with actual disabilities. Workers without disabilities may be entitled to other rights, such as workers' compensation benefits, or may have rights under the federal and/or state family and medical or sick leave laws. Consider all rights carefully.

3. **Scheduling the Meet & Confer Session.** Management usually needs to meet with the worker to discuss various accommodation needs and options. To many, this meet and confer process is a familiar part of administering workers' compensation claims. The worker should be contacted to arrange a convenient date for the session. The tone should be civil, and the worker should be invited to submit any additional information the worker believes will be of further assistance to management regarding the request.
4. **Homework for the Meet & Confer Session.** The HR Manager should be prepared to address the worker's request at the meet and confer session. Some homework is usually necessary in preparation for the meeting and may be necessary in follow up to the session. The following issues should be considered, in consultation with the other members of the management team, third parties, and Human Resources, as appropriate:
    - Can the worker perform the essential functions of the job *without* any accommodation?
    - Can the worker perform the essential functions of the job *with* reasonable accommodation?
    - If reasonable accommodation is needed, can management provide the worker with the accommodation the worker has requested? Would a different reasonable accommodation be better or less expensive? What alternatives are available?
    - If the worker cannot perform the essential functions of the job even with accommodation, can the worker be reassigned to a suitable, vacant, equivalent alternative position for which the individual is qualified?

- If a suitable, vacant, equivalent alternative position is not available, is a suitable, vacant, lower-level position available?
- Would a leave of absence or further leave be appropriate?

At least two management representatives should be present during the meet and confer session. One of the management representatives should take notes on the meeting.

The meet and confer session should be conducted in a private place. Make sure a private room is available. If appropriate, consider notifying the vocational rehabilitation counselor and the union leadership of the date for the session.

If the meet and confer session is delayed, documentation of the reasons for the delay and efforts to work together with the worker cooperatively is essential.

5. **Special Considerations When Reassignment is Considered as a Reasonable Accommodation.** If reassignment is being considered, or if it has been requested by the worker, bring copies of each job description/job analysis to the meet and confer session. Send them to the worker in advance, if possible. The worker may be reassigned to a vacant position for which the worker is "qualified" despite the disability. Reassignment is often viewed as the accommodation of last resort, unless the employee expresses a preference for reassignment. In such cases, it is recommended to first search for positions that are equivalent to the worker's original job (*e.g.*, same salary, same shift, same status, same level of responsibility, same promotional opportunities, etc.). If an equivalent position cannot be located, search for vacant lower-level positions. A worker reassigned to a lower-level position should be paid the usual salary for that position, unless workers without disabilities have been reassigned under similar circumstances without a loss of pay.

6. **Conducting the Meet & Confer Session.** Ideally, the meet and confer session will be cordial and professional. If the worker is uncooperative, explain that the worker's cooperation is needed. Consider ending the session if the worker (or the worker's representative) continues to be uncooperative, or if the worker becomes rude, belligerent, or angry. When conducting the meet and confer session, consider the following:

Never:

□	Raise your voice	□	Be provoked into an argument
□	Lose your temper	□	Make promises you can't keep

Always:

□	Take thorough notes	□	Be professional
□	Encourage the worker to fully participate	□	Agree to a reasonable request for additional information or additional time

7. **Follow-Up After Meet & Confer Session.** After the session, you should consider sending a written summary of the session to the worker, inviting the worker's comments, suggestions,

or any additional information that should be considered. The HR Manager should conduct further investigation into the matters discussed at the session, as needed.

8. **Final Response.** Management's final response should be communicated to the worker in writing. The final response should be formulated by the HR Manager in consultation with the other members of the management team. The following response usually will consist of one of the following:

    - accommodate the worker in the current job with the requested accommodation;
    - accommodate the worker in the current job with a different accommodation;
    - offer to reassign the worker to the suitable, vacant position that the worker requested;
    - offer to reassign the worker to a different suitable, vacant position;
    - offer the worker additional leave or an interim accommodation in anticipation of an impending vacancy for a suitable, alternative position;
    - offer the worker additional leave to obtain treatment for a disability;
    - vocational rehabilitation benefits (only work-related disabilities); or
    - separation from employment, if absolutely no reasonable accommodation is available. (The decision to separate a worker usually should be approved by senior management, in consultation with legal counsel.)

9. **Ongoing Duty to Accommodate.** Accommodations are a moving target, and may be affected by changes in: (1) the individual's condition/limitations; (2) available technology; or (3) the duties of the job. The duty of reasonable accommodation is not necessarily exhausted by making one accommodation. For example, a progression of the worker's disability may require the parties to revisit the accommodation provided. A qualified worker with a disability might be entitled to:

    - more than one type of accommodation;
    - different accommodations at different times; or
    - no accommodation part of the time and some accommodation at other times.

    If there are multiple requests for accommodation, follow the procedures above for each request. If an employee with a disability is still having difficulties even with accommodation, consider initiating a discussion about changing needs and alternate accommodations. Monitoring accommodations by soliciting feedback from the employee is usually a sound approach.

3.2 Sample Disability & Accommodation Policy

Provided below is a sample disability and accommodation policy that may be included in an employee handbook or manual. Note that some state laws may be broader than the ADA.

DISABILITY & ACCOMMODATION POLICY[482]

To comply with applicable laws ensuring equal employment opportunities for individuals with disabilities, **[Company Name]** will make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless undue hardship and/or a direct threat to the health and/or safety of the individual or others would result. Any employee who requires an accommodation in order to perform the essential functions of their job, enjoy an equal employment opportunity, and/or obtain equal job benefits should contact Human Resources **[or insert name/contact details for appropriate company representative or department]** to request such an accommodation.

Employees who believe they need an accommodation must specify, preferably in writing, what barriers or limitations prompted the request. The Company will evaluate information obtained from the employee, and possibly the employee's health care provider or another appropriate health care provider, or another appropriate health care provider, regarding any reported or apparent barriers or limitations, and will then work with the employee through an interactive process to identify possible accommodations, if any, that will help to eliminate or otherwise address the barrier(s) or limitation(s). If an identified accommodation is reasonable and will not impose an undue hardship on the Company and/or a direct threat to the health and/or safety of the individual or others, [**Company Name]** will generally make the accommodation, or it may propose another reasonable accommodation which may also be effective. Employees are required to cooperate with this process by providing all necessary documentation supporting the need for accommodation, and by being willing to consider alternative accommodations when applicable. In some cases, the above-described interactive process may be triggered without a request from the employee, such as when the Company receives notice from its own observation or another source that a medical impairment may be impacting the employee's ability to perform essential job functions.

Employees who wish to request unpaid time away from work to accommodate a disability should speak to Human Resources.

3.3 Accommodation Worksheet

The accommodation worksheet may be provided to managers and supervisors.[483]

[482] This is a sample policy only; it does not constitute and is not a substitution for consultation with legal counsel. It is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. The law in this area constantly changes and must be reviewed before implementing any agreement in this regard. This sample policy should not be implemented or executed except on the advice of counsel. In addition, there may be important state law distinctions that will impact the inclusion of certain provisions.

[483] This is a sample form only; it does not constitute and is not a substitution for consultation with legal counsel. It is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. The law in this area constantly changes and must be reviewed before implementing any agreement in this regard. This sample form should not be implemented or

Employee/Applicant Name: _____		
Position Desired/Held: _____		
Date of Request: _____		
Prior Requests?	Has the employee requested accommodation before? *If the answer to this question is "Yes," then specify the details of the prior request on a separate page (e.g., date of request; type of accommodation requested; whether accommodation provided/refused). Staple the extra page to this worksheet.*	□ Yes □ No
Disability?	Does the employee have a mental and/or physical impairment which limits at least one major life activity? (*e.g.*, seeing, hearing, working a broad range of jobs, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, breathing, reading, concentrating, thinking, learning, communicating, interacting with others, performing various bodily functions -- including but not limited to immune, digestive, bowel, bladder, neurological, brain, respiratory, hemic, lymphatic, musculoskeletal, genitourinary, sense, cardiovascular, circulatory, endocrine, or reproductive functions). List the impairment (if voluntarily disclosed) and restrictions reported by the employee or in records provided by the employee (you may attach additional information): _____ _____ _____ _____	□ Yes □ No
	If the answer to this question is "Yes," then you may assume, for purposes of continuing the accommodations process, that the employee has a disability. If the answer is "No," then you must still answer the next set of questions.	
	Does the employee have a condition that is "episodic" or in remission?	□ Yes □ No
	If the answer to this question is "Yes," then the employee may have a disability and you should proceed with the questionnaire.	
	Does the employee have a "record of" a mental and/or physical impairment which limited at least one major life activity?	□ Yes □ No

executed except on the advice of counsel. In addition, there may be important state law distinctions and even documentation requirements that will impact the inclusion of certain provisions.

	If the answer to either of these questions about whether the employee has a disability is "Yes," then you should assume, for purposes of continuing the accommodations process, that the employee has a disability.	
Medical Documentation	Did the employee provide medical documentation describing their condition and limitations? (*Do NOT request or record information regarding employee's family medical history.*)	□ Yes □ No
	Was the employee provided with a form or letter to their health care provider and instructed to complete it?	□ Yes □ No
	Was the employee informed to notify you if their condition, needs, or limitations change, and if further or different accommodations may be needed?	□ Yes □ No
Reason For No Disability?	The employee does not have a disability because (check off all that apply): *Note: Given the legal landscape, err on the side of finding a disability and pursue possible accommodations.*	
	Impairment was/is temporary (*e.g.*, flu, broken bone with no residual effects) *Note: some temporary conditions may be disabilities*	□
	Impairment was/is not limiting	□
	Impairment did/does not affect any major life activity	□
"Qualified?"	Can the employee perform *all* the essential functions of their current job or of a suitable vacant alternative job *without* reasonable accommodation?	□ Yes □ No
	Is the employee currently performing all the essential functions of their job to a satisfactory level?	□ Yes □ No
	If the answer to either question is "Yes," then the employee is qualified. If the answer is "No," then you must still answer the next set of questions.	
	Have you reviewed the employee's job duties and job description with them?	□ Yes □ No
	Can the employee perform *all* the essential functions of their current job or of a suitable vacant alternative job *with* reasonable accommodation?	□ Yes □ No
	If the answer to this question is "Yes," the employee is qualified. You should proceed to the accommodations section and the section below. If the answer is "Unsure," proceed anyway.	

	If the answer is "No," list the responsibilities that the employee cannot perform with or without accommodation: _____ _____ _____ _____		
Leave?	Has the employee been out of work to care for their condition?	□ Yes □ No	
	If the answer to the question above is "Yes," state how long the employee has been out of work: _____ _____ _____ _____		
	Has the employee indicated that the employee can and wishes to return to work?	□ Yes □ No	
	Was the employee asked when the employee believes they can return to work?	□ Yes □ No	
	Has the employee indicated when the employee estimates they can or expect to return to work? If so, when? _____ _____	□ Yes □ No	
	If the employee indicated a wish to return to work and provided some estimate on when the employee believes they should be able to return to work, then proceed with the additional accommodations questions.		
Accommodation?	The accommodation needed is (check off *all* that apply):		
	Making facilities accessible	□	
	Job restructuring	□	
	Part-time or modified work	□	
	Modifying/purchasing/using special equipment	□	
	Modifying policies	□	
	Reassigning nonessential or marginal job functions (if so, list functions believed to be "marginal:" _____ _____ _____)	□	
	Reassignment to a permanent, suitable, and vacant position	□	

	Additional leave of absence	□	
	Other (attach an extra page if necessary): _____ _____ _____	□	
	Were accommodations or adjustments discussed with the employee?	□ Yes □ No	
	Did the employee request this accommodation?	□ Yes □ No	
	If the answer to this question is "No," then you must answer the next question.		
	Did the employee (or physician or other) request a different accommodation?	□ Yes □ No	
	If the answer to this question is "Yes," then please list the different accommodation(s) and answer the next question.		
	The accommodation requested by the employee is not being provided because:		
	The other accommodation was mutually agreed upon	□	
	The accommodation required elimination of essential job functions (if so, list the functions that would be eliminated: _____ _____ _____)	□	
	The accommodation required reassignment of essential job functions to others (if so, list the functions that would be reassigned: _____ _____ _____)	□	
	The accommodation was a personal use item	□	
	The accommodation was an amenity	□	
	The accommodation required the creation of a new job	□	
	The accommodation was a promotion	□	

	The accommodation required permanent light duty	□	
	The accommodation required management to change the employee's supervisor	□	
	The accommodation conflicted with any seniority system being followed	□	
	The accommodation was for an indefinite leave of absence, with no estimate of a return to work date	□	
	The cost of the accommodation was extraordinary (if so, describe the cost: _____ _____ _____)	□	
	The accommodation was not consistent with the employee's work restrictions (if so, please explain: _____ _____ _____)	□	
	Other (attach an extra page if necessary): _____ _____ _____	□	
	Did you consult with other sources on possible accommodations that could be effective in enabling the employee to perform the essential functions of their job?	□ Yes	□ No
	If the answer to the question above is "Yes," identify the source(s) and information provided (separate sheets or the back of this form may also be used): _____ _____ _____ _____ _____		
Reassignment?	Did management attempt to accommodate the employee in their current job?	□ Yes	□ No
	If there was more than one suitable vacant position, did management reassign the employee to the job that was most closely equivalent to the employee's last job?	□ Yes	□ No

	Did the employee request or agree to a reassignment?	□ Yes	□ No
Threat to Health or Safety?	Is there any indication in written medical records or in statements by the employee regarding their condition or limitations that indicates that continued performance of their job would pose a threat to the employee's or to others' health and safety?	□ Yes	□ No
	If the answer above was "Yes," then explain fully on the back of this form or on a separate sheet what the threat is and why continued employment would or may pose such a threat.		
	Did you discuss with the employee any modifications and/or means to reduce or eliminate such a threat to health/safety?	□ Yes	□ No
	Did you consult any other sources to ascertain whether continued employment would indeed pose a threat to health/safety?	□ Yes	□ No
	If the answer to the question above is "Yes," identify the source and the information: _____ _____ _____		
Work Injury?	Does the employee have a disability because of an impairment which resulted from a work-related injury?	□ Yes	□ No
	If the answer to this question is "Yes," then you must answer the next set of questions.		
	If the employee was offered modified/alternate work, did management or the third-party administrator send the employee an Offer of Modified or Alternative Work?	□ Yes	□ No
	If "Yes," did the employee accept?	□ Yes	□ No
	Has the employee provided fitness for duty documentation and/or documentation on their restrictions?	□ Yes	□ No
Miscellaneous:	Is accommodation being denied because there was a breakdown in the interactive process?	□ Yes	□ No
	Did the employee fail to respond to letters, calls, requests to meet, etc.?	□ Yes	□ No
	If the answer to this question is "Yes," then you should attach a separate sheet explaining precisely what happened.		
Follow-Up:	Have you gotten back in touch with the employee to explain whether an accommodation can be provided, which	□ Yes	□ No

	accommodation can be provided, and/or whether further information from the employee is needed?		
	If the answer to this question is "Yes," please identify what follow-up was done: _____ _____ _____ _____ _____		

3.4 Sample Correspondence

3.4(a) *Letter Acknowledging Request for Accommodation*[484]

Personal & Confidential
[*Date*]
[*Employee's name and address*]
Re: Your Request For Reasonable Accommodation
Dear [*employee's name*]:
On _____, [*state the date that management was notified of the triggering event*], [*either*] [*you notified* _____ (*state the name of the individual who was notified of the triggering event*)] [*or if notice was given by someone other than the employee*] [_____(*state the name of the individual who was notified of the triggering event) was notified by* _____(*state name of individual who notified management of the triggering event—e.g., the employee's spouse* or *doctor*)] that you [*include all that apply*]:

Were injured at work□
Were injured away from work□
Have an illness□
Have a physical impairment□
Have a mental impairment□
Other (*specify*): _____□

and are requesting reasonable accommodation. [*If the employee has requested a specific accommodation, include the next sentence:* More particularly, you are requesting _____ *(specify requested accommodation—e.g., "six months of disability leave, starting on the first of next month").*]
Management is evaluating your request and will contact you to discuss your situation. If you have questions, feel free to contact me at _____ [*insert telephone number with area code*].

What Happens Next?

Management is gathering the information needed to help decide about how to respond to your request. Your cooperation in this process is critical and necessary. Once management has gathered the preliminary information, your request will be addressed.

What Is Your Role in the Process?

You play an indispensable role in the process. For example, please do not assume that management has all of the pertinent information; some information must come from you directly. Accordingly, please forward to me any information you believe will assist management in responding to your request, including any pertinent information from your doctor. If you mail any

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information to me, please call me to let me know the information is coming. That way, I know to look for the information in my mail. Please supplement information related to your request as appropriate.

Please keep me apprised of your current home telephone number(s) and residential address. Someone from management or human resources may need to speak with you. Your cooperation will help us ensure a prompt response to your request.

Note that, under the law, all medical information is confidential. Management will only disclose such confidential information on a restricted, need-to-know basis.

Note further that, under the law, your refusal to cooperate with management can have serious consequences including, but not limited to, delaying management's response to your request for accommodation or denial of your request.

The Company Prohibits Retaliation

The Company prohibits retaliation against an employee who has a mental or physical impairment who requests reasonable accommodation. Notify someone in management immediately if you believe that you have suffered any such retaliation. If you are not comfortable speaking to someone at the facility, contact the human resources department directly. Their telephone number is [*insert telephone number with area code*].

Conclusion

Again, you should always feel free to contact me directly with comments, questions, or concerns.

Sincerely,

[*Name and title*]

3.4(b) *Letter Summarizing Meet & Confer Session*[485]

Personal & Confidential
[*Date*]
[*Employee's name and address*]
Re: Status of Your Request for Reasonable Accommodation
Dear [*employee's name*]:

Thank you for participating in the meet and confer session on _____. I appreciate your cooperation. For everyone's convenience, this letter summarizes the substance of our discussion at the meet and confer session. If you believe anything in this letter is incomplete or inaccurate, please contact me as soon as possible. If I do not hear from you or anyone speaking on your behalf, I will assume you do not feel that any changes are necessary.

[*State the time of the session and identify all of the participants.*] We met at _____ a.m./p.m. in _____'s office. The following individuals were present at the meet and confer session: _____ [*employee*]; _____, Safety Manager; and, _____, Vocational Rehabilitation Counselor.

[*State the substance of the discussion; include all pertinent details.*] According to your doctor, _____, M.D., you are presently restricted from lifting more than _____ lbs. because of a work-related back lower back injury and cannot return to your current job as a _____, even with modifications to your job. The purpose of the meet and confer session was to discuss the possibility of placing you in an alternate job assignment.

On _____, I notified you that the Company has openings for the following positions: [*list all open positions*]. My _____ letter included a written job description for each position.

You expressed interest in a position as an Administrative Assistant. You also stated you have both the required computer skills (for example, the ability to use Word and Excel software applications) and the required typing skills, specifically, the ability to type at least 40 words per minute. On _____, your doctor indicated that the "essential functions" of this position are consistent with your permanent work restrictions.

We have agreed to consider you for this vacant position, subject to a standard typing test and interview. You have agreed to take a typing test by _____. We will not fill this position until you have an interview and receive your test results; however, we will continue to accept applications for this position so that we can select another candidate if necessary. If you pass the typing test, you will be reassigned to this position. Your salary and benefits will remain the same. Your workweek will be Monday

[485] Note that every letter or memo of this nature will differ substantially, based on the individual's job, limitations, and nature of the accommodation request. This letter is merely a sample, for illustrative purposes. These are sample provisions and do not constitute and are not a substitution for consultation with legal counsel. It is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. The law governing collective bargaining is ever-evolving and must be reviewed before proposing collective bargaining language. These sample provisions should not be implemented or executed except on the advice of counsel. In addition, there may be important state law distinctions that will impact the inclusion of certain provisions.

through Friday, from _____ a.m. to _____ p.m.

Please contact [*insert the name of the appropriate manager*] as soon as possible to arrange a time for your interview. You should also feel free to contact me with comments, questions, or concerns.

Sincerely,

[*Name and title*]