

Approved February 10, 1992
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry

The meeting was called to order by Representative Anthony Hensley at
Chairperson

9:06 a.m./~~p.m.~~ on January 30, 1992 in room 526-S of the Capitol.

All members were present except:

Representative Lynch - excused Representative Webb - excused

Representative Gomez - excused

Representative Pauls - excused

Committee staff present:

Jim Wilson, Revisor of Statutes

Jerry Donaldson, Principal Analyst

Conferees appearing before the committee:

Martha Gabehart, Director, Kansas Commission on Disability Concerns, Department
of Human Resources

Brandon Myers, Legal Counsel, Kansas Human Rights Commission

The meeting was called to order at 9:06 a.m., by the chairman, Rep. Anthony Hensley.

Chairman Hensley stated that the purpose of the meeting was to hear an overview of the federal Americans with Disabilities Act (ADA). He introduced Martha Gabehart, Director, Kansas Commission on Disability Concerns, Department of Human Resources.

Ms. Gabehart began her presentation by introducing Brandon Myers, Legal Counsel, Kansas Human Rights Commission. She explained that Mr. Myers' agency will be directly involved in receiving complaints from persons who claim they have been discriminated against by their employer when such complaints are not taken by the U.S. Equal Employment Opportunity Commission (EEOC).

Ms. Gabehart stated that the ADA makes it unlawful to discriminate against individuals with disabilities in employment hiring practices, state and local government services, public accommodations, transportation, and telecommunications. She handed out two booklets that contain information for disabled persons and employers (attachments #1 and #2).

Several committee members asked questions and expressed concerns about the ADA. Members acknowledged that one particular issue of concern that will have to be addressed in the future is how the ADA provisions will interact with the Kansas workers' compensation system.

The chairman reminded members that the committee will meet on Monday, February 3, 1992, to continue hearing the presentation of Bill Morrissey, acting Director of Workers' Compensation, regarding the medical fee schedule and other issues related to the Kansas worker's compensation system

The meeting was adjourned at 9:58 a.m.



The Americans With Disabilities Act

Your Employment Rights as
an Individual With
a Disability

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in state and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and state and local civil rights enforcement agencies that work with the Commission.

What Employers Are Covered by the ADA?

Job discrimination against people with disabilities is illegal if practiced by:

- private employers,
- state and local governments,
- employment agencies,
- labor organizations,
- and labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

- all employers, including state and local government employers, with 25 or more employees after July 26, 1992, and
- all employers, including state and local government employers, with 15 or more employees after July 26, 1994.

Another part of the ADA, enforced by the U.S. Department of Justice (DOJ), prohibits discrimination in state and local government programs and activities, including job discrimination by all state and local governments, regardless of the number of employees, after January 26, 1992.

Because the ADA gives responsibilities to both EEOC and DOJ for employment by state and local governments, these agencies will coordinate the federal enforcement effort. In addition, since some private and governmental employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ, and the Department of Labor also will coordinate the enforcement effort under the ADA and the Rehabilitation Act.

Are You Protected by The ADA?

If you have a disability and are qualified to do a job, the ADA protects you from job discrimination on the basis of your disability. Under the ADA, you have a disability if you have a *physical or mental impairment* that *substantially limits a major life activity*. The ADA also protects you if you have a history of such a disability, or if an employer believes that you have such a disability, even if you don't.

To be protected under the ADA, you must have, have a record of, or be regarded as having a *substantial*, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a *major life activity* such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.

If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things. First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses. Second, you must be able to perform the *essential functions* of the job with or without *reasonable accommodation*. Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job.

What is Reasonable Accommodation?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- providing or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials, or policies,
- providing readers and interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

An employer is required to provide a reasonable accommodation to a qualified applicant or employee with a disability unless the employer can show that the accommodation would be an *undue hardship* -- that is, that it would require significant difficulty or expense.

What Employment Practices are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- hiring
- job assignments
- pay
- lay off
- firing
- training
- promotions
- benefits
- leave
- all other employment related activities.

It is also unlawful for an employer to retaliate against you for asserting your rights under the ADA. The Act also protects you if you are a victim of discrimination because of your family, business, social or other relationship or association with an individual with a disability.

Can an Employer Require Medical Examinations or Ask Questions About a Disability?

If you are applying for a job, an employer cannot ask you if you are disabled or ask about the nature or severity of your disability. An employer can ask if you can perform the duties of the job with or without reasonable accommodation. An employer can also ask you to describe or to demonstrate how, with or without reasonable accommodation, you will perform the duties of the job.

An employer cannot require you to take a medical examination before you are offered a job. Following a job offer, an employer can condition the offer on your passing a required medical examination, but only if all entering employees for that job category have to take the examination. However, an employer cannot reject you because of information about your disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of the employer's business. Nor can the employer refuse to hire you because of your disability if you can perform the essential functions of the job with an accommodation.

Once you have been hired and started work, your employer cannot require that you take a medical examination or ask questions about your disability unless they are related to your job and necessary for the conduct of your employer's business. Your employer may conduct voluntary medical examinations that are part of an employee health program, and may provide medical information required by state workers' compensation laws to the agencies that administer such laws.

The results of all medical examinations must be kept confidential, and maintained in separate medical files.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use.

What Do I Do If I Think That I'm Being Discriminated Against?

If you think you have been discriminated against in employment on the basis of disability after July 26, 1992, you should contact the EEOC. A charge of discrimination generally must be filed within 180 days of the alleged discrimination. You may have up to 300 days to file a charge if there is a state or local law that provides relief for discrimination on the basis of disability. However, to protect your rights, it is best to contact EEOC promptly if discrimination is suspected.

You may file a charge of discrimination on the basis of disability by contacting any EEOC field office, located in cities throughout the United States. If you have been discriminated against, you are entitled to a remedy that will place you in the position you would have been in if the discrimination had never occurred. You may be entitled to hiring, promotion, reinstatement, back pay, or reasonable accommodation, including reassignment. You may also be entitled to attorney's fees.

While the EEOC can only process ADA charges based on actions occurring on or after July 26, 1992, you may already be protected by state or local laws or by other current federal laws. EEOC field offices can refer you to the agencies that enforce those laws.

To contact the EEOC, look in your telephone directory under U.S. Government. For information and instructions on reaching your local office, call:

(202) 663-4900 (Voice)

(800) 800-3302 (TDD)

(In the Washington, D.C. 202 Area Code, call 202-663-4494 (TDD).)

Can I Get Additional ADA Information and Assistance?

The EEOC will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help people with disabilities understand their rights and to help employers understand their responsibilities under the law.

In January 1992, EEOC will publish a Technical Assistance Manual, providing practical application of legal requirements to specific employment activities, with a directory of resources to aid compliance. EEOC will publish other educational materials, provide training on the law for people with disabilities and for employers, and participate in meetings and training programs of other organizations. EEOC staff also will respond to individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts of employers and individuals with disabilities to settle such differences through alternative methods of dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

More Questions and Answers About the ADA

- Q. Is an employer required to provide reasonable accommodation when I apply for a job?**
- A.** Yes. Applicants, as well as employees, are entitled to reasonable accommodation. For example, an employer may be required to provide a sign language interpreter during a job interview for an applicant who is deaf or hearing impaired, unless to do so would impose an undue hardship.
- Q. Should I tell my employer that I have a disability?**
- A.** If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.
- Q. Do I have to pay for a needed reasonable accommodation?**
- A.** No. The ADA requires that the employer provide the accommodation unless to do so would impose an undue hardship on the operation of the employer's business. If the cost of providing the needed accommodation would be an undue hardship, the employee must be given the choice of providing the accommodation or paying for the portion of the accommodation that causes the undue hardship.
- Q. Can an employer lower my salary or pay me less than other employees doing the same job because I need a reasonable accommodation?**

A. No. An employer cannot make up the cost of providing a reasonable accommodation by lowering your salary or paying you less than other employees in similar positions.

Q. Does an employer have to make non-work areas used by employees, such as cafeterias, lounges, or employer-provided transportation accessible to people with disabilities?

A. Yes. The requirement to provide reasonable accommodation covers all services, programs, and non-work facilities provided by the employer. If making an existing facility accessible would be an undue hardship, the employer must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless to do so would be an undue hardship.

Q. If an employer has several qualified applicants for a job, is the employer required to select a qualified applicant with a disability over other applicants without a disability?

A. No. The ADA does not require that an employer hire an applicant with a disability over other applicants because the person has a disability. The ADA only prohibits discrimination on the basis of disability. It makes it unlawful to refuse to hire a qualified applicant with a disability because he is disabled or because a reasonable accommodation is required to make it possible for this person to perform essential job functions.

Q. Can an employer refuse to hire me because he believes that it would be unsafe, because of my disability, for me to work with certain machinery required to perform the essential functions of the job?

A. The ADA permits an employer to refuse to hire an individual if she poses a direct threat to the health or safety of herself or others. A direct threat means a significant risk of substantial harm. The determination that there is a direct threat must be based on objective, factual evidence regarding an individual's present ability to perform essential functions of a job. An employer cannot refuse to hire you because of a slightly increased risk or because of fears that there might be a significant risk sometime in the future. The employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Q. Can an employer offer a health insurance policy that excludes coverage for pre-existing conditions?

A. Yes. The ADA does not affect pre-existing condition clauses contained in health insurance policies even though such clauses may adversely affect employees with disabilities more than other employees.

Q. If the health insurance offered by my employer does not cover all of the medical expenses related to my disability, does the company have to obtain additional coverage for me?

A. No. The ADA only requires that an employer provide employees with disabilities equal access to whatever health insurance coverage is offered to other employees.

Q. I think I was discriminated against because my wife is disabled. Can I file a charge with the EEOC?

A. Yes. The ADA makes it unlawful to discriminate against an individual, whether disabled or not, because of a relationship or association with an individual with a known disability.

Q. Are people with AIDS covered by the ADA?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

For more specific information about ADA requirements affecting *employment* contact:

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(202) 663-4900 (Voice)
(800) 800-3302 (TDD)
(202) 663-4494 (TDD for 202 Area Code)

For more specific information about ADA requirements affecting *public accommodations and state and local government services* contact:

Department of Justice
Office on the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-6193 (Electronic Bulletin Board)

For more specific information about requirements for *accessible design in new construction and alterations* contact:

**Architectural and Transportation Barriers
Compliance Board**
1111 18th Street, NW
Suite 501
Washington, DC 20036
800-USA-ABLE
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting *transportation* contact:

Department of Transportation
400 Seventh Street, SW
Washington, DC 20590
(202) 366-9305
(202) 755-7687 (TDD)

For more specific information about ADA requirements for *telecommunications* contact:

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554
(202) 632-7260
(202) 632-6999 (TDD)

This booklet is available in Braille, large print, audiotape and electronic file on computer disk. To obtain accessible formats call EEOC's Office of Equal Employment Opportunity on (202) 663-4395 (voice), (202) 663-4399 (TDD), or write this office at 1801 L Street, N.W., Washington, D.C. 20507.



The Americans With Disabilities Act

Your Responsibilities as an Employer

EEOC-BK-17
1991

Labor & Industry
1-30-92
Attachment # 2-1

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in State and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and State and local civil rights enforcement agencies that work with the Commission.

Are You Covered?

Job discrimination against people with disabilities is illegal if practiced by:

- private employers,
- state and local governments,
- employment agencies,
- labor organizations, and
- labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

- all employers, including state and local government employers, with 25 or more employees after July 26, 1992, and
- all employers, including state and local government employers, with 15 or more employees after July 26, 1994.

Another part of the ADA, enforced by the U.S. Department of Justice (DOJ), prohibits discrimination in state and local government programs and activities, including job discrimination by all state and local governments, regardless of the number of employees, after January 26, 1992.

Because the ADA gives responsibilities to both EEOC and DOJ for employment by state and local governments, these agencies will coordinate the federal enforcement effort. In addition, since some private and governmental employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ, and the Department of Labor also will coordinate the enforcement effort under the ADA and the Rehabilitation Act.

What Employment Practices are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- hiring
- promotion
- training
- lay-off
- pay
- firing
- job assignments
- leave
- benefit
- all other employment related activities.

The ADA prohibits an employer from retaliating against an applicant or employee for asserting his rights under the ADA. The Act also makes it unlawful to discriminate against an applicant or employee, whether disabled or not, because of the individual's family, business, social or other relationship or association with an individual with a disability.

Who Is Protected?

Title I of the ADA protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he has a *physical or mental impairment* that *substantially limits a major life activity*. The ADA also protects individuals who have a *record of* a substantially limiting impairment, and people who are *regarded as* having a substantially limiting impairment.

To be protected under the ADA, an individual must have, have a record of, or be regarded as having a *substantial*, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a *major life activity* such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working.

An individual with a disability must also be qualified to perform the *essential functions* of the job with or without *reasonable accommoda-*

tion, in order to be protected by the ADA. This means that the applicant or employee must:

- satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The ADA does not interfere with your right to hire the best qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits you from discriminating against a qualified applicant or employee because of her disability.

How Are Essential Functions Determined?

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing).

Factors to consider in determining if a function is essential include:

- whether the reason the position exists is to perform that function,
- the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- the degree of expertise or skill required to perform the function.

Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- actual work experience of present or past employees in the job,
- time spent performing a function,
- consequences of not requiring that an employee perform a function, and
- terms of a collective bargaining agreement.

What Are My Obligations to Provide Reasonable Accommodations?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- acquiring or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials or policies,
- providing readers and interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and

to enjoy benefits and privileges of employment equal to those available to other employees.

It is a violation of the ADA to fail to provide reasonable accommodation to the *known* physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business. Undue hardship means that the accommodation would require significant difficulty or expense.

What is the Best Way to Identify a Reasonable Accommodation?

Frequently, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious. The individual may suggest a reasonable accommodation based upon her own life or work experience. However, when the appropriate accommodation is not readily apparent, you must make a reasonable effort to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job. If this consultation does not identify an appropriate accommodation, you may contact the EEOC, state or local vocational rehabilitation agencies, or state or local organizations representing or providing services to individuals with disabilities. Another resource is the Job Accommodation Network (JAN). JAN is a free consultant service that helps employers make individualized accommodations. The telephone number is 1-800-526-7234.

When Does a Reasonable Accommodation Become An Undue Hardship?

It is not necessary to provide a reasonable accommodation if doing so would cause an *undue hardship*. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an

accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation.

If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship. If cost causes the undue hardship, you must also consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. You must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.

Can I Require Medical Examinations or Ask Questions About an Individual's Disability?

It is unlawful:

- to ask an applicant whether she is disabled or about the nature or severity of a disability, or
- to require the applicant to take a medical examination before making a job offer.

You can ask an applicant questions about ability to perform job-related functions, as long as the questions are not phrased in terms of a disability. You can also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will perform job-related functions.

After a job offer is made and prior to the commencement of employment duties, you may require that an applicant take a medical examination if everyone who will be working in the job category must also take the examination. You may condition the job offer on the results of the medical examination. However, if an individual is not

hired because a medical examination reveals the existence of a disability, you must be able to show that the reasons for exclusion are job related and necessary for conduct of your business. You also must be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Once you have hired an applicant, you cannot require a medical examination or ask an employee questions about disability unless you can show that these requirements are job related and necessary for the conduct of your business. You may conduct voluntary medical examinations that are part of an employee health program.

The results of all medical examinations or information from inquiries about a disability must be kept confidential, and maintained in separate medical files. You may provide medical information required by state workers' compensation laws to the agencies that administer such laws.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, it is not a prohibited pre-employment medical examination, and you will not have to show that the administration of the test to employees is job related and consistent with business necessity. The ADA does not encourage, authorize or prohibit drug tests.

How will the ADA Be Enforced and What Are the Available Remedies?

The provisions of the ADA which prohibit job discrimination will be enforced by the U.S. Equal Employment Opportunity Commission. After July 26, 1992, individuals who believe they have been discriminated against on the basis of their disability can file a charge with the Commission at any of its offices located throughout the United States. A charge of discrimination must be filed within 180 days of the discrimination, unless there is a state or local law that also provides relief for the discrimination on the basis of disability. In most cases where there is such a law, the complainant has 300 days to file a charge.

The Commission will investigate and initially attempt to resolve the charge through conciliation, following the same procedures used to handle charges of discrimination filed under Title VII of the Civil Rights Act of 1964. The ADA also incorporates the remedies contained in Title VII. These remedies include hiring, promotion, reinstatement, back pay, and attorney's fees. Reasonable accommodation is also available as a remedy under the ADA.

How Will EEOC Help Employers Who Want to Comply with the ADA?

The Commission believes that employers want to comply with the ADA, and that if they are given sufficient information on how to comply, they will do so voluntarily.

Accordingly, the Commission will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help employers understand their responsibilities and assist people with disabilities to understand their rights and the law.

In January 1992, EEOC will publish a Technical Assistance Manual, providing practical application of legal requirements to specific

employment activities, with a directory of resources to aid compliance. EEOC will publish other educational materials, provide training on the law for employers and for people with disabilities, and participate in meetings and training programs of other organizations. EEOC staff also will respond to individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about the ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts to settle such differences through alternative dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

Additional Questions and Answers on the Americans with Disabilities Act

- Q. What is the relationship between the ADA and the Rehabilitation Act of 1973?**
- A.** The Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by the federal government, federal contractors and by recipients of federal financial assistance. If you were covered by the Rehabilitation Act prior to the passage of the ADA, the ADA will not affect that coverage. Many of the provisions contained in the ADA are based on Section 504 of the Rehabilitation Act and its implementing regulations. If you are receiving federal financial assistance and are in compliance with Section 504, you are probably in compliance with the ADA requirements affecting employment except in those areas where

the ADA contains additional requirements. Your nondiscrimination requirements as a federal contractor under Section 503 of the Rehabilitation Act will be essentially the same as those under the ADA; however, you will continue to have additional affirmative action requirements under Section 503 that do not exist under the ADA.

Q. If I have several qualified applicants for a job, does the ADA require that I hire the applicant with a disability?

A. No. You may hire the most qualified applicant. The ADA only makes it unlawful for you to discriminate against a qualified individual with a disability on the basis of disability.

Q. One of my employees is a diabetic, but takes insulin daily to control his diabetes. As a result, the diabetes has no significant impact on his employment. Is he protected by the ADA?

A. Yes. The determination as to whether a person has a disability under the ADA is made without regard to mitigating measures, such as medications, auxiliary aids and reasonable accommodations. If an individual has an impairment that substantially limits a major life activity, she is protected under the ADA, regardless of the fact that the disease or condition or its effects may be corrected or controlled.

Q. One of my employees has a broken arm that will heal but is temporarily unable to perform the essential functions of his job as a mechanic. Is this employee protected by the ADA?

A. No. Although this employee does have an impairment, it does not substantially limit a major life activity if it is of limited duration and will have no long term effect.

Q. Am I obligated to provide a reasonable accommodation for an individual if I am unaware of her physical or mental impairment?

A. No. An employer's obligation to provide reasonable accommodation applies only to *known* physical or mental limitations. However, this does not mean that an applicant or employee must always inform you of a disability. If a disability is obvious, e.g., the applicant uses a wheelchair, the employer "knows" of the disability even if the applicant never mentions it.

Q. How do I determine whether a reasonable accommodation is appropriate and the type of accommodation that should be made available?

A. The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on a case-by-case basis, because the nature and extent of a disabling condition and the requirements of the job will vary. The principal test in selecting a particular type of accommodation is that of *effectiveness*, i.e., whether the accommodation will enable the person with a disability to perform the essential functions of the job. It need not be the best accommodation, or the accommodation the individual with a disability would prefer, although primary consideration should be given to the preference of the individual involved. However, as the employer, you have the discretion to choose between effective accommodations, and you may select one that is least expensive or easier to provide.

Q. When must I consider reassigning an employee with a disability to another job as a reasonable accommodation?

A. When an employee with a disability is unable to perform her present job even with the provision of a reasonable accommoda-

tion, you must consider reassigning the employee to an existing position that she can perform with or without a reasonable accommodation. The requirement to consider reassignment applies only to employees and not to applicants. You are not required to create a position or to bump another employee in order to create a vacancy. Nor are you required to promote an employee with a disability to a higher level position.

Q. What if an applicant or employee refuses to accept an accommodation that I offer?

A. The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may be considered not qualified.

Q. If our business has a fitness room for its employees, must it be accessible to employees with disabilities?

A. Yes. Under the ADA, workers with disabilities must have equal access to all benefits and privileges of employment that are available to similarly situated employees without disabilities. The duty to provide reasonable accommodation applies to all non-work facilities provided or maintained by you for your employees. This includes cafeterias, lounges, auditoriums, company-provided transportation and counseling services. If making an existing facility accessible would be an undue hardship, you must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless this would be an undue hardship.

Q. If I contract for a consulting firm to develop a training course for my employees, and the firm arranges for the course to be held at a hotel that is inaccessible to one of my employees, am I liable under the ADA?

A. Yes. An employer may not do through a contractual or other relationship what it is prohibited from doing directly. You would be required to provide a location that is readily accessible to, and usable by your employee with a disability unless to do so would create an undue hardship.

Q. What are my responsibilities as an employer for making my facilities accessible?

A. As an employer, you are responsible under Title I of the ADA for making facilities accessible to qualified applicants and employees with disabilities as a reasonable accommodation, unless this would cause undue hardship. Accessibility must be provided to enable a qualified applicant to participate in the application process, to enable a qualified individual to perform essential job functions and to enable an employee with a disability to enjoy benefits and privileges available to other employees. However, if your business is a place of public accommodation (such as a restaurant, retail store or bank) you have different obligations to provide accessibility to the general public, under Title III of the ADA. Title III also will require places of public accommodation and commercial facilities (such as office buildings, factories and warehouses) to provide accessibility in new construction or when making alterations to existing structures. Further information on these requirements may be obtained from the U.S. Department of Justice, which enforces Title III. (See page 16).

Q. Under the ADA, can I refuse to hire an individual or fire a current employee who uses drugs illegally?

A. Yes. Individuals who currently use drugs illegally are specifically excluded from the ADA's protections. However, the ADA does not exclude persons who have successfully completed or are currently in a rehabilitation program and are no longer illegally using drugs, and persons erroneously regarded as engaging in the illegal use of drugs.

Q. Does the ADA cover people with AIDS?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q. Can I consider health and safety in deciding whether to hire an applicant or retain an employee with a disability?

A. The ADA permits an employer to require that an individual not pose a direct threat to the health and safety of the individual or others in the work-place. A direct threat means a significant risk of substantial harm. You cannot refuse to hire or fire an individual because of a slightly increased risk of harm to himself or others. Nor can you do so based on a speculative or remote risk. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions. If an applicant or employee with a disability poses a direct threat to the health or safety of himself or others, you must consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Q. Am I required to provide additional insurance for employees with disabilities?

A. No. The ADA only requires that you provide an employee with a disability equal access to whatever health insurance coverage you provide to other employees. For example, if your health insurance coverage for certain treatments is limited to a specified number per year, and an employee, because of a disability, needs more than the specified number, the ADA does not require that you provide additional coverage to meet that employee's health insurance needs. The ADA also does not require changes in insurance plans that exclude or limit coverage for pre-existing conditions.

Q. Does the ADA require that I post a notice explaining its requirements?

A. The ADA requires that you post a notice in an accessible format to applicants, employees and members of labor organizations, describing the provisions of the Act. EEOC will provide employers with a poster summarizing these and other federal legal requirements for nondiscrimination. EEOC will also provide guidance on making this information available in accessible formats for people with disabilities.

For more specific information about ADA requirements affecting *employment* contact:

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(202) 663-4900 (Voice)
(800) 800-3302 (TDD)
(202) 663-4494 (TDD for 202 Area Code)

For more specific information about ADA requirements affecting *public accommodations and state and local government services* contact:

Department of Justice
Office on the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-6193 (Electronic Bulletin Board)

For more specific information about requirements for *accessible design in new construction and alterations* contact:

**Architectural and Transportation Barriers
Compliance Board**
1111 18th Street, NW
Suite 501
Washington, DC 20036
800-USA-ABLE
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting *transportation* contact:

Department of Transportation
400 Seventh Street, SW
Washington, DC 20590
(202) 366-9305
(202) 755-7687 (TDD)

For more specific information about ADA requirements for *telecommunications* contact:

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554
(202) 632-7260
(202) 632-6999 (TDD)

For more specific information about federal disability-related *tax credits and deductions for business* contact:

Internal Revenue Service
Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20044
(202) 566-2000

This booklet is available in Braille, large print, audiotape and electronic file on computer disk. To obtain accessible formats call the Office of Equal Employment Opportunity on (202) 663-4395 (voice) or (202) 663-4399 (TDD), or write to this office at 1801 L Street, N.W., Washington, D.C. 20507.