

## CHAPTER FIVE: Employment Policies and Practices

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This chapter reviews nondiscrimination requirements related to the employment policies and practices of One-Stop entities. It presents an overview of the legal standards and their basic requirements of nondiscrimination in the hiring and employment processes. It reviews definitions of “a qualified person with a disability” and “essential functions” in the context of employment. It discusses “reasonable accommodations” that are required of employers under the ADA, as well as the situation when an accommodation constitutes an “undue hardship” to the employer.

The chapter then reviews a number of additional employment-related issues, including:

- qualification standards and selection criteria
- nondiscrimination in the hiring process
- post-offer employee medical examinations and inquiries
- nondiscrimination prohibitions on limiting, segregating, or classifying applicants and employees because of disability
- insurance and other benefits
- opportunities for advancement, performance standards, and training opportunities

Finally, the chapter reviews nondiscrimination responsibility of One-Stops in their contractual relationships with other organizations, prohibitions against discrimination on the basis of relationship or association, and prohibitions against retaliation or coercion resulting from pursuing nondiscrimination compliance.

### WIA Title I Recipients as Employers

One-Stop entities may chiefly focus on the employment and training assistance they deliver in the form of aid, benefits, services, and training that are offered to the public. As WIA Title I financially assisted entities, they must ensure that the entire public has access to these opportunities, including persons with disabilities for whom reasonable modifications may be required to facilitate participation or benefit. These requirements have been discussed in Chapter Two, and Chapter Four included assessment in each of the areas

### 29 CFR §37.5

#### What forms of discrimination are prohibited by this part?

No individual in the United States may, on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in any WIA Title I--financially assisted program or activity, be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any WIA Title I--funded program or activity.

where specific provision for persons with disabilities is required.

At the same time as One-Stop entities seek to assist persons with disabilities in securing or changing employment, the entities themselves are employers. As employers, all recipients of WIA Title I financial assistance must ensure that they do not discriminate against persons with disabilities in their own employment policies and practices.

## Overview of Legal Standards and Requirements

The Section 188 regulations are explicit in prohibiting discrimination in the employment practices of WIA Title I financially assisted programs or activities and in extending that prohibition to any One-Stop partner to the extent that they conduct a program or activity as part of the One-Stop delivery system [29 CFR §37.10 (a)]. In addition, the Section 188 regulations incorporate, by reference, the implementing regulations of subparts B, C, and Appendix A of Section 504 of the Rehabilitation Act of 1973 as amended [29 CFR §§37.3 (b); 37.10 (d)]. And they caution recipients that are public entities to be mindful of the requirements of Titles I and II of the ADA, which pertain to them [29 CFR §37.10 (c)].

Title II prohibits all public entities from discriminating against qualified individuals with disabilities in their employment policies and practices [28 CFR §35.140(a)].

Title I of the ADA, by its incorporation in 1992 as an amendment to Section 504 of the Rehabilitation Act of 1973, and by reference in Section 188, is held to apply to all WIA Title I recipients. Its basic mandate is that an employer cannot discriminate against an otherwise qualified person with a disability in any aspect of the employment relationship. Activities that are part of the employment relationship include recruitment, the application process, testing, interviewing, hiring, assignments, evaluation, discipline, medical examinations, compensation, promotion, on-the-job training, layoff/recall, termination, leave, benefits such as health insurance, and any other terms, conditions, and privileges of employment.

## Examples of Prohibited Employment Policies and Practices

### 29 CFR §37.10

#### To what extent are employment practices covered by this part?

(a) Discrimination on the ground of race, color, religion, sex, national origin, age, disability, or political affiliation or belief is prohibited in employment practices in the administration of, or in connection with:

- (1) Any WIA Title I-financially assisted program or activity; and
- (2) Any program or activity that is part of the One-Stop delivery system and is operated by a One-Stop partner listed in Section 121(b) of WIA, to the extent that the program or activity is being conducted as part of the One-Stop delivery system.

### 28 CFR §35.140

#### Employment discrimination prohibited.

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to employment practices that discriminate against an individual with a disability in employment under any service, program, or activity conducted by a public entity.

- (1) Recruitment or recruitment advertising;
- (2) Selection, placement, layoff or termination of employees;
- (3) Upgrading, promotion, demotion or transfer of employees;
- (4) Training, including employment-related training;
- (5) Participation in upward mobility programs;
- (6) Deciding rates of pay or other forms of compensation;
- (7) Use of facilities; or
- (8) Deciding other terms, conditions, benefits and/or privileges of employment.

Under federal nondiscrimination regulations, the following actions in the area of employment are prohibited:

1. Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the public entity can prove that the accommodation would pose an undue hardship.
2. Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of the public entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.
3. Using qualification standards, employment tests, or other selection criteria that screen out, or tend to screen out, an individual with a disability, unless these criteria are job-related and consistent with business necessity.
4. Making pre-employment inquiries related to an individual's disability or medical history or refusing to hire an individual on the basis of the person's disability or medical history (unless the rejection is job-related and consistent with business necessity, and job performance cannot be accomplished with reasonable accommodation).
5. Failing to select and administer tests concerning employment so as to ensure that, when a test is administered to an applicant or employee with impaired sensory, manual, or speaking skills, the test results accurately reflect the individual's aptitude or achievement level (or whatever other factor the test purports to measure) rather than reflecting the person's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).
6. Making medical inquiries or conducting medical examinations of applicants or employees, or taking actions against individuals with disabilities based on medical or related information, in a manner prohibited by federal disability law.
7. Limiting, segregating, or classifying a job applicant or employee because of his or her disability in a way that adversely affects the individual's employment opportunities.

8. Participating in a contractual or other arrangement or relationship that subjects either a qualified applicant or an employee with a disability to discrimination.
9. Utilizing standards, criteria, or methods of administration (a) that have the effect of discrimination on the basis of disability; or (b) that perpetuate the discrimination of others who are subject to common administrative control.
10. Denying employment opportunities to or otherwise discriminating against a qualified individual, whether or not that individual has a disability, because he or she has a relationship or association with a person with a disability.
11. Discriminating against an individual because he or she has opposed an employment practice of the employer; has filed a complaint; or has testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of federal disability law.

## BASIC DEFINITIONS

### Who is a "Qualified Individual with a Disability?"

As mentioned in Chapter Two, employers may not discriminate against "qualified individuals with disabilities," either as job applicants or employees. For the purposes of employment, a qualified individual with a disability is a person with a disability who satisfies the requisite skill, experience, education, and other job-related requirements for the job and can perform the essential functions of the job, with or without reasonable accommodation [29 CFR §1630.2(m)].

**Clearly, all individuals with disabilities are not necessarily "qualified individuals with disabilities."** For example, a One-Stop Center is hiring for a certified public accountant position. Jill, who has a psychiatric disability, applies for the position. She has some bookkeeping experience, but she is not a certified public accountant and cannot perform the essential functions of the job in question with or without reasonable accommodation. The Center can reject Jill because she is not qualified for the position. On the other hand, Lisa, who has a visual disability, applies for the position. She is a certified

#### 29 CFR 37.4

*Qualified individual with a disability* means:

- (1) With respect to employment, an individual with a disability who, with or without reasonable accommodation, is capable of performing the essential functions of the job in question;

#### 29 CFR §1630.2

Definitions.

- (m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

public accountant and can perform all essential job functions. Lisa is qualified for the position.

### What are the "Essential Functions" of a Job?

A person is a qualified individual with a disability only if he or she can perform the **essential** functions of a job (with or without reasonable accommodation). If such a person cannot perform functions marginal or incidental to job performance, the individual is still qualified. Clearly, it is critical that employers thoughtfully analyze and document job requirements in a way that clarifies the distinction between essential and non-essential functions of a job.

Factors to be weighed in determining whether a job function is essential include:

1. whether the reason the position exists is to perform the function;
2. whether a limited number of employees are available to perform the function, or whether the performance of the job function can be distributed among them; and/or
3. whether the function is a highly specialized one that requires special expertise or ability the person hired must have to be able to perform it [29 CFR §1630.2(n)(2)].

Evidence that may be considered in determining whether a particular job function is essential includes, but is not limited to, the following:

- written job descriptions prepared before advertising or interviewing applicants;
- the terms of a collective bargaining agreement;
- the amount of time spent on the job performing the function;
- the work experience of past employees in the job;
- the work experience of current employees in the same or similar jobs;
- the consequences of not requiring that the function be performed; and/or
- the employer's judgment as to which functions are essential [29 CFR §1630.2(n)(3)].

### 29 CFR §1630.2

Definitions.

(n) *Essential functions.* (1) In general. The term "essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

Job descriptions used to identify essential job functions should be written to focus on the desired **outcomes** or **results** of a job, not the manner in which it is usually performed. Often, reasonable accommodation will enable an individual with a disability to achieve the necessary results in a different way from the more typical approach to the task. What matters is that the desired outcome is achieved.

If an individual with a disability who is otherwise qualified cannot perform one or more essential job functions because of his or her disability, the prospective employer must consider whether there are accommodations that would enable the person to perform these functions. The following section discusses the employer's obligation to provide reasonable accommodation and the limits to that obligation. The section also provides examples of reasonable accommodation.

### **The Obligation to Provide Reasonable Accommodation**

The concepts and definitions of reasonable accommodation, reasonable modifications, and auxiliary aids and services were introduced in Chapter Two. Employers are required to make reasonable accommodation for qualified applicants and employees with disabilities who request such accommodation. Reasonable accommodation means modification or adjustment to a job application process, the work environment, the way in which a job is customarily performed, or employment policies that enable a qualified individual with a disability to be considered for the position, perform the essential functions of the job, or enjoy benefits and privileges of employment equal to those available to a similarly-situated employee without a disability [29 CFR §1630.2(o)(1); 29 CFR §37.4].

### **Examples of Reasonable Accommodation**

Reasonable accommodation in the employment environment means modification of the job application process, the way in which a job is customarily performed, or employment policies that enable a qualified individual with a disability to be considered for the position, perform the essential functions of the job, or enjoy benefits and privileges of employment equal to those available to a similarly-situated employee without a disability [29 CFR §37.4]. Examples of reasonable accommodation include:

- adjusting work schedules,

- restructuring the job,
- reassigning the employee,
- acquiring or modifying equipment and devices,
- providing qualified readers or interpreters, or
- modifying the work site [29 CFR § 37.4; §1630.2(o)(2)].

A further description and case scenario for each of these is presented in Chapter Two.

## Choosing the Accommodation

The employer is obligated to accommodate only known disabilities of qualified applicants or employees [29 CFR §37.8(a)]. The responsibility for providing an accommodation is triggered when an individual with a disability makes a request for an accommodation. The person making the request will often be able to suggest an appropriate accommodation.

While the need for accommodation may be obvious for some employees with disabilities, not all employees with disabilities require accommodations. If an employee with a known disability is having difficulty performing the job without an accommodation, the employer may ask the employee whether he or she is in need of an accommodation. Under the disability regulations, a qualified individual with a disability is not required to accept the offer of an accommodation [29CFR §37.7(o)(1)]. However, if such an offer is rejected and the person cannot then perform the essential functions of the job, the person will no longer be considered a “qualified” individual with a disability [29 CFR §1630.9(d)].

Once the applicant or employee has requested an accommodation, sufficient information must be gathered to determine the type of accommodation necessary to enable the individual to perform the job. The recipient should seek to identify the precise limitations resulting from the disability. In most instances, the person with a disability is in the best position to identify what is needed. Ask them! When necessary, seek additional information from qualified experts.

An employer need not provide the requested accommodation if an alternative means of accommodation that is less costly, but equally effective, is available. It is mandatory, however, to provide an accommodation that gives a qualified

### 29 CFR §37.8(a)

With regard to aid, benefits, services, training, and employment, a recipient must provide reasonable accommodation to qualified individuals with disabilities who are applicants, registrants, eligible applicants/ registrants participants, employees, or applicants for employment, unless providing the accommodation would cause undue hardship.

### 29 CFR §37.4 (3)

To determine the appropriate reasonable accommodation, it may be necessary for the recipient to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

individual with a disability an opportunity to attain the same level of job performance as co-workers with similar skills and abilities.

The Job Accommodation Network (JAN) provides free consulting services for employers, employees, or job-seekers to help them select accommodations to enable persons with disabilities to perform critical job functions. By contacting JAN, an employer, job-seeker, or a One-Stop recipient can access experienced persons familiar with a large number of accommodations that may be applicable to the barrier an employee must overcome. The majority of accommodations suggested by JAN are inexpensive; many are free. Contact JAN at <http://www.jan.wvu.edu/english/homeus.htm>.

### A Limit: Undue Hardship

The limit on providing reasonable accommodation occurs if an employer can prove that a requested accommodation imposes an "undue hardship" on the employer [29 CFR §37.8 (a); §1630.9(a)]. However, if the originally suggested accommodation is an undue hardship, the employer must consider carefully whether another accommodation exists that would *not* result in an undue hardship.

Undue hardship is defined as significant difficulty or expense incurred by a covered entity in the provision of an accommodation [29 CFR §37.4; §1630.2(p)(1)]. The factors that should be weighed in determining whether a requested accommodation poses an undue hardship include:

- the nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions and/or outside funding;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of employees 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 work force; the geographic separateness and

### 29 CFR §37.4

*Undue hardship* This term has different meanings, depending upon whether it is used with regard to reasonable accommodation of individuals with disabilities, or with regard to religious accommodation.

(1) Reasonable accommodation of individuals with disabilities: (i) In general, "undue hardship" means significant difficulty or expense incurred by a recipient, when considered in light of the factors set forth in paragraph (ii).

(ii) Factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient include:

(A) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding, for the accommodation;

(B) The overall financial resources of the facility or facilities involved in the provision of the accommodation;

(a) It is unlawful for a covered entity to make a reasonable accommodation to the known, physical or mental limitations of an otherwise qualified individual with a disability at the facility or facilities, and

(b) The effect of the reasonable accommodation would be on the expenses and resources of the facility or facilities;

(C) The overall financial resources of the recipient, including:

(1) The overall size of the recipient,

(2) The number of persons aided, benefitted, served, trained, or employed by the recipient, and

(3) The number, type and location of the recipient's facilities;

(D) The type of operation or operations of the recipient, including:

(1) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient, and

(2) Where the individual is seeking an employment-related accommodation, the composition, structure and functions of the recipient's workforce; and

(E) The impact of the accommodation upon the operation of the facility or facilities, including:

(1) The impact on the ability of other participants to receive aid, benefits, services, or training, or of other employees to perform their duties, and

(2) The impact on the facility's ability to carry out its mission.

administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

- the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business [29 CFR §37.4; §1630.2(p)(2)].

The regulations require that the resources available to the employee's specific work site must be considered, in addition to consideration of the resources of the covered entity as a whole. The regulations also stress that net cost (taking into consideration the availability of tax credits, tax deductions, and/or outside funding) is a relevant factor.

If a recipient believes that a requested accommodation poses an undue burden, the burden of proof rests with the recipient to provide a written statement demonstrating the burden in light of all of the factors included in the definition of undue hardship in 29 CFR §37.4. The employer must also attempt to identify an alternative accommodation that would not impose a hardship.<sup>1</sup> In cases in which the accommodation would pose an undue hardship for the employer, Title I of the ADA provides that the individual with the disability should be given the option of paying for the portion of the cost that constitutes an undue hardship or of providing the accommodation [Appendix to 29 CFR Part 1630 at 414 (1994)]. It must be clearly understood, however, that this option is to be offered as a last resort and only in cases in which providing the requested accommodation would clearly constitute an undue hardship; it is not to be considered a routine cost-saving strategy.

If employees are governed by a collective bargaining agreement, the terms of that agreement may have an impact on whether or not a requested accommodation creates an undue hardship [Appendix to 29 CFR Part 1630, at 414 (1994)].

The EEOC has developed guidance on reasonable accommodation. It is available through the EEOC website: [www.eeoc.gov/docs/accommodation.html](http://www.eeoc.gov/docs/accommodation.html)

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<sup>1</sup>The full citation of 29 CFR § 37.8 (a), which describes a the burden of proof and other obligations that rest with a recipient in cases of undue hardship is printed in the margin in chapter 2.

## QUALIFICATION STANDARDS AND SELECTION CRITERIA

Federal regulations do not prohibit an employer from establishing physical and mental job-related qualification standards--including education, skills, and work experience--necessary for job performance, health and safety [29 CFR §1630.10]. One Stop entities are entitled to hire the most qualified person able to perform a job.

The regulations are designed to ensure that people with disabilities are not excluded from jobs that they can perform. However, qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability are not automatically disallowed if they are demonstrably job-related and consistent with business necessity [29 CFR §1630.10]. "**Job-related**" means that a selection criterion must be a legitimate measure or qualification for the specific job for which it is being used. "**Business necessity**" means that a selection criterion may not exclude an individual with a disability because of the disability unless the criterion relates to the essential functions of the job

Even if a standard is job-related and consistent with business necessity, if it screens out an individual with a disability on the basis of disability, the employer must consider whether the individual could meet the standard with reasonable accommodation. For example, it may be job-related and necessary for a One-Stop Center to require that a secretary produce letters and other documents on a word processor. However, it would be discriminatory to reject a person whose disability prevented manual keyboard operation but who could meet the qualification standard using a computer assistive device. Such devices are generally not costly and would not be expected to impose an undue hardship for any One-Stop.

It is important to note that employers may continue to select and hire people who can perform all job functions. However, an employer may not refuse to hire an individual with a disability who, while able to perform the essential functions of the job, cannot perform marginal job functions because of the disability, even though other applicants can perform those marginal functions.

### **29 CFR §1630.10 Qualification standards, tests, and other selection criteria.**

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

## **NONDISCRIMINATION IN THE HIRING PROCESS**

### **Job Advertisements and Notices**

It is advisable that job announcements, advertisements, and other recruitment notices include information on the essential functions of the job. Specific information about essential functions will attract applicants, including individuals with disabilities, who have appropriate qualifications.

Information about job openings should be accessible to people with various disabilities. For example, job information should be available in a location that is accessible to people with mobility impairments and in formats accessible to individuals with sensory impairments. While an employer is not obligated to provide written information (such as job descriptions) in alternative formats in advance of any request, the information in alternative formats must be made available in a timely manner once it has been requested.

### **Testing**

Employers may use any kind of test to determine job qualifications. However, if a test screens out or tends to screen out an individual with a disability or a class of such individuals on the basis of disability, it must be job-related and consistent with business necessity [29 CFR §1630.10]. For example, an administrator's office seeking to hire a secretary may continue to use a typing test that excludes individuals who type less than sixty words per minute if typing is an essential function of the job and sixty words per minute is the expected level of performance for employees in the job category.

Federal nondiscrimination regulations require that tests be given to people who have impaired sensory, speaking or manual skills in a format and manner that does not require use of the impaired skill, unless the test is designed to measure that skill [29 CFR §1630.11]. The purpose of this requirement is to ensure that tests accurately reflect a person's job skills, aptitudes, or whatever else the test is supposed to measure, rather than impaired skills that are not required to perform essential job functions. This requirement applies the reasonable accommodation obligation to testing.

#### **29 CFR §1630.11 Administration of Tests.**

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Some examples of alternative test formats and accommodations include:

- substituting a written test for an oral test (or written instructions for oral instructions) for people with impaired speaking or hearing skills;
- administering a test in large print, in Braille, by a reader, or on a computer for people with visual or other reading disabilities;
- allowing people with visual or learning disabilities or who have limited use of their hands to record test answers by tape recorder, dictation or computer;
- providing extra time to complete a test for people with impaired writing skills or certain learning disabilities;
- allowing individuals with disabilities who function better or worse at certain times of day because of the effects of medication or changing energy levels to take the test at a time when they can do their best;
- ensuring that a test site is physically accessible to a person with a mobility impairment;
- allowing a person with a disability who cannot perform well if there are distractions to take a test in a separate room, unless the ability to take the test in a group setting is relevant to essential job functions being tested; and
- allowing rest breaks for people with mental and other disabilities who need that relief.

### **Pre-employment Inquiries**

Federal nondiscrimination regulations prohibit pre-offer inquiries regarding the existence of an applicant's disability or the nature and severity of the disability on application forms, in job interviews, and in background or reference checks [29 CFR §1630.13(a); §32.15]. Pre-offer medical inquiries or medical examinations are also prohibited [29 CFR §1630.13(a); §32.15]. These requirements are intended to redress a historically common occurrence: the rejection of people with disabilities before their merits are considered, often based on myths and misinformation about their disability. Employers *may* make pre-employment inquiries into the ability of the applicant to perform job-related functions [29 CFR §1630.14(a); §32.15]. However, blanket questions such as "Do you have a disability?" or "How many times have you been hospitalized in the last five years and for what?" are not permissible. Employers may also not ask such questions as, "Have you ever been treated by a

psychiatrist or psychologist?" and "Are you taking any prescribed drugs?" Questions concerning an applicant's workers' compensation claims history are also prohibited at the pre-offer stage.

Employers may ask all applicants to describe or demonstrate how they will perform the functions of the job with or without reasonable accommodation. Employers may also ask an individual with a known disability to describe or demonstrate how functions of the job will be performed, whether or not all applicants in the job category are so asked [29 CFR §1630.14(a); §32.15]. If a demonstration of how the proposed accommodation would work in practice is required, the employer must provide the reasonable accommodation for the demonstration.

It is important to note that One-Stop entities have an obligation to make reasonable accommodations to enable an applicant with a disability to apply for a job. For example, individuals with visual or learning disabilities or other mental disabilities may require assistance in filling out application forms. One-Stops must also provide a reasonable accommodation, if needed, to enable an applicant to have equal opportunity in the interview process. Needed accommodations for interviews may include an accessible location for people with mobility impairments, a sign language interpreter for a person with a hearing impairment, or a reader for a person with a visual impairment. One-Stops may find it helpful to include a statement in job notices and/or job application forms, that applicants who need accommodation for an interview should request this in advance.

## **POST-OFFER AND EMPLOYEE MEDICAL EXAMINATIONS AND INQUIRIES**

### **Inquiries Following a Conditional Offer**

Once an offer of employment has been extended, it may be conditioned on the results of a medical examination if all individuals in the same job category are examined and if the information obtained is kept confidential [29 CFR §1630.14(b)]. Medical inquiries at this stage of the employment process are unrestricted. However, there are limitations on how medical information gathered at this stage may be used. If the results of

the medical examination are used to screen out applicants with disabilities, the criteria must be job-related and consistent with business necessity [29 CFR §1630.14(b)(3)].

### **Employee Medical Examinations and Inquiries**

Once an employee starts work, any health-related inquiries or medical examinations must be job-related and consistent with business necessity [29 CFR §1630.14(c)]. Medical examinations or inquiries may be conducted when there is a need to determine whether an employee is still able to perform essential job functions. For example, if an employee repeatedly falls asleep on the job, has excessive absenteeism, or exhibits difficulty performing essential job functions, a medical examination may be required to determine fitness for job duty and/or the need for reasonable accommodations.

Under Title I of the ADA, employers may conduct periodic examinations and other medical screening and monitoring required by federal, state or local laws [Appendix to 29 CFR Part 1630, at 413 (1994)]. The Title I regulations provide that an employer may defend an alleged discriminatory action by showing that the action was taken in compliance with another federal law or regulation [29 CFR §1630.15(e)]. An action taken to comply with state or local law must be consistent with the ADA [Appendix to 29 CFR Part 1630, at 413 (1994)]. For example, if a state or local law required that employees in a particular job be tested periodically for AIDS or the HIV virus, the ADA would **prohibit** such an examination unless an employer can show that it is job-related and consistent with business necessity or required to avoid a direct threat to health or safety.

### **Medical Files**

Employers are required to maintain medical files separate from employees' personnel files to ensure against unwarranted disclosure of the person's disability [29 CFR §37.15; §§1630.14(b)(1), (c)(1), and (d)(1)]. Although confidentiality must be maintained, an employer may inform supervisory personnel about an individual's medical restrictions or necessary accommodations. First aid or safety personnel may be informed if special treatment or evacuation assistance may be necessary. Disclosure is also permitted to: (1) government officials investigating compliance with federal disability law; (2)

state workers' compensation or second injury fund offices; and (3) the employer's health or life insurance companies [Appendix to 29 CFR Part 1630, at 412(1994)].

## **Drug Testing**

Federal nondiscrimination regulations do not require or prohibit testing employees for illegal use of drugs [29 CFR §1630.16(c)(1)]. However, any additional information obtained from drug tests besides whether the individual is currently engaging in the illegal use of drugs, such as the presence of a prescription medication to control a particular disability, must be treated as confidential medical information [29 CFR §1630.16(c)(3)]. The employer can require drug use tests at any stage of the employment process.

## **Direct Threat to Health or Safety**

As discussed in Chapter Two, federal nondiscrimination regulations do not require an employer to hire or continue to employ an individual who poses a direct threat to the health or safety of the individual or others [29 CFR §1630.15(b)(2)]. The direct threat standard is a strict one. The term is defined as "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" [29 CFR §1630.2(r)]. Speculative or remote risks are not sufficient to constitute a significant risk under this provision. In determining whether an individual would pose a direct threat, the factors to be considered include:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm [29 CFR §1630.2(r)].

The employer must rely on the most current medical knowledge and/or objective, factual evidence concerning the individual, not on generalizations or stereotypes, to demonstrate the existence of a direct threat to health or safety. The assessment must consider whether accommodations could be provided that would enable the individual to safely perform the essential functions of the job [29 CFR §1630.2(r)].

A specific provision of Title I of the ADA applies the direct threat analysis to food handlers with infectious or communicable

diseases. The Secretary of the U.S. Department of Health and Human Services is responsible for generating a list of infectious and communicable diseases that are transmitted by food handling. If a person with a disability has one of these diseases and there is no reasonable accommodation that can eliminate the risk of transmitting the disease, the employer can refuse to hire the applicant or can reassign an incumbent to a position where he or she does not pose a direct threat to health or safety [29 CFR §1630.16(e)].

### **LIMITING, SEGREGATING, OR CLASSIFYING JOB APPLICANTS OR EMPLOYEES**

An employer or other covered entity may not limit, segregate, or classify an individual with a disability in a manner that adversely affects the individual's employment opportunities because of his or her disability [29 CFR §1630.5]. Under federal statutes and regulations, an individual with a disability must have equal access to any employment opportunity available to a similarly situated individual who is not disabled. This includes access to opportunities and benefits extended to current employees as well as those offered during the recruitment process.

#### **29 CFR §1630.5 Limiting, segregating, and classifying.**

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

### **Insurance and Other Benefit Plans**

The requirement that individuals may not be limited, segregated, or classified because of a disability in a way that adversely affects their employment opportunities applies to health insurance and other benefit plans provided by the One-Stop Center to its employees. Included are life insurance and pension plans, as well as to other benefits and privileges of employment. If an employer provides insurance or other benefit plans to its employees without disabilities, it must provide equal access to the same coverage to its employees with disabilities [Appendix to 29 CFR Part 1630, at 404 (1994)].

An employer cannot fire or refuse to hire an individual with a disability because the employer's current health insurance plan does not cover the individual's disability or because the individual may increase the employer's future health care costs. Also, an employer cannot fire or refuse to hire an individual (whether or not that individual has a disability) because the individual has a family member or dependent with a disability

who is not covered by the employer's current health insurance plan or who may increase the employer's future health care costs.

### **Other Benefits and Privileges**

Nondiscrimination requirements, including the obligation to make reasonable accommodation, apply to all social or recreational activities provided or conducted by an employer, to any transportation provided by an employer for its employees or applicants, and to all other benefits and privileges of employment [29 CFR §1630.4 and Appendix to 29 CFR Part 1630, at 404 (1994)]. Picnics, parties, award ceremonies, and other social functions held by or sponsored by One-Stop entities must be held in accessible locations with interpreters or other accommodations available when needed. Employees with disabilities must be given an equal opportunity to participate in employer-sponsored sports teams, leagues, or recreational activities such as hiking or biking clubs. (However, no activity need be cancelled because an employee with a disability cannot participate, or participate fully, because of the nature of the disability.) Any special facilities provided to employees--such as lounges, cafeterias, exercise rooms and gymnasiums--must be equally available to employees with disabilities. Transportation provided to employees must also be accessible to employees with mobility impairments.

### **OPPORTUNITIES FOR ADVANCEMENT**

The nondiscrimination requirements that apply to initial selection apply to all aspects of employment, including opportunities for advancement [29 CFR §1630.4]. For example, an employer may not discriminate with respect to promotion, job classification, evaluation, disciplinary action, opportunities for training, or participation in meetings and conferences. Assuming that an employee is not interested in or qualified for advancement--whether resulting from prejudice or mistaken sympathy--is not permissible. Also, the need to provide reasonable accommodation to enable the person with a disability to perform essential job functions may not appropriately be considered as a criterion for advancement. Employers should ensure that supervisors and managers who make decisions regarding promotion and advancement are aware of ADA nondiscrimination requirements.

## Performance Standards

Employees with disabilities may be held to the same standards of production and performance as other employees without disabilities who are performing similar functions. No "special treatment" is required in performance evaluations. If an employee with a disability is not performing well, an employer is entitled to take the same disciplinary action that would be taken against other similarly situated employees. The employer is even permitted to make medical and other professional inquiries to determine how the disability may be affecting job performance, provided the inquiries are job-related and consistent with business necessity. However, an employee with a disability who needs an accommodation to perform an essential job function should not be evaluated on his or her ability to perform the function without the accommodation and should not be downgraded because the accommodation is necessary.

## Training Opportunities

Employees with disabilities must be provided equal opportunities to participate in training that will enable them to improve their job performance or to qualify for advancement [29 CFR §1630.4(g)]. In order to enable employees with disabilities to benefit from training, reasonable accommodation must be made, unless the employer can prove that it would constitute an undue hardship. For example, interpreters and note takers may need to be provided for employees who have hearing impairments. Training conducted directly by the recipient or made available through contractors must be held in locations accessible to persons with mobility disabilities.

## CONTRACTUAL OR OTHER RELATIONSHIPS

Employers may not do anything through a contractual relationship that they cannot do directly [29 CFR §1630.6(a)]. Examples of entities with which an employer might contract include employment referral services, training programs, labor unions, and organizations providing fringe benefits to employees [29 CFR §1630.6(b)].

As part of the self-assessment process and of future reviews conducted to ensure continued compliance with federal

### **29 CFR §1630.6 Contractual or other arrangements.**

(a) In general. It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

nondiscrimination regulations, One-Stop Centers should examine the recruitment and placement practices of any employment agencies they utilize (whether for temporary or permanent job placements) to ensure that the employment agencies' practices are in compliance with disability statutes. Particular attention should be given to the methods employment agencies use to recruit or screen applicants. One-Stop Centers should inform employment agencies they work with of their mutual obligation to comply with federal nondiscrimination regulations. In addition, any apprenticeship and job-training programs with which Local Workforce Investment Areas are associated must be free from discrimination in their treatment of participants.

For example, a One-Stop Operator uses an employment agency to recruit prospective employees for a management position. The agency places a newspaper advertisement with a telephone number that all interested persons must call; no address is given and the employer's identity is not cited. The advertisement mentions no TTY/TDD number. A qualified applicant with a hearing impairment uses a relay service to reach the employment agency; the interviewer finds using the service time-consuming and frustrating. As a result of her initial impression that the candidate would be a "hassle" to work with, she does not include the individual's resume in a selected group of resumes of qualified applicants for further consideration--even though the applicant has met all stated qualifications. ***The One-Stop is responsible for the contractor's discriminatory hiring practices.***

Labor unions are covered by the ADA and have the same obligation as the employer to comply with its requirements. A Local Workforce Investment Area cannot take any action through a labor union contract that would be impermissible for it to take directly. For example, if a union contract contained physical requirements for a particular job that screened out people with disabilities who were qualified to perform the job, and these requirements were not job-related and consistent with business necessity, they could be challenged as discriminatory by a qualified individual with a disability.

## **DISCRIMINATION ON THE BASIS OF RELATIONSHIP OR ASSOCIATION**

As discussed in Chapter Two, employers sometimes make damaging and unfounded assumptions about how a current or prospective employee's relationship to a person with a disability will affect job performance. To protect individuals from this form of discrimination, federal disability regulations bar employers from discriminating against employees, or potential employees, because of their known relationship or association with a person who has a disability [29 CFR §37.7 (l); §1630.8]. This ADA provision makes it illegal to fire or refuse to hire someone because of assumptions about how their relationship with a person who has a disability will affect either their work schedule or their participation in an employer-provided health insurance plan. Such persons also cannot be required to accept different insurance terms than those offered to other individuals.

The requirement prohibiting discrimination on the basis of "relationship or association" refers not only to family and other close personal relationships, but also to other social or business relationships and associations [Appendix to 29 CFR Part 1630, at 406 (1994)].

## **RETALIATION AND COERCION**

Also as discussed in Chapter Two, it is unlawful to discriminate against an individual because he or she has opposed an employment practice of the employer, has filed a complaint, or has testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the Act [29 CFR §37.11 (a) (1-3); §1630.12(a)]. It is also unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of any right protected by the ADA or because that individual aided or encouraged any other individual to exercise any right protected by the ADA [29 CFR §1630.12(b)].

## **IMPLEMENTING THE REVIEW OF EMPLOYMENT POLICIES AND PRACTICES**

Federal nondiscrimination regulations require One-Stop Centers and entities to ensure that qualified persons with disabilities are given equal opportunity to compete for available jobs, to maintain their jobs, and to advance through the organization as far as their abilities will take them. Qualified

persons with disabilities must also have equal access to all benefits and privileges afforded other employees. To ensure that a One-Stop is in compliance with these regulations, it is recommended that an Access Team conduct a thorough review of system-wide policies and practices in the area of employment. In particular, it is recommended that a review of One-Stop Center job descriptions be conducted, evaluating whether or not those descriptions accurately represent “essential job functions.” Access Teams should make certain to receive input from all of the One-Stop partnering agencies and organizations. Resource 5-1 is provided as an aid in assessing reasonable accommodations that could be provided at all stages in the employment process: from recruitment and hiring, to on-the-job, to access to training opportunities and social activities.

## Resource 5-1: Reasonable Accommodations Checklist

*The first column illustrates many common forms of reasonable accommodation. For each stage of the employment process where the reasonable accommodation indicated is already available upon request, mark with an X. Mark with a D those that should be developed.*

	Recruiting and Hiring	On-the-job	Training Activities	Social Activities
Large print materials (e.g. 18 pt)				
Braille materials				
Audio cassettes				
Computer diskette				
Readers				
Interpreters				
Note takers				
TTY/TDDs				
Amplified & hearing aid compatible telephones				
Assistive listening systems				
Website accessibility				
Open/Closed captioning				
Real-time captioning (CART)				
Adaptive computer hardware (specify)				
Adaptive computer software (specify)				
Flex-time work schedules				
Part-time work schedules				
Work-site modifications				
Job restructuring				
Job reassignment				

<b>Other (list)</b>				
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CHAPTER FIVE: Employment Policies and Practices

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- Overview of Legal Standards and Requirements . . . . . Ch. 5 Pg. 2
- Examples of Prohibited Employment Policies and Practices . . . . . Ch. 5 Pg. 3
- Basic Definitions . . . . . Ch. 5 Pg. 4
  - Who is a "Qualified Individual with a Disability?" . . . . . Ch. 5 Pg. 4
  - What are the "Essential Functions" of a Job? . . . . . Ch. 5 Pg. 5
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- Qualification Standards and Selection Criteria . . . . . Ch. 5 Pg. 10
  - Job-related
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- Contractual or Other Relationships . . . . . Ch. 5 Pg. 19
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- Implementing the Review of Employment Policies and Practices . . . . . Ch. 5 Pg. 21
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