Questions and Answers about Health Care Workers and the Americans with Disabilities Act

Introduction

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against individuals with disabilities. Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers of the same size. Section 501 of the Rehabilitation Act provides the same protections for federal employees and applicants for federal employment.

The ADA protects a qualified individual with a disability from disparate treatment or harassment based on disability, and also provides that, absent undue hardship, a qualified individual with a disability is entitled to reasonable accommodation to perform, or apply for, a job or to enjoy the benefits and privileges of employment. The ADA also includes rules regarding when, and to what extent, employers may seek medical information from applicants or employees. The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. Most states also have their own laws prohibiting employment discrimination on the basis of disability. Some of these laws may apply to smaller employers and provide protections in addition to those available under the ADA.

Health care is the largest industry in the American economy, and has a high incidence of occupational injury and illness.[1] Though they are "committed to promoting health through treatment and care for the sick and injured, health care workers, ironically, confront perhaps a greater range of significant workplace hazards than workers in any other sector."[2] Health care jobs often involve potential exposure to airborne and bloodborne infectious disease, sharps injuries,[3] and other dangers; many health care jobs can also be physically demanding and mentally stressful.[4] Moreover, health care workers with occupational or non-occupational illness or injury may face unique challenges because of societal misperceptions that qualified health care providers must themselves be free from any physical or mental impairment.[5]

Although the rules under Title I of the ADA and Section 501 of the Rehabilitation Act are the same for all industries and work settings, this fact sheet explains how the ADA might apply to particular situations involving job applicants and employees in the health care field.[6] Topics discussed include:

- when someone is an "employee" covered by the ADA (as opposed to an independent contractor);
- when someone is an "individual with a disability" under the ADA;

- how to determine if a health care applicant or employee with a disability is qualified for ADA purposes;
- what types of reasonable accommodations health care workers with disabilities may need and the limitations on a health care employer's obligation to provide reasonable accommodation;
- when an employer may ask health care applicants or employees questions about their medical conditions or require medical examinations; and
- how a health care employer should handle safety concerns about applicants and employees.

General Information on Employment in the Health Care Industry

The health care industry includes public and private hospitals, nursing and residential care facilities, offices of physicians, dentists, and other health care practitioners, home health care services, outpatient care centers and other ambulatory health careservices, and medical and diagnostic laboratories.[7] The occupations within this field are many and varied, including but not limited to physicians and surgeons, dentists, dental hygienists and assistants, registered nurses, licensed practical and licensed vocational nurses, physician's assistants, social workers, physical therapists, psychiatrists, psychologists, radiologists, audiologists, chiropractors, dieticians and nutritionists, pharmacists, optometrists, podiatrists, medical records and health information technicians, clinical laboratory and diagnostic-related technologists and technicians, emergency medical technicians and paramedics, ambulance drivers, nursing aides, home health aides, orderlies and attendants, occupational therapists, speech-language pathologists, medical assistants, personal and home care aides, medical transcriptionists, custodial and food service workers in medical facilities, as well as those functioning in either management or administrative support roles for workers who provide direct services.[8]

The rate of growth in this segment of the economy has been rapid. The 2002 U.S. Economic Census revealed that, between 1997 and 2002, the health care and social services industries gained 1.8 million jobs, representing a 13 percent increase in merely five years.[9] The health care industry provided more than 13 million jobs in 2004 and is expected to account for 19 percent of all new jobs created between 2004 and 2014 -- more than any other industry.[10] This expansion in health care employment is attributable in part to the aging of the population and attendant increase in health care needs.[11]

Just like in other fields, applicants or employees in the health care industry can experience impairments of any kind. However, certain impairments more commonly occur in the health care field or, regardless of cause, present particularly challenging accommodation issues in the health care context. "Health care workers face a wide range of hazards on the job, including needlestick injuries, back injuries, latex allergy, and stress," while also encountering those illnesses and injuries not unique to the health care field.[12] For example, a June 30, 2006 report issued by the U.S. Department of Labor's Bureau of Labor Statistics revealed that from 1995-2004, musculoskeletal injuries were the most common type of non-fatal injury or illness for nursing, psychiatric and home health aides, who represent nearly two-thirds of all health care

support occupations.[13] In order to fulfill their mission, many entities that provide health care operate seven days a week, 24 hours per day. For this reason, shift work is common for some health care jobs, such as registered nursing. Additionally, many health care workers work part-time and/or hold more than one job.[14] These factors and others combine to present unique disability issues for health care workers in a variety of settings.

When Health Care Workers are "Employees" Under the ADA

While the ADA's protections apply to applicants and employees, the statute does not cover independent contractors. Many workers in the health care industry are referred to as independent contractors, e.g., because they are placed through temporary or staffing agencies. However, whether a particular health care worker is an "employee" covered by the ADA is a fact-based and case-specific determination that depends on a variety of factors.[15] The mere fact that an individual is designated as an "independent contractor" or has a certain title, such as partner, director, or vice president, is not dispositive, nor is the existence of a document styled as an "employment agreement." For more information about this issue, refer to the EEOC Compliance Manual Section on Threshold Issues, Section 2-III A.1.d, http://www.eeoc.gov/policy/docs/threshold.html.

Moreover, health care providers should be aware that they may be considered the employer or joint employer of temporary nurses and other temporary workers who are provided by a temporary agency or staffing firm. See EEOC Enforcement Guidance on Application of the ADA to Contingent Workers Placed By Temporary Agencies & Other Staffing Firms (2000), http://www.eeoc.gov/policy/docs/guidance_contingent.html.

In addition to being employers, many health care providers -- regardless of the number of employees they have -- are also state or local government services covered under Title II of the ADA, "public accommodations" covered by Title III of the ADA, or federally funded programs or activities covered under Section 504 of the Rehabilitation Act. As such, hospitals, doctors' offices, clinics, and other entities that provide health care services may need to make physical changes to their facilities or other modifications to serve members of the public with disabilities. For more information about how these provisions apply to health care facilities, including how members of the public may file complaints of discrimination, contact either the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS) at (800) 368-1019 (voice) or 800) 537-7697 (TTY), or the U.S. Department of Justice (DOJ) at 800-514-0301 (voice) or 800-514-0383 (TTY). Additional information is also available on the Internet at http://www.hhs.gov/ocr/ada.html (Title II), http://www.hhs.gov/ocr/504.html (Section 504), and http://www.ada.gov/ (Titles II and III and Section 504).[16]

Individual with a Disability

1. When is a health care worker an individual with a disability under the ADA?

A person is an individual with a disability under the ADA when he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of a substantially limiting impairment; or (3) is regarded (treated by an employer) as having a substantially limiting impairment. Major life activities are basic activities that the average person can perform with little or no difficulty, such as walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, eating, sleeping, performing manual tasks, caring for oneself, learning, thinking, concentrating, interacting with others, and working.

EXAMPLE 1
"Substantially Limited"

Helen, a hospital social worker, was diagnosed five years ago with multiple sclerosis that causes chronic, intermittent weakness. Every few months, she has a flare up and is unable to stand or walk for a period of several days or weeks, during which she must use a wheelchair. Helen is substantially limited in walking and standing due to this recurring, episodic limitation.

EXAMPLE 2
"Substantially Limited"

Jose, a physical therapist, fractures one of his vertebrae in a motorcycle accident. He submits a note to his employer from his doctor stating that he cannot perform any lifting at all for six weeks, but thereafter will be able to resume any physical activities and will have no further lifting restrictions. While Jose may not have a permanent disability, he has a temporary disability as protected under the ADA Amendments Act of 2008 (the six month or less medical condition rule no longer applies).

EXAMPLE 3
"Record Of"

Steven applies for a physician's assistant position in a medical clinic. The clinic makes a job offer and then requires that he complete a post-offer medical history form before starting work. Steven's medical history includes a two-year period during which he was unable to work at all because of complications from AIDS. However, with new medications he has been able to work successfully as a physician's assistant for the past five years. Steven has a "record of" an impairment that

substantially limited him in the past from working in a class of jobs or a broad range of jobs in various classes.[17]

EXAMPLE 4
No "Record Of"

Three years ago, Xavier, a patient records clerk, was diagnosed with a cervical strain following an automobile accident. To prevent exacerbation of the pain and to promote recovery, his physician restricted him from lifting, pushing, or pulling more than ten pounds for a period of six weeks, following which he had no restrictions. Xavier does not have a "record of" a disability.

EXAMPLE 5
"Regarded As"

Tomasina, a pharmacist, tells her hospital administrator that she has a degenerative eye condition, but at present is able to continue to perform her duties. The administrator, who is concerned that eventually work errors will be made as her vision deteriorates, removes her from her position because he is afraid to risk a future mistake with respect to reading prescriptions, labels, or medical documents. Since the employer views Tomasina as unable to perform any jobs involving accurate reading, she is "regarded as" an individual with a disability because she is misperceived as substantially limited in working.[18]

EXAMPLE 6
Not "Regarded As"

Jaden, a dental hygienist with mild depression that does not substantially limit a major life activity asks for a schedule change one day a week for the next two months to attend therapy. Without regard to the ADA, the dental office administrator grants the request. The employer has not "regarded" the hygienist as an individual with a disability simply because it has granted the schedule change.[19]

2. Are health care applicants or employees who are alcoholics or who engage in illegal drug use considered to have a disability under the ADA?

Individuals with alcoholism or who have past (not present) drug addiction may be individuals with disabilities.

> **Alcoholism:** Under the ADA, someone with alcoholism is an individual with a disability if the alcoholism currently substantially limits a major life activity, was substantially limiting in the past, or is regarded as substantially limiting. An employer may not discriminate against, and may need to accommodate, a qualified applicant or employee with past or present substantial limitations relating to alcoholism who can competently perform his job and can comply with uniformly-applied employer conduct rules prohibiting employees from drinking alcohol at work or being under the influence of alcohol at work.

> **Illegal Use of Drugs:** Under the ADA, someone currently engaging in the illegal use of drugs is not an "individual with a disability." Accordingly, he may be denied employment, disciplined, or fired on the basis of the current illegal use of drugs. However, someone who is not currently engaging in the illegal use of drugs but who has a history of past drug addiction is an individual with a disability if the past drug addiction substantially limited a major life activity, or is regarded as substantially limiting. An employer may not discriminate against, and may need to accommodate, a qualified applicant or employee with a past drug addiction who can competently perform the job and comply with uniformly-applied employer conduct rules.

Qualified

3. What determines if a health care worker is "qualified" to perform a job within the meaning of the ADA?

To be qualified to perform a job under the ADA, an individual must satisfy the requisite skill, experience, education, and other job-related requirements ("qualification standards") of the position held or desired, and be able to perform the job's essential functions with or without a reasonable accommodation. Essential functions are the basic job duties that an employee must be able to perform, based on factors such as the reason the position exists, the

number of other employees available to perform the function or among whom performance of the function can be distributed, and the degree of expertise or skill required to perform the function.

If a job requirement excludes a health care worker from a position due to a disability, the requirement must be job-related and consistent with business necessity. Some requirements will obviously meet this standard, such as licenses required by state and/or local governments for doctors and other health care professionals.[20] In other instances, however, an employer may need to consider whether the standard that is excluding an individual with a disability from employment accurately predicts the individual's ability to perform the job's essential functions.

EXAMPLE 7
Requirement that Does Not Predict Employee's Ability to Perform Essential Function

A certified nursing assistant with an intellectual disability (mental retardation) who has a full scale I.Q. of 66 has been performing her job at a nursing home successfully for five years. The employer decides to impose a high school education or G.E.D. requirement for the job. The employee did not finish high school due to her disability and has several times tried unsuccessfully to obtain her G.E.D. This requirement is not job-related and consistent with business necessity as to this employee, because the fact that she has successfully done the job without meeting the requirement shows that it does not accurately predict her ability to perform the job's essential functions. [21]

An employer's judgment and a written job description prepared before advertising or interviewing for a job will be considered as evidence of essential functions, though they are not dispositive. Other evidence includes the actual work experience of present or past employees in the job, the time spent performing a function, the consequences of not performing a function, and the terms of a collective bargaining agreement (i.e., does the agreement provide that employees in certain jobs will perform particular duties?). Determining whether a job duty is an essential function is a fact-specific inquiry.

EXAMPLE 8
Duty May Not Be Essential Function Even if Included in Position Description

A hospital's job description for a registered nurse position states that lifting patients is a duty of the job. However, lifting patients will not be considered an essential function of the position if a registered nurse in that hospital typically spends only minutes per day

repositioning patients in their beds, or transferring patients between beds and gurneys or into and out of wheelchairs, and if it is nearly always accomplished in this hospital by two people because the hospital employs orderlies, licensed practical nurses, and nurse's aides whose duties are to assist registered nurses in all patient care activities, including the lifting and transferring of patients.[22]

EXAMPLE 9
Infrequently Performed Duty May Still Be an Essential Function if Limited Number or Type of Employees Are Available to Do It

A pharmacy technician in a county hospital asks to be relieved of delivery functions due to knee and leg injuries that substantially limit his ability to walk. The function takes only an hour cumulatively out of an eight-hour shift. Given the size of the hospital and limited hospital staff, however, delivery of medication to patients is an essential function of the pharmacy and the pharmacy technician is in the best position to perform this function. Therefore, the delivery function is essential even though a comparatively small amount of time is spent performing the task.[23] Similarly, if a collective bargaining agreement states that only pharmacy technicians will regularly be assigned to perform this task, or states that employees in various other job categories will not be assigned this task, that would tend to support the conclusion that delivery is an essential function of the pharmacy technician job even if only performed for a short period of time during each shift.

An employer never has to remove an essential function as an accommodation but, absent undue hardship, must provide a reasonable accommodation that would permit an employee to perform an essential function. Therefore, in example 9 above, if the hospital cannot eliminate the delivery function but another reasonable accommodation exists that would not result in undue hardship, such as a mobility device with carrying baskets for the technician to use within the hospital, the hospital must provide the alternative accommodation.

EXAMPLE 10
Employee Able to Perform Essential Function

An applicant for a hospital patient access technician has paraplegia and uses a wheelchair. The position requires

> greeting patients and their families, obtaining patient data and entering it into the computer, and moving patients who may be in wheelchairs to their next location, as well as moving back and forth among rooms to check the status of patients. The applicant will be considered qualified for the position if she has the requisite education, experience, and skills, and has the ability to push others in wheelchairs satisfactorily and safely even though she uses a wheelchair herself.[24]

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. The following questions address the extent of a health care employer's obligation to make reasonable accommodations and the limitations on this obligation; requests for reasonable accommodation and the interactive process for determining an appropriate accommodation solution; and types of reasonable accommodations that health care job applicants and employees may need.

4. What is a request for accommodation, and what should an employer and an individual with a disability do after a request for accommodation has been made?

Generally, an employer does not have to provide a reasonable accommodation unless an employee asks for one. An applicant or employee (or a doctor, family member, or other representative on his or her behalf) requests reasonable accommodation by either orally or in writing asking for some change relating to work due to a medical condition. This requires no "magic words" such as "ADA" or "reasonable accommodation."

After receiving a request for reasonable accommodation, the employer may ask for supporting medical information to determine that the requestor is an individual with a disability who needs the accommodation, unless this is obvious or already known. In addition, the employer should engage in an interactive process with the requestor to determine what is needed and why.

Often, an individual with a disability will request a specific accommodation, particularly if he has successfully used the accommodation in the past. If the employer rejects the accommodation proposed by the individual with a disability for legitimate reasons (e.g., it would involve elimination of an essential function or would pose an undue hardship), the employer must offer an alternative reasonable accommodation if one exists. If more than one accommodation exists, an employer may choose the one that is less costly or difficult to provide, so long as the accommodation is effective. An accommodation is effective if it allows an individual with a disability to have an equal opportunity to compete for a job, to achieve the

same level of performance as a non-disabled employee, or to enjoy equal access to the benefits and privileges of employment that are available to all employees.

EXAMPLE 11
Employer's Proposed Alternative Accommodation is Not Effective

A blind employee in a hospital administrative office requests that, on the afternoon prior to each weekly staff meeting, he receive electronic versions of any handouts to be provided and discussed at the meetings. This would allow him to read them on his computer before the meeting, using a screen-reading program. The hospital administrator suggests instead that another employee can summarize the contents of the handouts during the meeting. The employee tries this accommodation, but because much of the information in the handouts is presented in the form of charts and tables, it is not possible for his co-worker to describe the contents of the handouts quickly or completely enough for him to participate fully in the meetings. Additionally, the blind employee finds it difficult to follow both the meeting discussion and his co-worker's description of the written materials. The employer's proposed alternative accommodation is not effective. Therefore, the hospital must provide the handouts in electronic format before the meetings or in another alternative format that the blind employee would be able to use during the meetings.

An individual with a disability, given his understanding of his disability and the job, should identify possible accommodations that would meet his needs. If an individual with a disability explains the situation that requires accommodation, but does not or cannot specify a proposed solution, the employer, working with the individual as necessary, should determine what reasonable accommodation can be provided.

EXAMPLE 12
Employer Fails to Offer an Alternative to Employee's Rejected Proposal

A hospital stock clerk has back and neck impairments that substantially limit him in the major life activities of reaching and lifting. He submits medical documentation asking to be relieved of his newly-assigned linen delivery duties because they are aggravating his back and neck conditions. Linen delivery duties typically require frequent bending over a cart with high sides. The

hospital denies the clerk's request, stating that linen work is an essential function of his position, but fails to consider any alternatives, such as providing a different type of cart. If another accommodation was available that would have enabled the clerk to perform his job, or if the clerk could have been reassigned to a vacant position, the employer will have violated the ADA.[25]

EXAMPLE 13
Employer Satisfies Its Obligation by Offering Reasonable Accommodation

A hospital painter has a stroke and is given permanent medical restrictions. These include: no lifting, bending, stooping, or pushing; no standing or walking for more than one hour; and performing only sedentary work. The hospital offers him a reassignment to a data entry clerk position which he rejects, requesting instead that the employer allow him to perform "odd jobs" around the paint shop. The hospital has satisfied its ADA obligation. It is not required by the ADA to create a new position or allow performance of "odd jobs" as a reasonable accommodation.[26]

5. Will an employer's "light duty" program satisfy its obligation to make reasonable accommodations under the ADA?

Not necessarily. Sometimes an employer will provide temporary light duty work for an individual with a disability while a workers' compensation claim is pending, under the terms of a collective bargaining agreement, or for other reasons unrelated to the ADA. While the ADA does not require an employer to make temporary light duty permanent as an accommodation, if an individual with a disability cannot return to her previous position once the light duty work ends, she may be entitled to reassignment as an accommodation of last resort under the ADA.[27]

EXAMPLE 14
Workers' Compensation and ADA

A county emergency medical technician (EMT) injures his back and files a workers' compensation claim. While the claim is pending, he is placed on light duty performing miscellaneous office tasks. His claim is subsequently denied, at which time he is still unable to perform the essential functions of his EMT position but asks to return to work. If he is an individual with a disability and can no longer perform his EMT job, the

county must offer him reassignment to a vacant position for which he is qualified, if one exists, as an accommodation under the ADA.

6. What can be a "reasonable accommodation" for a health care applicant or employee?

Even though health care workers are by definition often in the position of caring for others, health care employers must bear in mind that the same accommodation obligations and wide array of possible solutions exist in the health care industry as in other fields.[28] For example, reasonable accommodation may include:

- **Changes to workplace facilities**

  EXAMPLE 15

  Leilani, a licensed radiology technician and mammographer employed by a medical imaging firm, has asthma and chronic sinusitis that are aggravated by her exposure to chemicals and poor ventilation in the darkroom. As a result, she begins to experience frequent headaches, dizziness, fatigue, breathing difficulties, burning eyes and other symptoms while performing her job. Assuming she is an individual with a disability, accommodation might involve the employer's retaining an industrial hygienist to evaluate the darkroom and conduct airflow testing and implementing his recommendations by installing a vent, as well as paying for a respirator mask for Leilani to wear in the darkroom.[29]

- **Acquiring or modifying equipment or devices, or providing a sign language interpreter for someone who is deaf, a reader for someone who is blind, or an assistant to help someone perform manual tasks associated with a job**

  EXAMPLE 16

  John is an occupational physician for a county government who conducts scheduled post-offer, pre-employment medical examinations of job applicants to determine fitness for duty, evaluates work-related injuries to determine whether benefits are owed, reviews return-to-work status, and evaluates medical documentation and conducts medical examinations in connection with requests for workplace

accommodations. He develops a substantially limiting hearing impairment as an adult and does not use sign language. Over time he has developed the ability to communicate with patients by either reading their lips or using a qualified oral interpreter, provided by the employer, who silently mouths the words. As an accommodation to permit him to perform the essential functions of his job, the employer has also provided a stethoscope that has an amplifier, a vibrating pager, and accessible telephone equipment.[30]

- **Job restructuring (i.e., eliminating marginal functions or swapping marginal functions among employees)**

  EXAMPLE 17

  An ophthalmologist employed by a health maintenance organization (HMO) medical center sees patients throughout the day and performs related record-keeping and administrative work. He can perform these duties but his disability substantially limits his ability to walk. The Medical Center requires each of its doctors to escort patients to and from the waiting room, which is some distance from the examination room. Because escorting the patients between the waiting and examination areas is a marginal function of the job, assigning this duty to another employee can be a reasonable accommodation for the ophthalmologist.

- **Part-time work or a schedule change (e.g., from the night shift to the day shift, excusing an individual from shift rotation, or permitting a flexible work schedule rather than a set arrival time)**[31]

  EXAMPLE 18

  A hospital requires its nurses to rotate morning, evening and night shifts every four weeks. Mingmei, a nurse, submits documentation from her physician requesting that she be exempt from shift rotation because management of her disability requires that she keep a regular sleep schedule that allows her to get to bed and get up at the same time every day, even on weekends and vacations. Granting a fixed schedule could be a reasonable accommodation.[32]

- **Use of accrued paid leave or unpaid leave (if paid leave is unavailable)**[33]

  EXAMPLE 19

  A licensed practical nurse with disabling arthritic psoriasis suffered a flare-up of the condition for the first time in eight years, triggered by a staph infection. During the flare-up, she was completely unable to work and sought several months of unpaid leave, providing medical documentation that informed the employer of the nature of her medical condition and the need for leave for treatment and recuperation. This may be a reasonable accommodation.[34]

- **Modifying policies or supervisory methods**

  EXAMPLE 20

  Shekar, a patient service technician for a large medical supply company, is required to deliver and pick up equipment from homecare patients, set up the equipment and instruct patients on how to use it, and assist patients in solving any problems regarding the equipment. The company has a policy prohibiting patient service technicians from taking more than a half-hour lunch break plus one 15-minute break in the morning and one 15-minute break in the afternoon. Due to his disabling diabetes, Shekar needs to take several brief additional breaks during the day to check his blood sugar and if necessary eat a snack that he keeps in the delivery van to regulate his insulin and blood sugar levels. Modifying the break schedule policy for him may be a reasonable accommodation.

- **Reassignment to a vacant position for which the individual is qualified (provided that the employer is not required to remove another employee, disrupt a seniority system not subject to exceptions, or reassign to a higher-level position)**

  EXAMPLE 21

  A registered nurse with osteoarthritis in both knees who was employed at a birthing center could no longer perform her current position even with accommodation, and therefore requested reassignment. Her employer offered her a vacant position as a scheduler, which

entailed a pay cut but was the closest in pay of the positions that were vacant at that time. She rejected it because she felt she was overqualified and because of the pay cut. The employer fulfilled its obligation to offer reasonable accommodation.[35]

7. Under what circumstances may a health care employer deny a requested accommodation because it is too difficult, disruptive, or expensive to provide?

An employer does not have to provide a reasonable accommodation that would result in an undue hardship on the operation of the employer's business. Undue hardship means that the accommodation would require significant difficulty or expense, or would be unduly disruptive to 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 and financial resources, and the nature and structure of its operation.

If a particular accommodation would be an undue hardship but another accommodation exists that would not, the employer must provide the alternative accommodation. Funding from an outside source, such as a vocational rehabilitation agency, to pay all or part of the cost of an accommodation and the availability of state or federal tax credits or deductions to offset an accommodation's cost will be considered in determining whether an accommodation poses an undue hardship in terms of cost.

EXAMPLE 22
No Undue Hardship

A nursing assistant at a large hospital injures her back and as a result has a permanent ten-pound lifting restriction. She informs her supervisor that she can nevertheless perform all of her duties except for lifting patients, which is an essential function of her position. She requests that the hospital purchase a portable mechanical patient lifting device as an accommodation that would permit her to perform this function. The hospital administrator learns that the hospital can acquire the device for approximately $1500. The administrator also consults with the hospital occupational health and safety officer who informs the administrator that the device can be used safely and appropriately to perform this employee's duties, and that training in using the device properly will be necessary. Purchase of the device and the cost of the associated training would not pose an undue hardship.[36]

EXAMPLE 23
Undue Hardship

Mary is a clerical staff member in a busy private medical practice that has 25 employees. Her duties include preparing patient bills and preparing submissions to insurance companies and Medicare. Due to a mobility impairment that substantially limits her ability to stand or walk, Mary is having difficulty commuting to work, and she asks to work from home two days per week. She proposes to bring home the patient files she will need to work from on the two telecommuting days, and then enter necessary information into the office computer system on her days working in the office. If this proposed accommodation would jeopardize the confidentiality or security of patient files, or inhibit the ability of the other staff to access files in the office as needed, the proposed accommodation would pose an undue hardship.[37]

Direct Threat to Safety

8. Under what circumstances can an employer bar a health care worker with a disability from employment for safety reasons?

Health care employers oversee workplaces that raise unique safety questions and concerns. Various care settings may involve invasive procedures, exposure to body fluids or bio-hazardous materials, caring for immune-compromised patients, and making specific assessments and determinations according to medical protocols, sometimes in a fast-paced setting. Errors may result in health or safety consequences for the patient, while at the same time demanding duties or exposure to illness may pose health or safety consequences for the health care worker. For these reasons, health or safety risks posed by the disability of an applicant or employee may be of particular concern to health care employers.

Under the ADA, an employer may exclude an applicant or employee with a disability from a particular position if that individual would pose a direct threat to health or safety. “Direct threat” is defined as a significant risk of substantial harm to the individual or others in the workplace that cannot be reduced or eliminated through reasonable accommodation. The determination that a particular applicant or employee with a disability poses a direct threat must be based on an individualized assessment of the individual’s present ability to perform the essential functions of the job safely. 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. This standard must be satisfied in all instances where an individual with a disability is not hired or is removed from a position based on concerns about health or safety risks posed by the disability.

A fact-specific inquiry into the nature of the workplace setting and the requirements of a position, as well as the best available objective evidence about a particular individual's disability and its effect on health and safety, will be important in assessing whether a "direct threat" exists. The determination that an individual with a disability poses a direct threat to safety must be based on an ***individualized*** assessment of the employee's present ability to safely perform the essential functions of the job. The decision must be based on a reasonable medical judgment that relies on the most current medical knowledge rather than on speculation about what people with a particular impairment generally can do.[38] In some situations, an employer may want to have an employee (or an applicant post-offer) whom it reasonably believes may pose a direct threat examined by a health care professional of the employer's choice (at the employer's expense) who has expertise in the employee's specific condition.

EXAMPLE 24
No Direct Threat

Ariel, a phlebotomist at a blood bank, is responsible for drawing blood. Lakshmi, a certified nurse's aide in a nursing home, is responsible for dressing and grooming residents, making their beds, and serving their food trays. Both Ariel and Lakshmi are HIV-positive. Since the best available medical evidence at the time of the employer's decision indicates that HIV-positive healthcare workers in these types of positions do not pose a direct threat to the safety of patients if they adhere to universal precautions, neither poses a direct threat in their positions based on their HIV-positive status. Therefore, their HIV-positive status would not justify reassigning these employees to different positions or terminating them.[39]

EXAMPLE 25
Direct Threat

A hospital physician served as Chief of the Department of Internal Medicine. In addition to patient care, his responsibilities included assignment and evaluation of a staff of 150 physicians and others and overseeing departmental quality control. Following a three-month absence for treatment of alcoholism after a hospital employee found him visibly intoxicated while treating a patient, the physician sought to resume his position as chief of internal medicine. The hospital refused based on information that the physician had relapsed after a six-year period of sobriety, and that his prior alcohol abuse, as well as a prior barbiturate addiction, had gone on for many years undetected by his professional colleagues.

Under these circumstances, the physician would pose a direct threat even with reasonable monitoring. [40] Moreover, even if the direct threat standard was not satisfied, the employer could discipline the physician -- up to and including termination -- in accordance with any uniformly applied conduct rule that was consistent with business necessity, for example a rule prohibiting drinking alcohol before or during a shift.

Obtaining, Assessing, Using, and Disclosing Medical Information

The ADA strictly limits an employer's access to and use of medical information about applicants and employees.[41] How much information the employer may obtain, and under what circumstances, depends on the stage of the employment relationship. The ADA rules regarding "disability-related inquiries" (**questions that are likely to elicit information about a disability)** and medical examinations and the confidentiality of medical information, apply to all applicants and employees, whether or not they are individuals with disabilities.[42]

9. May a health care employer inquire about an applicant's health before making a job offer?

Generally, it is unlawful to ask an applicant any disability-related inquiries or require the applicant to take a medical examination before making a conditional offer of employment. In order to obtain medical information from an applicant, the employer must first have made a "real" job offer, meaning that the employer has obtained and evaluated all non-medical information. Before making an offer, an employer may ask an applicant questions about ability to perform job-related functions. An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, she will perform job-related functions.

After a conditional job offer is made, but before employment has begun, an employer may require that an applicant take a medical examination or answer disability-related questions if everyone who will be working in the job must also take the examination or answer the questions. The employer may withdraw a job offer made to an individual with a disability if the results of the medical examination show that the individual cannot perform the essential functions of the job or would pose a "direct threat" (i.e., a significant risk of substantial harm to the individual or others), even with a reasonable accommodation.

EXAMPLE 26
Prohibited Pre-Offer Medical Examination

An agency providing home health aides makes its employment offers to aide applicants contingent upon completion of employment history verification, criminal

history background checks, and a tuberculosis (TB) skin test. The agency decides, for efficiency, to administer the TB test at the time of the job interview, but not to access the results until after it has made an offer of employment and has completed the employment history verification and criminal background check.[43] The TB test is a prohibited pre-offer medical examination even though the employer does not intend to access the test results until it has evaluated all non-medical information and extended a conditional offer of employment.

EXAMPLE 27
Permissible Pre-Offer Ability Test

An emergency rescue squad requires all applicants to complete a pre-offer physical ability test in which they must quickly and correctly lift and carry supplies and stretchers (with simulated body weight) as would be required on the job. If the test does not measure heart rate or other physiological responses to the test, it is not a medical exam. As such, it is permitted under the ADA before an offer of employment is made.

10. May an employer ask all applicants if they will need accommodations for the application process?

Yes. An employer may ask all applicants if they will need accommodations for the application process by, for example, including a question on a job application form or stating in a job advertisement who an applicant should contact to request any accommodations. This is permitted so that employers will be aware of the need for accommodation and can make arrangements to provide it in advance of the applicant's arrival for a pre-employment interview or test.

11. May an employer ask a particular applicant whether he will need a reasonable accommodation to do the job?

Yes. If the disability is obvious or an applicant discloses that he has a disability and the employer reasonably believes the disability will require a reasonable accommodation, the employer may ask whether the applicant will need an accommodation and, if so, what will be needed. However, until a conditional offer of employment has been made, the employer may not ask any further disability-related questions (e.g., questions about the nature or prognosis of the disability).

12. May an employer ask a current employee disability-related questions or require an employee to take a medical examination?

Yes, if it is job-related and consistent with business necessity, i.e., if the employer has a reasonable belief that the employee may be unable to perform the essential functions of the job or may pose a direct threat due to a medical condition. The reason for this rule is that once an applicant has been hired and begins work, performance is generally the best measure of ability to work. However, an employer may make disability-related inquiries or require a medical examination if it has a reasonable basis (i.e., evidence of current performance problems, observable evidence, or individualized medical information) for believing that the employee may be unable to perform the essential functions of the job or may pose a direct threat due to a medical condition.

EXAMPLE 28
Impermissible Disability-Related Inquiry or Medical Exam of Current Employee

A hospital administrator learns that an anesthesiologist has diabetes and has been using an insulin pump for the past year. There have been no incidents indicating a performance problem. The administrator nevertheless wants to send the anesthesiologist to a fitness for duty examination to ensure that his blood sugar can be maintained properly during lengthy surgeries and that he does not pose any safety risk in the operating room. Requiring this examination would violate the ADA because the employer does not have objective evidence that the anesthesiologist will be unable to perform his job or will pose a direct threat due to his diabetes and use of insulin.

EXAMPLE 29
Impermissible Disability-Related Inquiries and Medical Examinations Relating to Drug Use

A pharmacy fears possible theft of drugs by employees for illegal sale or personal use. To address this concern, it implements a requirement that employees periodically report to the manager all prescription and non-prescription medications they are taking. This disability-related inquiry violates the ADA because it goes beyond asking about illegal drug use and instead asks for information that is likely to reveal the existence of a disability.

13. May a health care employer inquire about, or test applicants or employees for, current illegal use of drugs?

Yes. 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. Similarly, if following a leave of absence for treatment due to drug addiction an employee is medically cleared for return to work provided she continues to attend a support program regularly, the employer may for a reasonable period of time require periodic drug testing, verification from the employee that she is regularly participating in such a program, or other reasonable assurances that she is no longer engaging in the illegal use of drugs.

14. May a health care employer inquire about, or test applicants or employees for, use of alcohol?

While an employer may have uniformly applied conduct rules prohibiting employees from drinking at work or being under the influence of alcohol at work, a test for alcohol use is considered a medical examination under the ADA, and therefore, an alcohol test may not be administered to an applicant before a conditional offer of employment. Once employment begins, an alcohol test generally may only be required if the employer has a reasonable belief based on objective evidence that an employee has been drinking on the job or is under the influence of alcohol, or otherwise may be unable to perform the essential functions of the job or may pose a direct threat to safety based on his alcoholism.

EXAMPLE 30
Permissible Alcohol Testing

An on-call surgeon is paged to come to the hospital late in the evening to perform surgery. When he arrives, a nurse notices that his speech appears slightly impaired and believes she smells alcohol on his breath. She informs an administrator who requires that the surgeon submit to a blood alcohol test. The alcohol test, as well as any resulting discipline for violation of a uniformly-applied conduct rule, is permissible under the ADA.[44]

Additionally, an employer may require random alcohol testing of an employee who has undergone alcohol rehabilitation, even in the absence of evidence that the employee has been drinking or is presently under the influence of alcohol, if the employer reasonably believes that the employee would pose a direct threat in the absence of such testing. In determining whether to require that an employee submit to alcohol testing in such a situation, the employer should consider the safety risks associated with the position the employee holds, the consequences of the employee's inability or impaired ability to do his or her job, and the reason(s) the employee will pose a direct threat. For example, random alcohol testing may be unwarranted in the case of a recently rehabilitated clerical employee but appropriate in the case of an employee who provides direct patient care, performs medical procedures, or interprets medical test results. Random alcohol testing must be limited in frequency and duration to address the employer’s legitimate safety concerns.

15. May an employer follow the recommendations of the Centers for Disease Control and Prevention (CDC) guidelines with respect to testing current employees for tuberculosis (TB) without violating the ADA?

Yes. The CDC's "Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health-Care Settings, 2005," http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5417a1.htm, recommend instituting particular types and duration of TB screening programs for current health care workers in those settings where a threshold level of risk is indicated pursuant to CDC risk assessment standards. The CDC guidelines set forth objective measurements based on the number of TB patients treated in the preceding year and other non-speculative risk factors to determine when testing of current employees is recommended. Therefore, testing under the guidelines will only occur where the employer has a reasonable belief based on objective evidence that the employees designated for testing may pose a significant risk of substantial harm to themselves or others.

16. May a health care employer require its employees to participate in a health and wellness program that includes disability-related inquiries or medical examinations?

No. The ADA allows disability-related inquiries or medical examinations as part of a wellness program only if participation in the program is voluntary. In addition, the employer must keep any medical information obtained in the course of such programs confidential. For more information about the ADA's confidentiality provisions, see question # 19, below.

17. May a health care employer require an individual who has requested reasonable accommodation to provide medical information or take a medical examination to demonstrate that he is an individual with a disability and needs the accommodation requested?

If the disability and/or need for accommodation is not obvious or already known, the employer mayrequire reasonable medical information or documentation from an appropriate health care provider to demonstrate that the individual is an individual with a disability and needs the accommodation requested.

EXAMPLE 31
Permissible Request for Supporting Medical Information

A newly-hired hospital orderly who must wear medical gloves to perform her work tells her supervisor that she has a latex allergy and requests that the hospital order gloves made from another material. The employer may request further information from the orderly and/or her health care provider about the nature of the allergy and its adverse effects to determine whether it is a disability as well as whether and what accommodation is needed. Of course, in situations such as this where the

accommodation is inexpensive or easily provided, employers may and often simply grant the accommodation without asking for medical documentation.[45]

EXAMPLE 32
Impermissible Request for Supporting Medical Information

A physical therapist diagnosed with bipolar disorder requests and is granted a four-month leave for hospitalization and treatment following a series of manic episodes. In the course of processing the leave request, the employer receives medical documentation establishing that the therapist has a permanent condition that will benefit from medication, but that is still likely to cause substantial limitations from time to time throughout the employee's life. Two years later, the employee begins to experience bipolar symptoms that interfere with his ability to work. The employee tells his supervisor that his psychiatrist has recommended that he take leave while the effects of adjustments to his medication are being monitored. The employer cannot ask for medical documentation that the employee has a disability, because it already received documentation two years earlier indicating that the employee's bipolar disorder is permanent and substantially limiting. It may only seek documentation from the treating health care provider regarding whether and how much leave is needed for the disability.

An employer should explain the type of documentation it needs to decide whether to grant an accommodation. If the documentation the individual requesting accommodation provides is insufficient to show that the requestor is an individual with a disability and that an accommodation is needed, the employer may ask for clarification. This can be done, for example, by having the individual sign a release that would allow the employer's health care professional to discuss the accommodation request with the individual's health care professional, or by submitting a list of specific questions for the individual's health care professional to answer. If the individual requesting accommodation is unable to provide sufficient documentation, the employer may ask the employee to take a medical examination by a physician of the employer's choice at the employer's expense.

18. May a supervisor rely on his or her own experience and knowledge as a medical professional to determine whether to grant or deny a reasonable accommodation?

While many supervisors in the health care field may have greater medical knowledge than supervisors in other fields, care should be taken before denying an accommodation request to obtain and assess medical documentation from the employee's own health care provider if the disability or need for accommodation are not obvious. Moreover, a supervisor should not deny an accommodation request based on his perception that an employee could avoid the need for the accommodation by following a different treatment regimen or better adhering to a prescribed treatment plan.

Confidentiality

19. Does the ADA require health care employers to keep applicant and employee medical information confidential?

Yes. Subject to several very narrow exceptions, all applicant and employee medical information, including written records and medical information provided orally, whether solicited by the employer or volunteered by the individual, must be kept confidential, and maintained in separate medical files rather than with personnel files. The employer may give medical information only:

- to supervisors or managers in order to meet an employee's need for reasonable accommodation(s) or in connection with an employee's work restrictions;
- to first aid or safety personnel where a condition might require emergency treatment or an employee would require assistance in the event of an emergency;
- to government officials investigating compliance with the ADA or similar state and local laws;
- as needed for workers' compensation purposes (for example, to process a claim); and,
- for certain insurance purposes.

EXAMPLE 33
Unlawful Disclosure of Confidential Medical Information

A hospital employee with neuropathy requests and is granted a reserved parking space in the parking lot close to the entrance to minimize walking long distances. When a co-worker asks hospital officials the reason for what appears to be preferential treatment, management may not reveal that the reserved parking space was requested or provided as a reasonable accommodation.[46] Management, however, may respond to co-workers' questions by explaining that it will not discuss the situation of any employee with co-workers. Additionally, an employer may be less likely to receive questions from co-workers if its employees are educated on the requirements of EEO laws, including the ADA.

Legal Enforcement

Private Sector, State Government, and Local Government Applicants and Employees

An applicant or employee who believes that his employment rights have been violated on the basis of disability by a private sector, state government, or local government employer and wants to make a claim against that employer must file a "charge of discrimination" with the EEOC. The charge must be filed by mail or in person with a local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge. [47]

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

If mediation is not pursued or is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination occurred. If reasonable cause is found, the EEOC will then try to resolve the charge. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a lawsuit. A charging party also can request a notice of a "right to sue" from the EEOC 180 days after the charge first was filed. For a detailed description of the process, please refer to the EEOC website at http://www.eeoc.gov/charge/overview_charge_filing.html.

Federal Government Applicants and Employees

A federal government applicant or employee who believes that her employment rights have been violated on the basis of disability and wants to make a claim against a federal agency must file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the alleged discriminatory action. The individual will be provided counseling, and may choose to participate in Alternative Dispute Resolution (ADR) if the agency offers this alternative. Ordinarily, counseling must be completed within 30 days, or 90 days with ADR. At the end of counseling, or if ADR is unsuccessful, the individual may file a complaint with the agency. The agency must conduct an investigation unless the complaint is dismissed. If a complaint contains one or more issues that must be appealed to the Merit Systems Protection Board (MSPB), the complaint is processed under the MSPB's procedures. For all other EEO complaints, once the agency finishes its investigation or after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.

In cases where a hearing is requested, EEOC regulations provide that the administrativejudge issues a decision within 180 days and sends the decision to both parties. If the agency does not issue a final order within 40 days after receiving the administrative judge's decision, the decision becomes the final action of the agency.

A complainant may appeal to EEOC an agency's final action within 30 days of receipt. The agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge's decision.

For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at http://www.eeoc.gov/facts/fs-fed.html.

ENDNOTES

[1] "As the largest industry in 2004, health care provided 13.5 million jobs — 13.1 million jobs for wage and salary workers and about 411,000 jobs for the self-employed." U.S. Dept. of Labor, Bureau of Labor Statistics, Career Guide to Industries, "Health Care," (2006-07 edition), at 231, http://www.bls.gov/oco/cg/cgs035.htm. In 2004, the incidence of occupational injury and illness in hospitals was 8.7 cases per 100 full-time workers, and in nursing care facilities was 10.1 cases per 100 full-time workers, compared with the average of 5.0 for private industry overall. Id. at 233.

[2] Jane Lipscomb and Bill Borwegen, "Health Care Workers," in Occupational Health: Recognizing and Preventing Work-Related Disease and Injury (4th ed.) (Barry S. Levy and David H. Wegman, ed., 2000).

[3] Injuries from needles and other sharp devices used in healthcare and laboratory settings are associated with the occupational transmission of various pathogens. See "Overview: Risks and Prevention of Sharps Injuries in Healthcare Personnel" in Workbook for Designing, Implementing, and Evaluating a Sharps Injury Prevention Program (Centers for Disease Control Feb. 12, 2004), http://www.cdc.govsharpssafety/.

[4] See "Health Care Workers," supra n.2.

[5] Issues regarding health care workers with disabilities have long been subject to consideration by courts, beginning with an early case under Section 504 of the Rehabilitation Act of 1973, Southeastern Community College v. Davis, 442 U.S. 397 (1979) (upholding college's rejection of applicant with a severe hearing impairment from a nursing program where court found that her proposed accommodations would have fundamentally altered the nature of the program if after graduation she would not be able to perform that job), to recent cases such as Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11 (1st Cir. 2002) (holding that applicant for an emergency medical technician position who had no left hand and did not use a prosthesis could nonetheless be qualified for the position).

[6] This is part of a series of ADA question-and-answer documents issued by the EEOC that address particular disabilities, or in this instance, a particular sector of the workforce. The first two -- Reasonable Accommodations for Attorneys with Disabilities (May 23, 2006) and How to Comply with the ADA: A Guide for Restaurants & Other Food Service Employers (Oct. 28, 2004) -- as well as numerous other ADA publications, are available at http://www.eeoc.gov/types/ada.html. The information set forth in these documents is based on the statutory provisions of Title I of the ADA, the Title I regulations at 29 C.F.R. Part 1630 and Appendix, and existing EEOC guidances, available at http://www.eeoc.gov/types/ada.html.

[7] Career Guide to Industries, "Health Care," supra n.1, at 233, http://www.bls.gov/oco/%20cg/cgs035.htm.

[8] Id. at 233 -37.

[9] See 2002 Economic Census Industry Series Reports, "Health Care and Social Assistance," http://www.census.gov/econ/census02/guide/INDRPT62.HTM.

[10] Career Guide to Industries, "Health Care," supra n.1, at 235, http://www.bls.gov/oco/%20cg/cgs035.htm.

[11] Id.

[12] National Institute for Occupational Safety and Health, "Safety and Health Topic: Health Care Workers," http://www.cdc.gov/niosh/topics/healthcare/.

[13] Hoskins, Anne B., "Occupational Injuries, Illnesses, and Fatalities Among Nursing, Psychiatric, and Home Health Aides, 1995-2004," U.S. Dept. of Labor, Bureau of Labor Statistics (originally posted June 30, 2006), http://www.bls.gov/opub/cwc/sh20060628ar01p1.%20htm.

[14] Career Guide to Industries, "Health Care - Working Conditions," http://www.bls.gov/%20oco/cg/cgs035.htm#conditions.

[15] Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) (analyzing whether a physician shareholder-director in a private medical practice was an employee or an independent contractor).

[16] At least one court has held that Title III of the ADA applies to a physician who has privileges to practice at a hospital, even though the physician would not be considered the hospital's employee under Title I. See Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113 (3d Cir. 1998).

[17] Goodman, Ellen, "Living With AIDS: The Lazarus Syndrome," The Baltimore Sun (March 18, 1997) at 9A.

[18] See also Brown v. Lester E. Cox Medical Centers, 286 F.3d 1040 (8th Cir. 2002) (hospital regarded nurse with multiple sclerosis as substantially limited in thinking where it transferred her from surgical duties to a supply room position upon learning of her diagnosis notwithstanding that she had just received a positive performance appraisal).

[19] Similarly, if an employer does not perceive the limitations as long-term or potentially long-term, it does not regard someone as an individual with a disability. See Vierra v. Wayne Memorial Hospital, 2006 WL 288665 (3d Cir. Feb. 8, 2006) (unpublished) (even if hospital believed nurse was unable to conform to hygiene standards due to her broken finger, hospital did not regard her as disabled because it was aware she would only have to wear splint for one month).

[20] Title II of the ADA prohibits discrimination on the basis of disability with respect to licensing. For more information, contact either the U.S. Department of Justice (DOJ), DOJ at 800-514-0301 (voice) or 800-514-0383 (TTY), or the U.S. Department of Health and Human Services (HHS) at (800) 368-1019 (voice) or 800) 537-7697 (TTY).

[21] The facts in this example are based on a lawsuit filed by EEOC and voluntarily settled Jan. 29, 2003, prior to a decision by a judge or jury (EEOC v. Northwest Community Action of Wyoming, Inc. d/b/a NOWCAP Services, No. 02 CV 031 D (D. Wyo.)).

[22] See Deane v. Pocono Medical Center, 142 F.3d 138, 148 (3d Cir. 1998) (en banc) (finding that lifting, repositioning, or transferring patients would not be an essential function of registered nurse's position if she spent only moments each day performing those tasks); compare Ingerson v. Healthsouth Corp., 139 F.3d 912 (10th Cir. 1998) (unpublished) (finding lifting was an essential function of a registered nurse's position where she frequently had to move patients from beds to wheelchairs or commodes).

[23] The facts in this example are based on Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001). However, in that case the court concluded that the employee had failed to demonstrate that the motorized wheelchair he proposed would be a reasonable accommodation because he did not show how it would have allowed him to push delivery carts and trucks up a 15 percent grade on ball casters. Nor was he able to demonstrate that the delivery could have been performed within a reasonable amount of time.

[24] The facts in this example are based on a lawsuit filed by EEOC and voluntarily settled February 6, 2006, prior to a decision by a judge or jury (EEOC v. New Hanover Regional Medical Center, Civil Action No. 7:05-CV-180-D(2)). See also Stafne v. Unicare Homes, 266 F.3d 771 (8th Cir. 2001) (disagreement between majority and dissenting opinions regarding whether pushing wheelchairs was an essential function of a nursing home nurse position, and if so whether nurse could have performed this function if provided a motorized cart as an accommodation).

[25] Armstrong v. Burdette Tomlin Memorial Hosp., 438 F.3d 240 (3d Cir. 2006) (employer failed to accommodate hospital clerk where it rejected his proposed accommodation but did not offer one of the alternative accommodations that was available); see also Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9th Cir. 2001) (when medical transcriptionist with obsessive compulsive disorder requested and was denied permission to work from home as an accommodation after initial accommodation of a flexible start time became ineffective, her employer had an obligation prior to resorting to termination to suggest an alternative accommodation if one was available).

[26] Rubio v. Mount Sinai Hospital, 215 F.3d 13330 (7th Cir. 2000) (unpublished) (hospital was not required by ADA to create new position performing "odd jobs" as accommodation for hospital painter who had a stroke); see also Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998) (industrial nurse's refusal to consider transfer to clinical nursing position or to non-nursing positions during the interactive process prior to termination foreclosed her ability to assert a right to such a reassignment in the ADA case filed after her termination).

[27] See generally EEOC Enforcement Guidance: Workers' Compensation & the ADA (Sept. 3, 1996), http://www.eeoc.gov/docs/workcomp.html.

[28] See, e.g., Grogg, Holly, Nurses with Disabilities (Job Accommodation Network), http://www.jan.wvu.edu/media/nurses.html (discussing specific accommodation ideas for nurses with memory deficits, difficulty reading and writing, difficulty lifting or transferring patients, use of one hand, fatigue/weakness, building and work environment accessibility issues, sterile technique for nurses who use wheelchairs, depression and anxiety, stress, speech impairments, vision impairments, and hearing impairments).

[29] Selenke v. Medical Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001) (even if radiology technician with sinusitis had established she was an individual with a disability, employer accommodated her by retaining industrial hygienist and implementing his recommendations).

[30] See Wahlberg, David, "The Doctor is Deaf But He Listens Well" (Ann Arbor News Nov. 26, 2000), http://www.amphl.org/articles/wahlberg2000.html; see also Greg Livadas, "Echoes of Caring in 6 Deaf Doctors" (Rochester Democrat and Chronicle Dec. 15, 2004), http://www.deaftoday.com/v3/archives/2004/12/echoes_of_carin.html.

[31] See Ward v Massachusetts Health Research Institute, Inc., 209 F.3d 29 (1st Cir. 2000) (arthritic lab data entry clerk may be entitled to flexible arrival time absent undue hardship, notwithstanding employer's policy of requiring a uniform 9:00 a.m. start time).

[32] However, if a shift change requires a reassignment to a vacant position to which another employee has rights under a seniority system, the reassignment may not be a reasonable accommodation. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship (as revised, Oct. 17, 2002), http://www.eeoc.gov/%20policy/docs/accommodation.html, at question 31. Even when seniority is involved, an employer (and a union if a collective bargaining agreement exists) should determine whether exceptions to the seniority system exist or have been made in the past that would justify providing a reassignment needed as a reasonable accommodation. Id.

[33] Unpaid leave may also be available under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor. Information about the FMLA is available from the U.S. Department of Labor at http://www.dol.gov/esa/whd/fmla/. For a discussion of the interplay between the FMLA and the ADA, see EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship (as revised, Oct. 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html, at questions 21-23.

[34] Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998) (denying employer's motion for summary judgment on claim by nurse with chronic generalized pustular psoriasis and psoriatic arthritis that she was denied unpaid leave as an accommodation, and then was not permitted to return to work once medically cleared to do so); compare Brenneman v. MedCentral Health Sys., 366 F.3d 412 (6th Cir. 2004) (employer did not have obligation to accommodate employee's excessive absenteeism, even absent undue hardship, where most of the absences at issue were unrelated to his diabetes).

[35] Hedrick v. Western Reserve Care System, 355 F.3d 444 (6th Cir. 2004); compare Tuck v. HCA Health Servs., 842 F. Supp. 988 (M.D. Tenn. 1992) (failure to reassign nurse who could no longer perform her position due to disability to other nursing positions within the hospital that were vacant and for which she was qualified violated the Rehabilitation Act).

[36] See generally "Caring for Caregivers at Braxton," Job Safety & Health Quarterly, Occupational Safety and Health Administration, U.S. Department of Labor, www.osha.gov/Publications/JSHQ/spring2003/caregivers.htm.

[37] However, working from home as a reasonable accommodation may not pose an undue hardship for other jobs that do not involve removing confidential files or those to which co-workers need to have access. See, e.g., Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001) (employer could have accommodated medical transcriptionist with obsessive compulsive disorder by allowing her to work from home).

[38] For example, in EEOC v. Procel International Corp., d/b/a Procel and Procel Temporary Services, Inc., No. CV05-7146 (C.D. Cal.), an ADA lawsuit filed by EEOC and voluntarily settled October 6, 2005, prior to a decision by a judge or jury, it was alleged that a staffing agency improperly refused to place qualified instrument technician in acute care facility because she is deaf.

[39] See, e.g., Centers for Disease Control and Prevention (CDC) "Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures" (1991), http://www.cdc.gov/%20mmwr/preview/mmwrhtml/00014845.htm (advising that HIV-positive health care workers who follow universal precautions and who, except In specified circumstances, do not perform specially-defined exposure-prone invasive procedures, do not pose a safety risk in their employment based on HIV infection). This issue has arisen in a number of ADA lawsuits filed by EEOC and voluntarily settled prior to a decision by a judge or jury, for example EEOC v. Broadway Plaza at Cityview and American Retirement Corp., Civil Action No. 3-02-CV-209M) (E.D. Tex.), settled June 8, 2004, alleging retaliatory termination of a nursing home assistant director of nursing who allegedly refused order to terminate HIV-positive certified nursing assistant), and EEOC v. Trimar Hollywood, Inc., LA CV 03-9399 (S.D. Cal.), settled on January 14, 2004, alleging discriminatory refusal to hire an applicant for phlebotomist position because he was HIV-positive. See also EEOC v. Heartway Corp.d/b/a York Manor Nursing Center, CIV 03-534-WH (E.D. Okla. August 17, 2004) (jury verdict of $50,000 returned against employer in case brought on behalf of nursing home food service employee who was found to have been terminated because of her Hepatitis C diagnosis even though she did not pose a direct threat to safety), aff'd, 458 F.3d 1156 (10th Cir. 2006); Estate of Mauro v. Borgess Medical Center, 137 F.3d 398 (6th Cir. 1998) (disagreement between majority and dissenting opinions regarding whether direct threat standard satisfied in case of HIV-positive surgical technician).

[40] See also Altman v. New York City Health and Hospitals Corp., 903 F. Supp. 503 (S.D.N.Y. Sept. 28, 1995) (physician's prior history of undetected drug and alcohol abuse rendered him a direct threat to safety).

[41] The ADA requirements with respect to when employers can make disability-related inquiries and the ADA requirements regarding confidentiality of applicant and employee medical information are distinct from the requirements that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) imposes upon health care providers in dealing with patient health information. HIPPA is enforced by the U.S. Department of Health and Human Services (HHS). For information about HIPPA requirements, consult the HHS website, http://www.hhs.gov/ocr/hipaa/.

[42] More detailed information is available in EEOC Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the ADA (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance_inquiries.html, and EEOC Enforcement Guidance: Pre-employment Disability-Related Questions & Medical Examinations (Oct. 10, 1995), http://www.eeoc.gov/policy/docs/preemp.html.

[43] Leonel v. American Airlines, 400 F.3d 702 (9th Cir. 2005) (an employer has not made a "real" job offer, and thus cannot commence pre-employment medical testing, until the employer has either completed all non-medical components of its hiring process or can demonstrate that it could not reasonably have done so before issuing the offer; the ADA regulates "the sequence in which employers collect information, not the order in which they evaluate it"). See also EEOC Enforcement Guidance on Pre-employment Disability-Related Questions (Oct. 10, 1995), http://www.eeoc.gov/policy/docs/%20preemp.html.

[44] Nothing in the ADA either prohibits or requires an employer to offer a "last chance agreement to an employee who has engaged in misconduct because of alcoholism. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship (as revised, Oct. 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html, at n.103.

[45] See Saab, Tracie DeFreitas, "Work-Site Accommodation Ideas for Natural Latex Allergies in the Healthcare Environment," Job Accommodation Network, http://www.jan.wvu.edu/media/LATEX.html.

[46] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship (as revised, Oct. 17, 2002), http://www.eeoc.gov/policy/docs/%20accommodation.html, at question 42.

[47] Many states and localities have disability anti-discrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Individuals may file a charge with either the EEOC or a FEPA. If a charge filed with a FEPA is also covered under the ADA, the FEPA will "dual file" the charge with the EEOC but usually will retain the charge for investigation. If an ADA charge filed with the EEOC is also covered by a state or local disability discrimination law, the EEOC will "dual file" the charge with the FEPA but usually will retain the charge for investigation.

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