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Employment Rights Under the Americans with Disabilities Act (and other related laws)

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**Notice: Law Subject to Change based on Proposed Federal
Regulations**

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A. OVERVIEW of ADA

1. The ADA and the ADA-AA

The Americans with Disabilities Act (ADA) is a federal law that makes discrimination based on disability illegal. It gives civil rights protection to people with disabilities and prohibits discrimination in employment, public accommodations, and public services. The ADA has titles that are like chapters in a book. Title I of the ADA prohibits discrimination in employment against people with disabilities by employers with 15 or more employees.

The ADA was passed by Congress in 1990 as Public Law 101-336, and signed into law by President George H.W. Bush. Critically, in 2008, the ADA was amended by Congress as Public Law 110-325, and signed into law by President George W. Bush (ADA Amendments Act, “ADA-AA”). These amendments or the ADA-AA went into effect on January 1, 2009. Therefore, as of 2009, significant changes in the law have taken place with respect to employment rights under the ADA.

In particular, the ADA-AA now expressly defines the terms “major life activities” and “substantially limits”, which it had previously left undefined and for interpretation by either the courts or the U.S. Equal Employment Opportunity Commission through administrative regulation. In crafting these new important definitions related to the overarching definition of “disability”, the ADA-AA also expressly rejects the holdings of several United States Supreme Court decisions that had interpreted the ADA (and “substantially limits” and “major life activities”) narrowly and denied coverage to some persons with disabilities.¹ For example, in a case known as *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the United States Supreme Court held that mitigating measures should be used when determining whether an individual was “substantially limited” in one or more major life activities. In rejecting this holding from *Sutton*, the ADA-AA now expressly rejects the “mitigating measures” case law that followed *Sutton* in almost all circumstances. Thus, the ADA-AA now provides critical guidance to individuals with disabilities, employers, advocates, attorneys, and judges as to Congress’s intent as to whom the Act should cover and how the Act should be interpreted going forward into the future. The ADA-AA applies only to acts of discrimination that occur after January 1, 2009 when the law took effect.²

You should also be aware that there are other laws that protect the rights of qualified persons with disabilities from discrimination in an employment

context other than Title I of the ADA. For example, Title II of the ADA protects qualified individuals with disabilities from discrimination by the state or local government. Therefore if your employer is part of the state or local government, you may have claims under Title II of the ADA as well. Title II of the ADA may cover some state and local entities not covered under Title I. Two of the most prominent civil rights laws used in California to protect against disability discrimination that are not in the ADA are 1) the federal law known as Section 504 of the Rehabilitation Act (if your employer receives federal funding) and 2) the state law known as the California Fair Employment and Housing Act. Again, this publication focuses mostly on your rights under the ADA. However, you may have additional rights and remedies under these other laws.

2. Title I – In General

Title I of the ADA states:

“No covered entity shall discriminate against a **qualified individual** on the basis of **disability** in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”³

This definition prohibits discrimination only to a “qualified individual” on the basis of “disability.” Therefore the definitions of both “qualified individual” and “disability” are critical to determining whether you are protected against discrimination under Title I. These definitions are discussed in detail later in this publication. You will also note that the prohibition on discrimination applies only to a “covered entity” so that definition will also be important to determining whether you are protected against discrimination under Title I.

3. Covered Employers

Under Title I,⁴ the ADA applies to private employers, state and local government entities, employment agencies and labor unions. Under Title I, “covered entity” is defined as “an employer, employment agency, labor organization, or joint labor-management committee.”⁵ In general, an “employer” is defined as “a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person.”⁶ However, the term “employer” does not include the Federal Government, United States, Indian tribes and private membership clubs.⁷ The ADA does apply to religious entities, however, religious entities can give

preference to individuals of a particular religion and they may require that all applicants and employees conform to the religious tenets of the organization.⁸

4. Protected Individuals

The ADA protects an individual with a disability from discrimination based on that disability. The ADA defines “**disability**” in three separate and independent ways, while also stating that the three definitions shall be construed broadly.⁹ Thus, you only need to meet the terms of one of these definitions to have a “disability” under the ADA. However, to be protected from discrimination based on that disability, you also must show you are a “**qualified individual**”, which is explained further below.

The three definitions of “**disability**” under the ADA are as follows:

First, you are an individual with a “disability” under the ADA if you have a physical or mental impairment that substantially limits one or more major life activities. A “physical impairment” is “Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.”¹⁰ A “mental impairment” is “Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹¹

There are two important sub-definitions to the first definition of “disability”: What is a “**major life activity**”? And, what is “**Substantially Limits**”? The ADA-AA answers these questions directly and defines these important sub-terms as follows.

“**Major life activities**” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹² A “major life activity” also includes “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”¹³

With regard to the definition of “**substantially limits**”, the ADA-AA states

that the term shall be interpreted “consistently with the findings and purposes of the ADA Amendments Act of 2008.”¹⁴ Critically, the ADA-AA “findings” section (which is not codified) expressly references two United States Supreme Court holdings that it states are no longer good law with regard to defining “substantially limits”. Congress expressly states that *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and the lower court decisions interpreting these cases have incorrectly construed the term “substantially limits” too narrowly, effectively “eliminating protection for many individuals whom Congress intended to protect.”¹⁵ Additionally, in the findings section of the ADA-AA, Congress expressly states that the regulations interpreting the ADA that define “substantially limits” as “significantly restricted” are also incorrect and need to be amended.¹⁶

Further, “**substantially limits**” is defined by the ADA-AA as follows. “An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”¹⁷ “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹⁸ Further,

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.¹⁹

However, “The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”²⁰ Additionally, the regulations interpreting the ADA identify several factors in determining whether an individual is substantially limited in a major life activity: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”²¹ These regulations also state that if an individual is “unable to

perform a major life activity that the average person in the general population can perform” this will meet the definition of “substantially limits” as well.²²

Thus, the first definition of “disability” discussed above requires an analysis of two key sub-definitions: “major life activity” and “substantially limits.”

Second, you are an individual with a “disability” under the ADA if you have a record of such an impairment (such as a condition in remission). The definitions of physical and mental impairment are provided in the above section. The term “has a record of such an impairment” means you have a history of, or have been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. For example, someone who had cancer, but now the cancer is in remission.

Third, you are an individual with a “disability” under the ADA if you have been regarded as having such an impairment. Again, the definitions of physical and mental impairment are provided in the above sections. As to the “regarded as” aspect of this third definition, if your impairment does not limit your ability to do your job, but your employer or potential employer treats you as if it does, then you are “regarded as” having an impairment. This might include a person with epilepsy whose seizures are under control. It also might include someone who is blind and can type accurately by touch, but is not permitted to be a typist because others believe he or she cannot type due to blindness. Or, you might be “regarded as having an impairment” even if you have none of the impairments listed, but you are treated by an employer or prospective as having a substantially limiting impairment. This might be because you are associated with or related to someone who has a disability. Or this might include someone with an awkward gait who is treated by an employer or prospective employer as if he or she had a limitation of ability to do manual tasks.

As the law currently states, “An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”²³ However, under the ADA-AA, being regarded as having such an impairment, “shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”²⁴

Even if you meet one of the three definitions of “disability”²⁵ outlined

above, you still have to meet the other employment-based definition of or relating to a disability to receive protection from employment discrimination under the ADA. Critically, you must not just have a “disability” but be a **“qualified individual”** with a disability.²⁶ Being a “qualified individual” with a disability means you must also be qualified to perform the essential functions of the job (in other words, with or without a reasonable accommodation). This means you must have the minimum requirements necessary to perform the job such as the necessary education, experience or licenses. **“Qualified individual”** is defined as “an individual who, with or without **reasonable accommodation**, can perform the **essential functions** of the employment position that such individual holds or desires.”²⁷

You will note that the definition of “qualified individual” includes two important terms, which are **“reasonable accommodation”** and **“essential functions.”** Therefore these sub-definitions will be important to determining whether or not you are a “qualified individual” and are protected under Title I of the ADA.

The regulations interpreting the ADA define **“essential functions”** as “the fundamental job duties of the employment position the individual with a disability holds or desires.”²⁸ Essential functions do “not include the marginal functions of the position.”²⁹ In other words, fundamental job tasks are important and necessary job duties of the position. An individual must be considered for a job as long as he or she can do the important functions of a job with or without reasonable accommodation.³⁰ Employers may not deny you a job as long as you are qualified simply because you cannot do marginal job functions if the inability to perform is because of your disability. Consideration is given to the employer’s judgment about what functions of a job are essential.³¹ If an employer has prepared a written description before advertising or interviewing applicants for the job, this description is evidence of the essential functions of the job.³² “Marginal functions” are tasks that are not “essential functions” of the job. They might be duties that are included in a job description as “other duties as assigned.”

Under the ADA, a **“reasonable accommodation”** includes modifications or adjustments that enable employees with disabilities to perform the essential functions of their job.³³

Some examples of possible accommodations include: allowing an employee to take time off from work for doctor appointments; allowing an employee a

flexible work schedule so that the employee may work more hours on “good days” and fewer hours when necessary; restructuring the job description to eliminate non-essential functions; providing technological devices such as talking computers; making restrooms accessible; or, simply educating and reshaping co-worker attitudes.³⁴

Job reassignment to a vacant or soon to be vacant position is another possible reasonable accommodation.³⁵ You must be qualified for the other job. A promotion is never considered a reasonable accommodation, and your employer is not required to create a new position for you.

Whether a requested accommodation is reasonable may be determined by an “interactive process” between the employer and the employee. The regulations state,

“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”³⁶

For example, if your employer states “no” to your first request for a reasonable accommodation he or she might simultaneously ask you to provide additional information or discuss the matter further with him or her. Under the law, you may have an obligation to either provide further information or discuss the matter further to find an appropriate “reasonable” accommodation with your employer. Thus, you may have an obligation to meet with your employer and to provide further information about your limitations or need for a particular reasonable accommodation. For more details regarding “reasonable accommodations” see Section C of this publication.

5. Is there any exception when a “qualified individual” with a disability will not be covered by the ADA?

If qualifications standards that apply to all applicants or employees tend to screen out individuals with disabilities, employers may have a defense if the requirements are job related, consistent with business necessity, and cannot be accomplished by reasonable accommodation.³⁷

6. Does the ADA cover temporary disabilities?

In general, the ADA does not cover temporary disabilities. This is because the primary definition of “disability” requires a showing of a “substantial limitation” in one or more “major life activities.”³⁸ This definition will not be met by most temporary disabilities. However, the ADA also states that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”³⁹ The regulations interpreting the ADA state that one of the factors that may be relevant to whether an impairment is substantially limiting is the duration of the impairment.⁴⁰ The length of time that an impairment affects major life activities may help to determine whether the impairment substantially limits those activities.⁴¹

Even so, the law expressly states with respect to those “regarded as having such an impairment” that protection under the ADA shall not be given to “impairments that are transitory and minor.”⁴² “A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”⁴³

The determination as to whether an impairment is temporary or not is made on a case-by-case basis. Generally, conditions that last for only a few days or weeks and have no permanent or long-term effects on your health are not substantially limiting impairments. Examples of such short-term conditions are common colds, influenza, and most broken bones and sprains. The mere fact that you may have required absolute bed rest or hospitalization for such a condition does not alter the transitory nature of the condition. Even the necessity of surgery, without more, is not enough to raise a short-term condition to the level of a disability.

Although short-term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities. Thus, if you become blind or paralyzed but are expected to recover fully “eventually” you are an individual with a disability, despite the prognosis for full recovery at some indeterminable time in the future.

7. Are independent contractors or volunteers protected as “employees” within the meaning of the ADA?

No. Independent contractors are not regarded as employees within the

meaning of the ADA and the FEHA. The question of whether an individual is an independent contractor is decided on a case-by-case basis and turns on whether the individual has control over the work he or she performs. Factors to be considered include whether the individual does the following:

- Supplies the tools or materials;
- Makes services available to the general public;
- Works for a number of clients at the same time;
- Has an opportunity for profit or loss as a result of labor or services provided;
- Invests in the facilities at work;
- Directs the order in which the work is to be done; and
- Determines the hours during which the work is to be done.

Volunteers generally are not protected “employees.” But an individual may be considered an employee, as a result of volunteer service, if he/she receives benefits such as a pension, group life insurance, worker’s compensation, and access to professional certification, even if the benefits are provided by a third party. A volunteer may also be covered if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity.

8. Does the ADA require “affirmative action” by employers?

The ADA does not require employers to hire a set number of people with disabilities. It only requires that employers give qualified people with disabilities employment opportunities equal to those given employees without disabilities.⁴⁴ You must be able to perform the essential functions of your job, either with or without reasonable accommodation to be protected under the ADA.⁴⁵ Employers are not required to hire or keep a person who cannot perform the essential functions of a job even with reasonable accommodations. Furthermore, because the ADA applies only to people with disabilities, non-disabled employees cannot use it to challenge an employer’s perceived favoritism toward employees with disabilities.

9. What kinds of actions by an employer are prohibited by the ADA?

Under the ADA, employers may not discriminate because of your disability in application procedures, hiring, firing, advancement, compensation, training, and other terms and conditions of employment and recruitment.⁴⁶ This includes advertisements, tenure, layoffs, leave time, benefits, and all other employment-related activities. Refusing to provide a reasonable accommodation is also discrimination, unless the employer can establish that to do so would be an undue hardship or is a direct threat to the health and safety of the individual or others.⁴⁷ In addition, the ADA applies to contracts the employer may have with other businesses.⁴⁸

10. Must my employer know I have a disability to be protected by the ADA?

Yes. The ADA prohibits discrimination on the basis of a **known** disability.⁴⁹ In order to request a reasonable accommodation or file a complaint against your employer for discrimination under the ADA, you must be able to show that your employer knew you had a disability. Once you tell your employer that you have a disability, you may request a “reasonable accommodation”. Employers are only required to provide “reasonable accommodations” for **known** disabilities.⁵⁰ Telling an employer that you are experiencing personal or health problems is not notice of a disability for purposes of the ADA. Personal problems and health problems may be temporary and do not necessarily qualify as a disability under the ADA.⁵¹ You must tell your employer that you have a disability which is covered under the ADA.

It is certain from the wording of the ADA, the regulations, and the legislative history, that employers will not be faulted for failure to accommodate a disability that they were not informed existed.⁵² It is, therefore, the responsibility of the person with a disability to let the employer know he or she has a disability and request a “reasonable accommodation,” if needed. Disability Rights California recommends that you request accommodations for your disability in writing. The Appendix contains a sample Reasonable Accommodation Request letter.

11. Do I have to inform my employer of my disability during the hiring process?

No. In fact, a potential employer may not ask you if you have a disability during the hiring process.⁵³ A potential employer may ask if you have the job skills necessary to perform the functions of the job for which you are applying.⁵⁴ This may be done by asking about your past work experience, job training or other relevant skills. But a potential employer may not ask you

whether you have a disability at any time during the hiring process by claiming that not having a disability is a necessary job skill.

12. When do I need to inform my employer that I have a disability?

The ADA does not require an employee to inform his or her employer of a disability at a particular time. Thus, you may choose not to inform your employer that you have a disability.

While it is not necessary to tell your employer that you have a disability at any specific time, you should inform your employer and request a “reasonable accommodation” when you first realize that an accommodation is necessary in order for you to successfully fulfill the essential functions of your job. Waiting until after your employer has fired you is too late to request accommodation. In order to prove that your employer engaged in discriminatory hiring or firing based on your disability, you must first be able to show that your employer had knowledge of your disability. Once an employer knows of a disability, he or she must provide “reasonable accommodations” that will enable you to carry out the essential functions of your job.⁵⁵

13. How do I prove to an employer that I have a disability?

Under the ADA you have a disability whenever (1) you have a physical or mental impairment that substantially limits one or more of your major life activities; (2) you have a record of such an impairment; or (3) you are regarded as having such an impairment.⁵⁶ Sometimes a disability will be obvious, such as when you use a wheelchair, or may not be obvious, such as a learning disability. When a disability is obvious, generally you will not need to prove you have a disability, although you must if your employer wants documentation of your disability. If your disability is not obvious, you will need to provide your employer with information from your doctor that describes your disability. A sample doctor’s letter is included with these materials in the Appendix.

B. PRE-EMPLOYMENT ISSUES

1. What questions may be on a job application?

The job application is a pre-employment inquiry under the ADA. Its purpose is to gather information on your skills, abilities, training, credentials, and

references. It also serves to identify where you can be reached. It **may not** be used to elicit information about whether you are an individual with a disability or about the nature or severity of your disability.

Questions seeking information on your prior or current illnesses, medication, medical treatment, substance abuse, disabilities, injuries, or Workers' Compensation claims are prohibited, as are all inquiries into your family's medical history. But questions about illegal drug use are permitted.

Also prohibited are questions about subjects so closely related to disability that your response is likely to elicit information about your disability.

In general, an employer may not ask questions on an application or in an interview about whether you will need reasonable accommodation for a job. This is because these questions are likely to elicit whether you have a disability (generally, only people who have disabilities will need reasonable accommodations).

In order to assure that misconceptions do not bias the employment selection process, prohibitions against any inquiries regarding your physical or mental disabilities prior to an offer of employment have been included in the ADA. Until you are offered a job, an employer is only permitted to make inquiries as to your ability to perform job-related functions.

2. I have a psychiatric disability. Are questions about my mental health history legal?

No. People with psychiatric disabilities are frequently confronted with employment application forms that request detailed information concerning their mental health. The information conveyed may sometimes be used to exclude you from employment, often before your ability to perform the functions of the job is even evaluated.

3. What do I do when I am filling out an application for employment and it asks me an illegal question?

This is an individual decision you need to make yourself. Lying on an application is grounds for later dismissal. Leaving a question blank may cause the potential employer to ask specific questions. Some people answer this question by simply stating "not applicable," or by saying, "I can perform the essential functions of the job with or without reasonable accommodations," or, "This is an improper question."

4. If there are gaps in time in my resume as a result of my disability, what can I do to explain it without jeopardizing my application?

You can handle gaps in a resume a number of ways. One suggestion is to indicate that the time off was for personal reasons, but not specifically identify what the personal reasons are. Another suggestion is to specifically explain the gap. But this may lead an employer to reject you based on disability-related biases.

5. Before going to an interview, should I check on wheelchair access?

Yes. A potential employer is required to accommodate you at an interview. If the interview location is not wheelchair accessible, the potential employer is required to move the interview to an accessible location.

6. What happens if I get to the interview and I find I don't have wheelchair access?

This is an individual decision, but one option is to ask that the interview be rescheduled at an accessible location.

7. If I get called for an interview, what do I do if I have an impairment which requires that I communicate in a specialized manner? How can I get an accommodation?

If you need and want an accommodation, you must let the potential employer know your needs. A potential employer is required to accommodate your known disability-related impairments during an interview.

8. How do I find out if I will need an accommodation to perform the job?

Ask for the job description defining the essential functions of the job. Ask where you will be working and whether it is accessible and in an environment compatible with your needs. Evaluate what your needs will be to perform the job. Your physicians and vocational rehabilitation counselors can help you.

9. What type of questions can I be asked at an interview?

The purpose of the interview is to investigate your ability, education, skill, work experience, licenses or certifications that are necessary to do the job. Questions about whether you are an individual with a disability, or as to the nature or severity of your disability, are prohibited.

An employer should describe the job in detail so that you have a reasonable understanding of what is expected, and ask you whether you can perform the job functions with or without reasonable accommodation. An employer can also ask you to describe or demonstrate how, with or without reasonable accommodation, you will be able to perform the job functions.

Example: A person with a psychiatric disability applies for a job as a newspaper reporter. The employer poses questions in the interview about the applicant's ability to work under stress. This is allowed under the ADA. But questions as to whether an individual has ever been treated for stress, anxiety, or a panic disorder are not allowed.

10. What if my disability is obvious? Can I be asked if I need reasonable accommodations?

When an employer could reasonably believe that you will need reasonable accommodations to perform the functions of the job, the employer may ask you certain limited questions. Specifically, the employer may ask *whether you need reasonable accommodation* and *what type of reasonable accommodation* would be needed to perform the functions of the job. The employer could ask these questions if:

The employer reasonably believes you will need reasonable accommodation because of an obvious disability;

The employer reasonably believes you will need reasonable accommodation because of a hidden disability that you have voluntarily disclosed to the employer; or

You have voluntarily disclosed to the employer that you need reasonable accommodation to perform the job.

Example: An applicant with a severe visual impairment applies for a job involving computer work. The employer may ask whether he will need reasonable accommodation to perform the functions of the job. If the applicant answers "no," the employer may not ask additional questions about reasonable accommodation (although, of course, the employer could

ask the applicant to describe or demonstrate performance). If the applicant says that he *will* need an accommodation, the employer may ask questions about the type of required accommodation such as, “What will you need?” If the applicant says he needs software that increases the size of text on the computer screen, the employer may ask questions such as, “Who makes that software?” “Do you need a particular brand?” or “Is that software compatible with our computers?” But the employer may not ask questions about the applicant’s underlying condition. In addition, the employer may not ask reasonable accommodation questions that are unrelated to job functions such as, “Will you need reasonable accommodation to get to the cafeteria?”

11. Does the ADA prohibit job testing?

No. The ADA requires only that tests which screen out persons with disabilities be job related and consistent with business necessity. An employer may use tests that measure aptitude, physical agility, intelligence, and specific skills. These kinds of tests are not considered to be “medical examinations” under the ADA and are not subject to the special rules that govern medical examinations.

Tests an employer uses must be designed to test the **essential** functions of the job, and be accurate predictors of successful performance on the job. If the tests used screen out persons with disabilities, they must be job related and consistent with business necessity.

Tests should measure what they claim to measure. According to the House Judiciary Committee report, it is discriminatory to select and administer tests to a person who has a disability that impairs his or her sensory, manual, or speaking skills, if the test itself will measure sensory, manual or speaking skills rather than the skills or aptitudes the test purports to measure. It is permissible for an employer to use such a test only if that test will truly measure a skill necessary for the job.

12. Does the “reasonable accommodation” standard apply to job testing?

Employers have an obligation to provide you reasonable accommodations to enable you to take the job test. The place where the tests are held must be accessible. A potential employer may request reasonable documentation of the disability.

For example, a person with dyslexia should be given an opportunity to take an oral test instead of a written test unless the ability to read is the skill the written test is designed to measure. Persons with disabilities might need a longer time to complete the test. If the job does not require hearing, but the test does, the potential employer should have a sign language interpreter or other appropriate accommodation for a deaf applicant.

You should not be disqualified from a job that you have the ability to perform because a disability prevents you from taking a test as it is presented. When the employer's failure to make reasonable accommodation negatively affects test results, persons who really are qualified may be excluded. This is what the ADA was designed to prohibit. An employer should be testing your ability to perform the job, not testing your ability to take a test.

Test results may not be used to exclude your disability unless: (a) the tested skill is necessary to perform an essential function of the position; and (b) there is no reasonable accommodation that can be made available to enable you to perform that essential function; or (c) providing the necessary accommodation would cause undue hardship.

Example: A person with a psychiatric disability applied for a job as a landscaper/gardener. The applicant was qualified for the position, as detailed in the job description, and had previous experience in this occupation. But he did not perform well under the stress of taking timed, written tests. At the interview, he was given fifteen minutes to answer a series of questions testing his knowledge about the job responsibilities. Unable to accomplish this task, he was denied the job. Under these circumstances, an employer could have made a "reasonable accommodation" by offering to pose the questions orally to the applicant or waive the timed nature of the test.

13. Are there special rules for medical examinations?

Yes. Medical examinations are prohibited until after a job offer is made.

However, employment may be conditioned on the results of your medical examination. If an employer requires medical examinations, they must require medical examinations of **all** applicants, or all applicants for a certain position. An examination may not be given to some and not to others. A "Medical Examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.

An employer may give pre-offer **psychological examinations** to you, as an applicant, unless the particular examination is *medical*. This determination would be based on factors, such as the purpose of the test and the intent of the employer in giving the test. Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment (for example, those listed in the American Psychiatric Association's most recent *Diagnostic and Statistical Manual of Mental Disorders (DSM)*).

If a test is designed and used to measure only things such as honesty, tastes, and habits, it is not *medical* and, therefore, may be given before a job offer.

A physical agility test, in which you, as an applicant, demonstrate the ability to perform actual or simulated job tasks, is not a medical examination under the ADA.

A physical fitness test, in which your performance of physical tasks – such as running or lifting – is measured, is not a medical examination.

An employer may give **vision tests** to you, as an applicant, unless the particular test is *medical*. Evaluating your ability to read labels or distinguish objects as part of a demonstration of your ability to do the job is not a medical examination. But an ophthalmologist's or optometrist's analysis of your vision *is* medical. Similarly, requiring you to read an eye chart would be a medical examination.

14. During the post-offer medical exam, I revealed that I take medication for my Psychiatric Disability. Now my employer is asking me to sign a release that would allow them to look at all my mental health records. Is this legal? Should I sign the release?

The ADA⁵⁷ provides that an employer is permitted to require a medical exam after an offer of employment has been made to you and before you begin your employment duties. An employer may condition the offer of employment on the results of the examination, as long as all entering employees are subjected to the examination regardless of disability. Moreover, a post-offer examination or inquiry does not have to be “job-related” and “consistent with business necessity,” but all prospective employees must be subject to the same requirements. Thus, an employer may request access to your mental health records, as long as the mental

health records of all other applicants, regardless of disability, are also requested prior to those applicants beginning work. The information gleaned from such records may not be used to discriminate against you. If the employer uses your records to screen you out of the position because of your disability, the employer must prove that the criteria used to exclude you are job-related and consistent with business necessity, and cannot be met with reasonable accommodation, to defend against a charge of discrimination.

15. Can information gathered on a medical examination be disclosed?

All medical information, without exception, about applicants or employees **MUST BE KEPT CONFIDENTIAL**. Keeping medical information confidential means keeping it in a separate medical file, not in your personnel folder.

16. Can the employer share the medical information with anyone?

Medical information about you may be shared with supervisors if you are hired and require accommodation such as modification of job duties or restriction of hours. It may be shared with safety or first-aid personnel if the condition is one that might require emergency medical treatment. Medical information must be shared with government officials investigating compliance with the ADA. Since the ADA does not preempt state Workers' Compensation laws, the employer is free to submit information to those offices or to second injury funds without violating the ADA. Employers may also use the information for insurance purposes when it is necessary to administer a health insurance plan.

17. During employment, when is a disability-related inquiry or medical examination of an employee “job-related and consistent with business necessity”?

This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) your ability to perform essential job function will be impaired by a medical condition; or (2) you will pose a direct threat due to a medical condition. For example, inquiries or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform

essential functions of his/her position. In addition, inquiries or examinations are permitted if another Federal law or regulation requires them. In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on your ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

Example 1: A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. But there is no indication that his failure to learn his route is related in any way to a medical condition. Because the employer does not have a reasonable belief, **based on objective evidence**, that this individual's ability to perform his essential job function is impaired by a medical condition, a medical examination (including a psychiatric examination) or disability-related inquiries would not be permitted by the ADA as job-related and consistent with business necessity.

Example 2: A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin around-the-clock labor negotiations during the next several weeks. But the employer is concerned that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk of substantial harm to himself and others. There is no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings. The employer may make disability-related inquiries, or require a medical examination, because he or she has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

Example 3: An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was adjusted. Her employer may request a fitness-for-duty examination because

it has a reasonable belief, based on the employee's hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. But this examination must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would, for example, exceed this limited scope.

18. After making a job offer, may an employer ask all individuals whether they need reasonable accommodation to perform the job?

Yes.

19. If, at the post-offer stage, you request reasonable accommodation to perform the job, may the employer ask you for documentation of your disability?

Yes, if you request reasonable accommodation so you will be able to perform a job and the need for the accommodation is not obvious, the employer may require *reasonable* documentation of your entitlement to reasonable accommodation. So, the employer may require documentation showing that you have a *covered disability*, and stating your *functional limitations*.

Example: An entering employee states that she will need a 15-minute break every two hours to eat a snack in order to maintain her blood sugar level. The employer may ask her to provide documentation from her doctor showing that: (a) she has an impairment that substantially limits a major life activity; and (b) she actually needs the requested breaks because of the impairment.

20. Is drug testing prohibited?

The ADA neither requires nor prohibits drug testing. Testing for illegal use of drugs is **NOT** considered to be a "medical examination." You may be tested prior to an employer making an offer of employment.

Drug testing does not have to be related either to job duties or business necessity. If an employer tests for drugs, the procedures must conform to applicable federal, state and local law. The ADA considers that a positive drug test is indicative of current drug use. An individual currently engaging in

the illegal use of drugs is not a protected individual under the ADA when the employer acts on the basis of such use.

Since the ADA does not protect individuals who are currently using illegal drugs or alcohol, employers are allowed to:

Prohibit the use of alcohol or illegal drugs at the workplace by all employees;

Require that employees not be under the influence of alcohol or illegal drugs at the workplace;

Require that employees conform their behavior to requirements established pursuant to the Drug-Free Workplace Act of 1988;

Hold a user of drugs or alcohol to the same qualification standards for employment or job performance and behavior to which it holds other individuals; and

Require employees in sensitive positions, as defined by regulations established by the Departments of Transportation and Defense, and the Nuclear Regulatory Commission, to comply with standards established by such regulations.

An employer is permitted to test you for the illegal use of drugs. But the testing must not conflict with your right to not divulge your medical disability prior to an offer of employment. In other words, an employer may either perform a drug test after an offer of employment has been made, and make the offer contingent upon the negative outcome of the drug test, or ensure that any drug test given before a job offer will only test for illegal drugs and not any others that the applicant may be taking under medical supervision (i.e., to treat a mental disorder, epilepsy).

21. What about safety concerns?

The ADA does not compel an employer to hire you if you would be a **direct threat** to your own health or safety, or to the health and safety of others at the work site.

Before an employer decides not to hire you because you pose a direct threat, the employer must first determine that you pose a significant risk of substantial harm to the health and safety of yourself or others, which cannot be eliminated or reduced by reasonable accommodation. This determination

must be based on an individualized assessment of your present ability to safely perform the essential functions of the job. The employer should identify the specific risk posed by you. The determination of whether you pose a direct threat should be based on the following factors:

The duration of the risk;

The nature and severity of the potential harm;

The likelihood that the potential harm will occur; and

The imminence of the potential harm.

An assessment of a direct threat to health or safety must be based upon a reasonable judgment that relies on the most current knowledge and/or on the best available objective evidence.

22. What if I am unable to meet conduct standards because of my disability?

Guidelines issued by the Equal Employment Opportunity Commission (EEOC)⁵⁸ provide that employers may require employees with disabilities to meet standards of conduct which are uniformly applied to all employees and are job-related to the position in question.

The Guidelines state that, “nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence or from disciplining you if you steal or destroy property.” Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

Example: An employee steals money from her employer. Even if she asserts that her misconduct was caused by a disability, the employer may discipline her consistent with its uniform disciplinary policies because the employee violated a standard of conduct which is job-related and consistent with business necessity.

But if the misconduct in question is not “job-related for the position in question,” the EEOC takes the position that the employer must accommodate behavior that would otherwise result in discipline.

Example: An employee with a mental disability works in a warehouse. He has no customer contact, and has contact with co-workers infrequently. He

has come to work looking increasingly disheveled, with ill-fitting clothes. Co-workers complain he is anti-social, will not speak to them in casual conversation, and is rude and abrupt. But his work has not suffered. The Company handbook requires employees to be neat and courteous. When the employee is disciplined for his appearance and rudeness, he informs the employer that his behavior is caused by his disability. The EEOC Guidelines state that, “the dress code and co-worker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.”

NOTE: The EEOC does not appear to consider the effect that requiring an employer to “accommodate” rudeness to co-workers may have on employee morale and the smooth operation of business. Presumably these factors could in some circumstances allow the employer to argue that accommodating such behavior would create an undue hardship.

Employers do not have to excuse past misconduct. Thus, if an employer disciplines you for violating a standard of conduct without knowing that you have a disability, the employer need not rescind that discipline. But once the employer is told that the misconduct is caused by a disability, the employer must undertake the ADA analysis by determining whether the employee actually has a disability, whether the misconduct was actually caused by the disability, whether the disability can be reasonably accommodated, and whether such an accommodation would pose an undue hardship.

Medication: The EEOC Guidelines make it absolutely clear that the decision of whether or not to take psychiatric medication is entirely in your hands, and it is your responsibility to take such medication. If the employer believes that your misconduct is due to your failure to take medication, the employer should **not** tell you to take your medication. Instead, the employer should focus on the consequences of continued misconduct under of the Company’s uniform disciplinary policies.

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C. REASONABLE ACCOMMODATIONS

1. What is a “reasonable accommodation”?

Under Title I of the ADA, a “reasonable accommodation” includes modifications or adjustments that enable employees with disabilities to perform the essential functions of their job.⁵⁹ However, an employer is not required to provide a “reasonable accommodation” if it can establish that to do so would be an undue hardship or be a direct threat to the safety of the employee or others. (See sub-sections below for more details regarding the definitions of “undue hardship” and “direct threat.”)

Some examples of possible accommodations include the following: allowing an employee to take time off from work for doctor appointments or visits to a therapist; allowing an employee a flexible work schedule so that the employee may work more hours on “good days” and fewer hours when necessary; restructuring the job description to eliminate non-essential functions; providing a wheelchair accessible work site, a sign language interpreter, or Braille materials; or simply educating and reshaping co-worker attitudes.

Job reassignment to a vacant or soon-to-be vacant position is another possible reasonable accommodation. You must be qualified for the other job and a promotion is **never** considered a reasonable accommodation. Further, an employer need not have another job to accommodate you.

The ADA does not require employers to hire a set number of people with disabilities. It only requires that employers give qualified people with disabilities employment opportunities equal to those given employees without disabilities.⁶⁰ You must be able to perform the essential functions of your job, either with or without reasonable accommodation to be protected under the ADA.⁶¹ Employers are not required to hire or keep a person who cannot perform the essential functions of a job even with a reasonable accommodation.

2. What are reasonable accommodations for workers with psychiatric disabilities?

Effective accommodations may only be developed with clear knowledge of you, as the worker, the requirements of your job, and familiarity with the particular work environment. But examples of modifications to the work environment that have helped other workers with psychiatric disabilities can

aid in this process.

Typically, accommodations for workers with psychiatric disabilities include changes in the supervisory process, the provision of human assistance, schedule modifications, changes in physical aspects of the workplace, restructuring of job duties, and adjustments in policies.

3. What if I've never told my employer that I have a disability and I later find that I need an accommodation?

You can be covered by the ADA once you disclose your disability, even if you have already been on the job a while. Workers with long-term disabilities may request accommodations at any time during their employment. Similarly, current employees who experience an illness or accident and become disabled may request accommodations during their job tenure. Whether or not the accommodation must be provided depends whether or not it imposes an undue hardship on the employer. But employers are not expected to make accommodations for workers' disabilities of which they are unaware.

4. How do I ask for a reasonable accommodation?

You need to tell your employer (1) that you have a disability, (2) how your disability interferes with your ability to do your job functions, and (3) what accommodations you need in order to do your job functions.

You may make your request orally or in writing; but, if your employer does not respond in a reasonable amount of time to an oral request, you should then make a written request.

A sample reasonable accommodation letter is included in these materials. You should ask your employer to give you a response within a specific amount of time, because you will need to take further action if your request is denied.

5. What if the accommodation is not effective, does my employer have any obligation to help me explore another reasonable accommodation?

If an initial attempt at accommodation of an employee with a disability is not successful, an employer will be expected to take the initiative to re-start the interactive process to determine if some other accommodation may be effective to allow the employee to perform his or her essential job

functions.⁶²

6. What if I am not sure what accommodations I need?

If you are unsure as to what accommodations you need there are professional evaluators who can assess that need. You may find such services in some hospital rehabilitation units, as well as in some organizations that provide services to people with disabilities, such as regional centers. A valuable resource for accessing this service, as well as other work-related assistance, is the Department of Rehabilitation. You may find the Department of Rehabilitation (“DR”) office nearest you by consulting your telephone book under “State of California, Department of Rehabilitation.”

If you qualify for DR services and an accommodation evaluation, you should be aware that your prospective employer is under no legal obligation to abide by another agency’s evaluation and conclusion. Nevertheless, a prospective employer may be encouraged to follow a DR evaluation because the employer may be able to negotiate with DR to share the cost of any accommodation you may need.

7. I need an assistive device to do my job. May I ask my employer to provide it?

Yes. The ADA says that one of the ways your employer may accommodate you is by providing new equipment or modifying existing office equipment.⁶³ If you need a special device to be effective in your work, you may request it as an accommodation. Like other forms of accommodation, your request for equipment must be reasonable. This is to say the equipment you want should be consistent with the nature and the operations of the business you are working for, and it should be affordable in light of the resources of the business.⁶⁴

8. I know what equipment meets my work-related needs. Am I entitled to it?

If you know exactly what you need, you should suggest it when discussing your needs with your employer. Finding the right accommodation should be a cooperative process in which you and your employer consider different options together.⁶⁵ Your employer should always consult you and must give primary consideration to your preference.⁶⁶ But she doesn’t have to provide the precise item or brand you ask for. In fact, the ADA gives your employer

discretion on how she chooses to help you. Off course, whatever she offers as accommodation must live up to some standard. It should be effective. It should help you overcome the limitations caused by your disability so you can fulfill your job obligations. If the offered device works in the sense you will be able to use it to live up to your employer's expectations, she need not do more. You can turn down the offered equipment but may face the prospect of being disqualified if you cannot perform without it.⁶⁷

You can always offer to supply your own equipment in which case you have much more say in choosing what it will be. So long as your choice is compatible with the technology used at your office, does not interfere with the ability of other employees to do their job and is not likely to need too much support, you have the right to bring in your own equipment.⁶⁸

9. I use my own computer for work. It is breaking down. Can I have my employer pay for its repair?

The ADA does not speak to this issue directly. But your willingness to use your own computer clearly confers a benefit on your employer. You can make a strong argument that as an accommodation, your employer should at least provide the necessary support such as cost of maintenance and repair of your equipment. Once again, cost is a factor. If repairing your computer is too expensive and your employer cannot afford it, she may not be responsible for it. To assure your employer is clear as to her obligations, you should write out the terms of your agreement with her. The agreement should include a statement reflecting her duty to repair your technology.

10. In what areas of employment can I ask for an assistive device?

The right to a special equipment is available in all stages of a job i.e., recruitment, employment and benefits.⁶⁹ Naturally, each phase dictates different needs. Given the uncertainty of the hiring process, the employer is not likely to purchase costly technology in this phase. She can use other ways to meet your needs. Enjoyment of benefits and privileges of employment generally does not require a need for equipment either. But you need to be aware that the ADA makes this right available in case you can show a need in these circumstances.

The main area where you are most likely to get special equipment is the actual employment. The equipment should enable you to perform the main duties of the job. The ADA calls these duties "essential job functions." They

are the essential tasks you were hired to complete. On the other hand, there may be, often are, tasks and functions that are marginal to the work you do. The ADA does not protect such tasks. The law does not compel your employer to furnish adaptive equipment so you can perform non-essential functions of your job.

11. What type of assistive devices can I ask for?

The ADA doesn't rigidly limit the type of equipment you can ask for. Anything that helps you do your work may be a reasonable accommodation. It may be a simple tool such as a one-handed typewriter for a person who can only use one hand. And it could also be a high-tech device such as specially manufactured communication equipment that helps a person with a speech disability to communicate.

To give you an idea of the range of equipment your employer may provide you under the ADA, here is a list of the examples EEOC has said are reasonable accommodations in its technical assistance manual. This list is only examples. You may need something entirely different:

TDDs (Telecommunication Devices for the Deaf) make it possible for people with hearing and/or speech impairments to communicate over the telephone;

Telephone amplifiers are useful for people with hearing impairments;

Special software for standard computers and other equipment can enlarge print or convert print documents to spoken words for people with vision and/or reading disabilities;

Tactile markings on equipment in Braille or raised print are helpful to people with visual impairments;

Telephone headsets and adaptive light switches can be used by people with cerebral palsy or other manual disabilities;

Talking calculators can be used by people with visual or reading disabilities;

Speaker phones may be effective for people who are amputees or have other mobility impairments.

A timer with an indicator light allowed a medical technician who was deaf to perform laboratory tests. Cost \$27.00;

A clerk with limited use of her hands was provided a “lazy susan” file holder that enabled her to reach all materials needed for her job. Cost \$85.00;

A groundskeeper who had limited use of one arm was provided a detachable extension arm for a rake. This enabled him to grasp the handle on the extension with the impaired hand and control the rake with the functional arm. Cost \$20.00;

A desk layout was changed from the right to left side to enable a data entry operator who is visually impaired to perform her job. Cost \$0;

A telephone amplifier designed to work with a hearing aid allowed a plant worker to retain his job and avoid transfer to a lower paid job. Cost \$24.00;

A blind receptionist was provided a light probe, which allowed her to determine which lines on the switchboard were ringing, on hold, or in use. (A light-probe gives an audible signal when held over an illuminated source.) Cost \$50.00 to \$100.00;

A person who had use of only one hand, working in a food service position could perform all tasks except opening cans. She was provided with a one-handed can opener. Cost \$35.00;

Purchase of a lightweight mop and a smaller broom enabled an employee with Down Syndrome and congenital heart problems to do his job with minimal strain. Cost under \$40;

A truck driver had carpal tunnel syndrome, which limited his wrist movement and caused extreme discomfort in cold weather. A special wrist splint used with a glove designed for skin divers made it possible for him to drive even in extreme weather conditions. Cost \$55.00;

A phone headset allowed an insurance salesman with cerebral palsy to write while talking to clients. Rental cost \$6.00 per month; and

A simple cardboard form, called a “jig” made it possible for a person with mental retardation to properly fold jeans as a stock clerk in a retail store. Cost \$0.

12. I have a mobility impairment and need to use a wheelchair. Can I ask my employer to make one available to me at work?

Generally, no. One important exception to the kind of equipment you can ask for is personal devices you use regularly for your daily activities.⁷⁰ If you use a wheelchair every day whether you are at work or not, your wheelchair is a personal item and your employer doesn't have to provide one so you can use it at the work place. But even in this case, there may be a situation where your employer may be responsible. For instance, you have sufficient upper body strength to use a manual wheelchair for your personal needs but the work environment such as terrain or the texture and depth of the office carpeting may prevent you from using your manual wheelchair. Your employer may have to provide a power wheelchair in such cases.

Most items that your physician prescribes for your health and normal living activity are personal devices. They include eyeglasses, hearing aids, canes, crutches, medical equipment, prosthesis and orthotic appliances. Nonprescription items such as wheelchair lifts are also personal in nature and are your own responsibility.

The line between personal items and work-related equipment is sometimes blurred. A hearing impaired person needs a telephone amplifier both for personal purposes and for talking to people on the phone at work. There is no simple answer for knowing the nature of all devices. As you can see from the list in the previous question, EEOC describes telephone amplifiers as reasonable accommodations. It would be safe to say that if you need equipment, a tool, some supplies or an item of technology to carry out a specific work duty, your employer should provide it regardless of its characterization.

13. I have a visual impairment and cannot read print. Do I have a right to have the job application and other job information in an alternative format?

Yes. You have a right to be treated equally as others in all stages and all aspects of employment. This means you have a right to have an opportunity to read and fill the job application. You have a right to know about and have

access to other job information given to all employees including information on employment policies, benefits, tax deductions and so on. But the ADA does not obligate your employer to provide the information in the form you ask for. Your employer may choose among the options that are effective in your case. Audio recording of the materials is one of the most typical choices. If this is not adequate, you need to explain why it isn't and suggest the most practicable way your needs can be met.

For filling out the job application and other forms, your employer could offer you a personal assistant to read the information and complete the forms upon your instructions.⁷¹ Given the sensitivity and personal nature of some information, you can insist that the assistant be a person with access to such confidential information.

14. I work full time. To accommodate me, my employer lets me work from home for part of the time. Can I ask for special equipment to help me with the work I do from home?

In theory, yes. If you are permitted to work from home and need special equipment to do your job, your employer should provide it. Since you also work at the office, you presumably need the same supports there too. Providing the same accommodation in both locations may prove to be too expensive. The ADA does not force an employer to shoulder the cost of an item which is too high for that business. What is important to note is that your employer by agreeing to alter your work schedule and allowing you to work from home, is not automatically bound to supply anything you need regardless of how much it costs. If the equipment is portable, you may be entitled to only one set and may be responsible for taking it back and forth.

15. My company is undertaking significant modifications to our current computer system. As a result, I no longer can use my special equipment. What can I do?

You still have a right to reasonable accommodation.⁷² Your company should find other means to enable you to do your work. There are many alternatives. It may be feasible that the computer system can be adjusted so that you can continue working as before. The company may have to provide different equipment too. It may also have to offer you a support staff to assist you with your work. It could even modify your work schedule so you will no longer have to use a computer. And finally, it may offer you a job transfer. Transfers to other positions should be the last option to be considered. The new position must be equivalent to your current position in

all respects i.e., pay, benefits, status and opportunity for promotion.⁷³

Your employer cannot offer you an inferior position unless that is the only one available. You cannot ask to be transferred to a superior position either. You also cannot require your employer to create an entirely new position in order to accommodate you. Moreover, you cannot expect the company to stay with the current system if the change is made because of business necessity. Generally, courts are likely to accept the judgment of a business that the technological change is, in fact, appropriate.

16. What do I need to do to get the right equipment for work?

The process begins with you letting your employer know that you have a disability and need an assistive device to do your work. Then you should ask for a meeting in which you discuss the specifics of your needs. If you and/or your employer know enough about assistive technology, you can agree upon what meets your needs. You should document the contents of your discussion and the terms of your agreement accurately. If you don't know enough or cannot agree on the same device, your employer should seek an assessment by an evaluator who can recommend an effective option.⁷⁴

Your employer is not required to purchase the most expensive or the most recently developed equipment. In fact, she doesn't have to purchase anything if your needs can be met some other way. For example, if there is no reasonable choice because available devices are all too costly, you should be given the chance to provide it yourself. Moreover, your employer cannot rely on the cost of an item to do nothing. When one option is ruled out, the employer should consider other reasonable alternatives.

17. I have a written evaluation done by the Department of Rehabilitation that states the assistive devices I need. How can I use this evaluation?

Since such evaluations are fairly comprehensive, you can use them for different purposes. You can use them as proof of your disability and your functional limitations that affect the performance of your job. You can also use them as evidence of your need for assistive technology as well as the specific items you need. But the ADA does not require your employer to accept some other agency's assessment or conclusions. Your employer is free to make her own judgments based on the nature and resources of her business.

Yet there may be a practical reason for accepting Department of Rehabilitation's (DR) evaluation. Assessments done by DR are part of a rehabilitation plan in which the DR is required to assure the achievement of its goals. This generally means that DR should financially help in the purchase of the assistive devices you have identified in the plan. If your employer agrees with DR's assessment results, she will find it more economical if she negotiates with DR so they could share the cost of the technology you need.

18. Can my employer require me to obtain a letter from my doctor stating what kind of equipment I need?

No. In most instances, a physician does not have adequate knowledge to recommend assistive technology. There are professional evaluators who assess technology needs of persons with disabilities. Depending on your disability and the place you live, you can find them in a variety of entities. Some work in rehabilitation units of reputable hospitals. Others can be found in disability organizations. There are also private companies whose job is solely technology evaluations. A counselor at DR, a specialist at an Independent Living Center or a Case Manager at a Regional Center should be able to refer you to one.

Moreover, it is your employer who should obtain an assessment that would reveal the equipment you need. Your employer is only entitled to know the physical and mental limitation you experience because of your disability. This may require some type of a statement from your doctor. But your doctor need not and should not divulge your medical records and information. Her statement should only state that you have a disability or medical condition and describe with some specificity the functional limitations that affect your ability to do your job. If you can provide this information through other reliable documentation, there is no need for your doctor to be involved at all.

19. Is my employer obligated to provide any accommodation that I request?

No. Employers are required to provide "reasonable accommodations." Employers must make reasonable efforts to determine the appropriate accommodation for you, by consulting with you and giving primary consideration to your preference. The employer may select a less expensive alternative as long as it is appropriate.

20. What is an "undue hardship"?

Employers are not required to provide an accommodation if it would create an “undue hardship” on the employer.⁷⁵

In general, the term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of . . . [the following factors]: (i) the nature and cost of the accommodation . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.⁷⁶

Thus, determinations of “undue hardship” are based on a balancing of factors including the size of the employer, the number of employees, and the cost of the accommodation requested.⁷⁷

For example, an accommodation that could be provided by a larger employer with little or no hardship might be a substantial hardship for a smaller employer. For a large employer with more than one receptionist, it might present no hardship to allow one receptionist to take a longer lunch or arrive later. For a smaller employer with only one receptionist, the same request could create a more substantial hardship. In the second scenario, a court might find that allowing the receptionist to arrive late or take a longer lunch on a regular basis creates an “undue hardship”. The court would probably find that being at work and able to answer phones from 9:00 a.m. - 5:00 p.m. was an essential function of the job. It is impossible to predict with certainty how a court would rule in a case like this or, for that matter, how flexible or creative your employer will be in working with you to devise a reasonable accommodation. But regardless of how receptive you think your employer might be, it will be to your advantage – **in a situation where you think your disability is impairing your work performance** – to inform your employer of your disability and try to negotiate a “reasonable accommodation.” Once you have been fired, it is too late to ask for a

reasonable accommodation or claim that you were fired because of your disability **unless you can demonstrate that your employer knew of your disability.**

21. Can an employer consider health and safety in deciding whether to hire or retain an employee with a disability? What is a “Direct Threat”?

Yes. In *Chevron USA, Inc. v. Echazabal*, the Supreme Court upheld EEOC’s Title I regulation permitting employers to have qualification standards that exclude applicants and employees who poses a direct threat to their *own* health or the safety of others in the workplace. These regulations state that a “direct threat” means as follows:

a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.⁷⁸

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D. MISCELLANEOUS (Promotions, Worker's Compensation, & Social Security Benefits)

1. Does the ADA apply to promotions?

The ADA prohibits discrimination in promotional opportunities, just as it does in initial hiring decisions. You may not be denied a promotion on the basis of a disability.

2. I've been found eligible for worker's compensation. Does the ADA also protect me?

Not necessarily. Only injured workers who meet the ADA's definition of an individual with a disability will be considered to have a disability under the ADA, regardless of whether you satisfy criteria for receiving benefits under Worker's Compensation or other disability laws. You also must be qualified for the job (with or without reasonable accommodation) to be protected by the ADA.

3. Does filing a worker's compensation claim prevent an injured worker from filing a claim under the ADA?

No. State Worker's Compensation laws bar all other claims under the laws related to an injury that has been compensated by a Worker's Compensation system. But these clauses do not prohibit a "qualified individual" from filing a discrimination charge with an administrative agency or filing a suit under the ADA.

4. I have heard that applying for Social Security disability benefits or other disability benefits may affect my ability to file a discrimination complaint. Is this true?

It may. Recent court decisions throughout the United States have held that individuals claiming "total disability" for purposes of obtaining Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) or other disability-based benefits may be stopped from claiming employment discrimination under the ADA. What this means is that individuals with a disability who applied for and were granted Social Security benefits after being discharged by their employers may lose their right to sue their employers for discrimination based on a disability. The legal term for this concept is "judicial estoppel."

To successfully show discrimination under the ADA you have to prove that you are qualified to perform the essential functions of your job, with or without reasonable accommodation. To obtain Social Security disability benefits you have to show that you are unable to work despite accommodations. Various courts have said that people with disabilities may not be allowed to say that they are capable of fulfilling the duties of their jobs, yet at the same time say they have a disability to the point that they can't work and need benefits.

The Equal Employment Opportunity Commission (EEOC)⁷⁹ has issued ADA enforcement guidelines to address this issue. The guidelines state that an employee can simultaneously be eligible for Social Security disability benefits and “qualified” for purposes of the ADA. The EEOC says that statements made after discharge, such as statements made on a Social Security Administration form, are not relevant to whether an individual was unfairly discharged based on their disability. This is because applying for benefits occurs after the individual has been terminated from employment. To effectively enforce the ADA and further the policy goals of the ADA, the EEOC encourages courts to reach the merits of an ADA claim. Although the EEOC’s enforcement guidelines do not have the force of law, they may be helpful in cases where this “judicial estoppel” argument is raised.

E. OTHER LAWS THAT PROTECT EMPLOYMENT RIGHTS FOR PERSONS WITH DISABILITIES

1. What is Section 504?

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by anyone receiving federal funds and by federally conducted programs. Section 504 offers essentially the same protections as the ADA. However, the definition of “disability” is different. Under the Rehabilitation Act of 1973, for purposes of employment discrimination, “disability” is defined as follows. “Individual with a disability” means any individual who “has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to title I, III, or VI.”⁸⁰

2. Are there any California laws which protect me?

Yes, the California Fair Employment and Housing Act (FEHA) prohibits discrimination against any person with a physical or mental disability by

employers with five (5) or more employees.⁸¹ The Department of Fair Employment and Housing is the California agency that enforces the FEHA.

In 2000 several significant changes were made to the FEHA that became effective January 1, 2001 in response to the 1999 United States Supreme Court decisions that narrowed the application of the ADA. California legislators drafted the changes to establish California protections as *intentionally* stronger than those afforded by the federal ADA at that time. However, since the ADA-AA was signed into law in 2008, Congress itself has now directly addressed many of these same concerns California also identified and the ADA-AA now expressly provides for broader coverage to qualified individuals on the basis of a disability.

Somewhat like the ADA-AA, the changes to the California FEHA in 2000 stated an intent to provide broader coverage to persons with disabilities by using broader definitions of “physical disability”, “mental disability”, and “major life activities”. However, California law also chose to include a new definition of disability which is not in the ADA-AA, a “medical condition” that limits one or more major life activities.

Below are some of the important distinctions between FEHA and the ADA:

Definition of Employer

FEHA – Any Person regularly employing five or more persons, except a religious association or corporation not organized for private profits.⁸²

ADA – A person engaged in an industry affecting commerce who has 15 or more employees.⁸³

Definition of Disability

FEHA – The definition of disability is broader under California law even in light of the ADA-AA amendments. California FEHA protects an individual with a “mental disability”, “physical disability”, or “medical condition” that limits a major life activity. These definitions are provided below:

“Mental Disability” – includes, but is not limited to, all of the following (1) “Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.”⁸⁴ (2) “Any other mental or psychological disorder or condition that requires special education.”⁸⁵ (3) “Having a record or history of a mental or psychological disorder or condition

. . . [described above], which is known to the employer or other entity covered by this part.”⁸⁶ (4) “Being regarded or treated by the employer as having, or having had, any mental condition that makes achievement of a major life activity difficult.”⁸⁷ (5) “Being regarded or treated by the employer as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).”⁸⁸

“Physical disability” – includes, but is not limited to all of the following: (1) “Having any physiological disease disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) affects one of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine and (b) limits a major life activity.”⁸⁹ (2) Any other health impairment that requires special education.⁹⁰ (3) Having a record or history of a disease, disorder, condition cosmetic disfigurement, anatomical loss, or health impairment described above which is known to the employer.⁹¹ (4) “Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.”⁹² (5) “Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).”⁹³

“Medical Condition”– Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer, genetic characteristics defined as identifiable genes or chromosomes, or inherited characteristics, which are associated with a statistically increased risk of development of a disease or disorder, but which are not presently associated with any symptoms of any disease or disorder.⁹⁴

ADA – The term “disability” means, with respect an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.⁹⁵ Note that a “medical condition” alone will not meet the ADA definition of disability unless it also meets the above definition of “disability” under the ADA.

“Limits” versus “Substantially Limits”

FEHA – California law only requires a “limitation” upon a major life activity, but does not require, as does the Americans with Disabilities Act of 1990, a “substantial limitation.” This distinction is intended to result in broader coverage under the law of this state than under that federal act.⁹⁶

ADA – Requires a “substantial limitation” of one or more major life activities. See Section A for more details as to how the ADA now more broadly defines “substantial limitation” in light of the ADA-AA.

3. What is the Family Medical Leave Act FMLA)?

The Family Medical Leave Act of 1993 (FMLA)⁹⁷ is a federal law that requires employers having 50 or more employees to grant up to 12 weeks of unpaid medical leave per year to employees with at least 1 year of service who have a serious health condition. The right to leave is available also to care for seriously ill parents or children. The California Family Rights Act (CFRA) offers essentially the same rights as the FMLA.

During the period of unpaid leave, which may be taken on a part-time basis when medically necessary or when the employer and employee agree, the employer is required to maintain the employee’s group health insurance. Upon return to work, the employee is entitled *either* to the job he or she previously held *or* an equivalent job with equivalent benefits, pay and other terms of employment.

4. Are there any other programs that will pay me for taking such family leave?

On September 23, 2002, Governor Gray Davis signed into law SB 1661 (Kuehl), the Family Temporary Disability Insurance Act (FTDI), making California the first state to have paid family leave for employees. The intended purpose of the leave is to provide six weeks disability pay for any individual who demonstrates to a physician that he or she is unable to work due to the sickness or injury of a family member. This law was passed and signed by Governor Gray Davis in 2002. It became effective on January 1, 2004.

Under this California law, family leave applies to all businesses. This new benefit will be available to all employees who are currently covered by the State Disability Insurance (SDI) program. SB 1661 does not create a new

right to a leave of absence. Like SDI, it provides pay for time an employee is off work for a covered reason. Under existing law, employers who are covered by Family Medical Leave Act (FMLA) and California Family Rights Act – (CFRA) and California’s Pregnancy Disability Leave (PDL) must still comply with those laws by continuing to grant time off, continuing benefits and preserving the employees’ job rights.

If the employee is eligible for these leaves for reasons covered by FTDI, the employee may receive up to six weeks of pay during that leave. Also, the FTDI covers leaves for an illness of a domestic partner.

An individual who is entitled to leave under the FMLA and the CFRA must take FTDI leave concurrent with leave taken under the FMLA and the CFRA. However, the law authorizes employers to require that employees utilize up to 2 weeks of earned but unused vacation leave prior to that employee’s receipt of the additional benefits. Unlike leave under the FMLA and CFRA, there is no guarantee that the employee’s job will be held through the FTDI period.

5. What are my rights in the event that my employer unjustly denies me FMLA leave?

It is against the law for any employer to “interfere with, restrain, or deny” your FMLA rights.⁹⁸ If an employer does unjustly prevent you from taking FMLA leave, the employer may be liable for lost salary and benefits plus interest, and may be ordered to employ, reinstate, or promote you as appropriate.⁹⁹ But see *Ragsdale et al v. Wolverine World Wide, Inc.* where the court affirmed an appellate court’s holding that 29 C.F.R. § 825.700(a) was an invalid exercise of the Secretary of Labor’s authority to issue enabling regulations in that the regulation relieved the employee of the burden of proving that the employer interfered with, restrained, or denied the employee’s FMLA rights with prejudice and imposed a more severe sanction than Congress intended.¹⁰⁰

6. Does the FMLA apply to government employers?

Yes. The FMLA defines “employer” as including “any public agency,” including states and most state agencies.¹⁰¹ Additionally, the U.S. Supreme Court held that Congress allows private employees to sue the states under the FMLA.¹⁰²

7. Are the ADA and the FMLA the same?

No. You may have both “a disability” within the meaning of the ADA and a serious health condition within the meaning of the FMLA. The FMLA is not intended to modify or affect the ADA or its coverage. The leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage and not to limit already existing rights and protections under other laws.

An employer must provide leave under whichever statutory provision provides the greater rights to you. When an employer violates both the FMLA and the ADA, you may be able to recover under either or both statutes. When you are a qualified individual with a disability under the ADA, the employer must make reasonable accommodations for you, while at the same time affording you your rights under the FMLA.

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F. INFORMATION ON FILING EMPLOYMENT DISCRIMINATION COMPLAINTS FOR VIOLATIONS OF THE ADA, THE FEHA, and SECTION 504

1. Can the ADA or FEHA help me if I think that my employer is discriminating against me because I have a disability?

Yes. Under the ADA and the FEHA employment discrimination is prohibited. Under both of these laws you may file complaints and sometimes lawsuits in court. In most situations you must file a complaint first before you can go to court. If you file a complaint or a lawsuit, you will have to follow through by appearing at hearings or court proceedings, writing statements and being interviewed by your employer's representatives or lawyers.

2. How do I know whether to file a state or a federal complaint?

You must first figure out which law covers you, your employer, and your complaint. You may find that both state and federal law covers you and that you may file a complaint either with a state or federal agency. You may talk to an advocate or an attorney to help you figure out which laws cover you and where to file your complaint. Sometimes, federal and state agencies have agreements about who will handle your administrative complaint if you can file with both. For example, if you can file a complaint with both the DFEH and the EEOC, you may file with either agency. Whichever agency you file with will let you know which agency will investigate your complaint.

In addition, if you file a complaint with the EEOC, your complaint will automatically be filed with the DFEH. But if you file your complaint with the DFEH, **you must request** that the DFEH forward a copy of your complaint to the EEOC if you want your complaint filed at both agencies.

3. What disabilities are protected by these laws?

The ADA protects a "qualified individual" with a disability.¹⁰³ This means that to be protected under the ADA you must:

Be qualified to perform the essential functions of the job with or without reasonable accommodation. This means that you must have the minimum requirements necessary to perform the job such as the necessary education, experience or licenses; **and**

Have a disability that is a physical or mental impairment that substantially limits one or more major life activities; **or**

Have a record of such an impairment; **or**

Be regarded as having such an impairment.

The ADA also protects people who are discriminated against because of their association with or relationship to a person with a disability. But the definition of a disability does not include transvestism, sexual behavioral disorders, or current illegal drug use.¹⁰⁴

The FEHA covers all disabilities covered by the ADA, except that it does not require that physical disabilities cause a substantial limitation of a major life activity, only a “limitation” upon a major life activity.¹⁰⁵

4. What employers are covered by these laws?

The ADA applies to private employers, employment agencies, state and local government agencies and labor unions under Title I¹⁰⁶ and state and local government employers under Title II.¹⁰⁷ Since July 26, 1994, private employers with 15 or more employees must follow the ADA.¹⁰⁸ All state and local government employers are covered by the ADA, regardless of the number of employees they have. The ADA does **not** apply to the following employers: the United States (except Congress), private membership clubs, and Indian tribes.¹⁰⁹

Under the FEHA, an employer may not discriminate against individuals with disabilities when it employs five or more people, is the state of California or any political/civil subdivision of the state, or is a city, unless the “individual [is] employed by his or her parents, spouse, or child, or . . . [is] employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.”¹¹⁰ The FEHA does not apply to religious organizations and corporations not organized for private profit.

5. Where and when can I file a complaint?

ADA - Title I (employers): You may file a Title I complaint with the Equal Employment Opportunity Commission (EEOC). Their telephone number is 1 (800) 669-4000. A complaint must be filed with the EEOC within 300 days of the discrimination. If the EEOC issues a right-to-sue letter (a letter saying you may file in court), you have 90 days to sue in US Federal District Court. You must receive a right-to-sue letter from the EEOC before filing an action

under Title I in court.

FEHA – You may file with the DFEH within one year from the discrimination. If the DFEH issues a “right to sue” letter, you may then file a private lawsuit in state court. If you think you may have an ADA complaint in addition to the FEHA complaint, you should file with the DFEH or the EEOC within 300 days, since the time line for filing an ADA complaint is 300 days.

6. I am an ADA Title II employee (employed by a state or local government). Where and when do I file a complaint?

Under a work-sharing agreement with the EEOC, the Department of Justice (DOJ) is primarily responsible for investigating employment discrimination complaints against most Title II employers. The telephone number of the DOJ is 1 (800) 514-0301. Complaints must be filed with the DOJ within 180 days of the discrimination. Courts have held that it is not necessary to obtain a right-to-sue letter from the DOJ before filing a Title II action in court. Such lawsuits should be filed within one year of the discrimination. Those courts have stated that while legal standards of Title I apply to a Title II employment discrimination claim, the procedural requirements of Title I do not.

Additionally, if you received any personal injuries as a result of the failure to provide the accommodation, you should file a state government tort claims act form.¹¹¹ This would need to be filed within six months of the date of harm or injury. There is a \$25 fee to file this form. Filing this form would preserve any future tort claims that you might have against the state if you were to pursue litigation within the requisite statutes of limitation. **Filing the state government tort claims form does not eliminate the application of other statutes of limitation to your case.**

In California, you may also file a discrimination complaint with the state Department of Fair Employment and Housing (DFEH). The EEOC or the DFEH will let you know which agency will investigate your complaint.

7. I am employed by an employer who receives federal funds (Section 504). Where and when do I file a complaint?

To file a complaint against an employer who receives federal funds, an employee should file with the office for civil rights at the federal agency which provides funding to the employer. For example, for complaints of discrimination as an elementary school teacher, file with the Department of

Education's Office for Civil Rights. An administrative complaint must be filed within 180 days of the discriminatory conduct. An aggrieved employee may also choose to file a lawsuit in federal district court. Such a lawsuit must be filed within 1 year of the discrimination. It is not necessary to first file an administrative complaint in order to file a lawsuit against a federally funded employer. But it is necessary to first file an administrative complaint if the complaint is against the federal government itself.

8. I filed a complaint with the DFEH (or EEOC). What can I expect to happen? How long will it take for them to help me?

Once a complaint is filed with the DFEH, a consultant decides whether the DFEH will accept the complaint or decline to accept it. If a complaint is accepted, a formal complaint is written and sent to you, the complainant, for signature, within one week. When you have signed the complaint and returned it to DFEH, they will serve it on the respondent (your employer). The employer has 21 days to produce a written response to the complaint. When the response is received by DFEH, the consultant decides if there was cause for the complaint, that is, if your employer discriminated against you. If cause is found, the DFEH consultant will ask the employer if they are interested in settling the matter through the process of conciliation. If the employer does not want to settle, an administrative complaint is filed. Once the administrative remedy is exhausted, you may file a formal complaint in superior court. If, within 150 days of filing a complaint with the DFEH, an accusation is not issued, or if DFEH earlier determines that an accusation will not be issued, DFEH will notify you that they may request a right-to-sue notice and sue within one year of the date the right-to-sue letter is mailed.

After filing a complaint with the EEOC, the employer charged with violating the ADA should receive written notification of the charge within 10 days after it is filed. The EEOC will investigate charges of discrimination. If the EEOC believes that the employer has discriminated against the complainant, it will try to resolve the charge through conciliation and obtain full relief for the aggrieved individual. If conciliation fails, the EEOC will file suit or issue a "right to sue" letter to the person who filed the charge, so that the individual may institute an action in court.

9. What will happen if my complaint is found to be true?

Under the ADA and the FEHA, you may get injunctive relief (an order to perform or not perform an act) which includes, for example, reinstatement,

making a building accessible, hiring an employee to assist you, and back pay. You may also get compensatory damages (payment to compensate you) for any losses you may have experienced and for pain and suffering, and you may be able to get punitive damages (damages that punish), depending on whether your employer's discrimination was intentional.

10. Are my rights different if I am in a union?

No. Your right to be free from discriminatory treatment, including discriminatory treatment by the union itself, is the same. But if you do belong to a union, you may be entitled to mediation, arbitration, and other processes to help you in resolving your situation. Also, if your employer's discriminatory actions violate the terms of your union contract, you may have claims under laws other than the ADA. If you are a union employee and have experienced discrimination on the job, you should contact your union for assistance, in addition to filing complaints with the EEOC or DFEH.

11. What about mediation? Is it a faster way to resolve my concerns?

The EEOC and DFEH complaint processes both include an attempt at "conciliation." Through the conciliation process, the EEOC or DFEH consultant will attempt to facilitate a settlement agreement between the aggrieved employee and the employer. This process may be much faster than litigation in court, which is often a lengthy process. If the conciliation fails, and no agreement is reached, you may still pursue your remedy and your day in court. The EEOC has also instituted a mediation program.

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G. APPENDIX

1. A. SAMPLE REASONABLE ACCOMMODATION REQUEST

Dear Employer:

I am an employee with a disability as defined by state and federal law. In order to perform my job duties I need a reasonable accommodation. I have [*State your disability*]. My disability affects me in the following manner: [*Describe the limitations you experience and how the impairment substantially limits at least one major life activity. Major life activities include but are not limited to hearing, seeing, lifting, walking, standing, and learning.*]

The accommodation I need is: [*You should list here the accommodations you need and be as specific as possible. Remember that the accommodations must enable you to do the essential functions of your job, if they do not, then it is not a reasonable accommodation.*]

Please let me know in 10 days whether you will grant my accommodation request so that I may pursue other action as necessary; Or

I would like to meet with you to discuss an accommodation plan that includes the accommodations I have described above; Or

I am attaching medical documentation regarding my disability and my need for accommodations; Or

If you need any medical documentation regarding my disability and my need for accommodations please let me know.

Sincerely,

Employee

To: Jane Do, HR Director
From: John Do, Employee

Re: Request for Accommodation

Date: January 15, 2004

I was recently hired by Newberry Consulting as an Administrative Assistant. I am an employee with a disability as defined under state and federal law. In order to perform my job duties I need an accommodation. I have Lupus. Lupus is a chronic, autoimmune disease. Due to my disability I am sensitive to fluorescent light. This type of light causes me to have headaches and I can become dizzy and nauseas.

I would like the following accommodation: A computer glare guard for my computer and the removal or replacement of the fluorescent light above my desk with natural or full spectrum lighting. These types of accommodations have assisted me in the past.

I would like to meet with you to discuss an accommodation plan that includes the accommodations I have described above. The following is the website to JAN accommodation. This website will be helpful to fully understand my disability and the type of accommodations that are appropriate: <http://www.jan.wvu.edu> JAN also has a website specifically addressing accommodations for people with Lupus: <http://www.jan.wvu.edu/media/lupus.html>

I am attaching medical documentation regarding my disability and my need for accommodations.

2. B. SAMPLE DOCTOR'S LETTER SUPPORTING A NEED FOR AN ACCOMMODATION

Dear Employer:

[*Your name*] is my patient and has a mental disability that causes functional limitations. [*Your name*] has the following functional limitations: [*Your doctor should list your limitations here that apply to your ability to work.*] Example: Is unable to wake up early in the morning.

[*Your name*] may be accommodated for their disability in the following way: [*Your doctor should list the accommodations you need here.*] Example: By having a flexible work schedule.

Sincerely,

Your Doctor

3. EMPLOYMENT ANTI-DISCRIMINATION RESOURCES

ADA RESOURCES

Free consulting services: www.jan.wvu.edu

Equal Employment Opportunity Commission: www.eeoc.gov

Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), *available at* <http://www.eeoc.gov/policy/docs/accommodation.html>

“Job Applicants and the Americans with Disabilities Act”
www.eeoc.gov/facts/jobapplicant.html

ADA Home Page by the U.S. Department of Justice: www.ADA.gov

ADA Information Line: The U.S. Department of Justice provides information to businesses, state and local governments, or individuals about general or specific ADA requirements. ADA specialists are available Monday through Friday from 9:30 AM until 5:30 PM (Eastern Time) except on Thursday when the hours are 12:30 PM until 5:30 PM. Spanish language service is also available. For general ADA information, answers to specific technical questions, free ADA materials, or information about filing a complaint, call:

800-514-0301 (voice)
800-514-0383 (TTY)

CALIFORNIA RESOURCES

www.dfeh.ca.gov

RESOURCES FOR PEOPLE WITH PSYCHIATRIC DISABILITIES

www.bazelon.org

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H. CITATIONS

¹ Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

² See generally Ekstrand v. School District of Somerset, 603 F.Supp.2d 1196, 1204-05 *citing* Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994); Peacock v. County of Orange, 2009 WL 314564, at *2 n.4 (Oct. 6, 2009) (not reported).

³ 42 U.S.C. § 12112(a) (emphasis added).

⁴ 42 U.S.C. § 12111(5)(7); 29 C.F.R. § 1630.2 b-e.

⁵ 42 U.S.C. § 12111(2).

⁶ 42 U.S.C. § 12111(5).

⁷ 42 U.S.C. § 12111(5)(B).

⁸ 42 U.S.C. § 12113(d).

⁹ 42 U.S.C. § 12102(1)-(3).

¹⁰ 29 C.F.R. § 1630.2(h)(1).

¹¹ 29 C.F.R. § 1630.2(h)(2).

¹² 42 U.S.C. § 12102(2)(A).

¹³ 42 U.S.C. § 12102(2)(B).

¹⁴ 42 U.S.C. § 12102(4).

¹⁵ ADA Amendments Act of 2008, Public Law 110-325, § 2 ("Findings").

¹⁶ ADA Amendments Act of 2008, Public Law 110-325, § 2 ("Findings"); see also 29 C.F.R. § 1630.2(j) (1991) (no longer good law on this point and defining "substantially limits" to include "significantly restricted" analysis).

¹⁷ 42 U.S.C. § 12102(4)(C).

¹⁸ 42 U.S.C. § 12102(4)(D).

¹⁹ 42 U.S.C. § 12102(4)(E)(i).

²⁰ 42 U.S.C. § 12102(4)(E)(ii).

²¹ 29 C.F.R. § 1630.2(j)(2)(i)-(iii) (possibly subject to amendment after ADA-AA).

²² 29 C.F.R. § 1630.2(j)(1)(i) (possibly subject to amendment after ADA-AA).

²³ 42 U.S.C. § 12102(3)(A).

²⁴ *Id.* § 12102(3)(B).

²⁵ The definition of a disability does not include transvestitism, sexual behavior disorders, or current illegal drug use.

²⁶ 42 U.S.C. § 12111(8).

²⁷ 42 U.S.C. § 12111(8) (emphasis added).

²⁸ 29 C.F.R. § 1630.2(n).

²⁹ *Id.*

³⁰ 42 U.S.C. § 12112(8) (“For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”).

³¹ 29 C.F.R. § 1630.2(n)(2) &(3) (outlining reasons that a job function may be essential).

³² 29 C.F.R. § 1630.2(n)(3)(i).

³³ 42 U.S.C. § 12112(9).

³⁴ 42 U.S.C. § 12111(9).

³⁵ *Id.* § 12111(9)(B).

- ³⁶ 29 C.F.R. § 1630.2(o)(3).
- ³⁷ 42 U.S.C. § 12113(a).
- ³⁸ 42 U.S.C. § 12102(1)(A).
- ³⁹ 42 U.S.C. § 12102(4)(D).
- ⁴⁰ 29 C.F.R. § 1630.2(j)(2)(i).
- ⁴¹ *Id.* § 1630.2(j)(2)(ii).
- ⁴² 42 U.S.C. § 12102(3)(B).
- ⁴³ *Id.*
- ⁴⁴ 42 U.S.C. § 12101(a)(7)&(8).
- ⁴⁵ 42 U.S.C. § 12111(8).
- ⁴⁶ 42 U.S.C. § 12112(a).
- ⁴⁷ 42 U.S.C. § 12112(5) & 29 C.F.R. § 1630.15(b)(2).
- ⁴⁸ 42 U.S.C. § 12112(a)(b); 29 C.F.R. § 1630.4 a-i.
- ⁴⁹ 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).
- ⁵⁰ 42 U.S.C. § 12112(5)(A); 29 C.F.R. § 1630.9.
- ⁵¹ 42 U.S.C. § 12102.
- ⁵² 42 U.S.C. § 12112(4); 29 C.F.R. § 1630.8-9.
- ⁵³ 42 U.S.C. § 12112(4)(A); 29 C.F.R. § 1630.13.
- ⁵⁴ 42 U.S.C. § 12112(7)(B).
- ⁵⁵ 42 U.S.C. § 12112(5)(A).
- ⁵⁶ 42 U.S.C. § 12102(2).
- ⁵⁷ 42 U.S.C. § 12102(d)(3).

58. EEOC Guidelines.
59. 42 U.S.C. § 12111(9).
60. 42 U.S.C. § 12101.
61. 42 U.S.C. § 12111(8).
62. 239 F.3d 1128 (9th Cir. 2001).
63. 29 C.F.R. § 1630.2(O)(2)(ii).
64. 29 C.F.R. § 1630.15(d) and 29 C.F.R. § 1630.2(p).
65. 29 C.F.R. § 1630.2(o)(3).
66. See Appendix to 29 C.F.R. § 1630 *et seq.*
67. 29 C.F.R. § 1630.9(d).
68. 29 C.F.R. § 1630.2(p)(v).
69. 29 C.F.R. § 1630.2(o)(1).
70. See EEOC's Technical Assistance Manual § 3.10.6.
71. 29 C.F.R. § 1630.2(o)(2)(ii).
72. 29 C.F.R. § 1630.9(a).
73. See Appendix to 29 C.F.R. § 1630.2(o).
74. See Appendix to 29 C.F.R. § 1630.9 under (process of determining the appropriate reasonable accommodation).
75. 42 U.S.C. § 12111(10).
76. 42 U.S.C. § 12111(10)(A)-(B).
77. 42 U.S.C. § 12111(10)(B).
78. 29 C.F.R. § 1630.2(r).
79. EEOC (EEOC) Guidelines.

- ⁸⁰ 29 U.S.C. § 705.
- ⁸¹ Cal. Gov. Code §12926(d).
- ⁸² Cal. Gov. Code §§ 12926(d), 12926.2 (c)
- ⁸³ 42 U.S.C. § 12111(4).
- ⁸⁴ Cal. Gov. Code §12926(i)(1).
- ⁸⁵ Cal. Gov. Code §12926(i)(2).
- ⁸⁶ Cal. Gov. Code §12926(i)(3).
- ⁸⁷ Cal. Gov. Code §12926(i)(4).
- ⁸⁸ Cal. Gov. Code §12926(i)(5).
- ⁸⁹ Cal. Gov. Code §12926(k)(1).
- ⁹⁰ Cal. Gov. Code §12926(k)(2).
- ⁹¹ Cal. Gov. Code §12926(k)(3).
- ⁹² Cal. Gov. Code §12926(k)(4).
- ⁹³ Cal. Gov. Code §12926(k)(5).
- ⁹⁴ Cal. Gov. Code §12926(h).
- ⁹⁵ 42 U.S.C. § 12102(1).
- ⁹⁶ Cal. Gov. Code § 12926.1(c).
- ⁹⁷ The Family Medical Leave Act of 1993 (FMLA).
- ⁹⁸ 29 U.S.C. § 2615(a)(1).
- ⁹⁹ 29 U.S.C. § 2617(a)(1).
- ¹⁰⁰ Ragsdale et al v. Wolverine World Wide, Inc 122 S.Ct. 1155, (2002).
- ¹⁰¹ 29 U.S.C. § 203(x); 29 C.F.R. § 825.104(a).

^{102.} Nevada Dept. of Human Resources v. Hibbs 123 S.Ct. 1972, (2003). Where a federal agency is the defendant, see 29 C.F.R. § 825.109 for application of specific FMLA provisions.

^{103.} 42 U.S.C. § 12102(2); 29 C.F.R. § 1630(g).

^{104.} 42 U.S.C. § 12208; 42 U.S.C. § 12114(a).

^{105.} California Government Code § 12926.1(c).

^{106.} 42 U.S.C. § 12111(5)(7); 29 C.F.R. § 1630.2 b-e.

^{107.} 28 C.F.R. § 35.140.

^{108.} 42 U.S.C. § 12111(5)(A).

^{109.} 42 U.S.C. § 12111(5)(B).

^{110.} California Government Code § 12926(c) & (d).

¹¹¹ California Government Claims Program Information and Claim Form, <http://www.boc.ca.gov/docs/forms/claims/GCClaimForm.pdf>