TRAINING

Municipal Technical Advisory Service
INSTITUTE FOR PUBLIC SERVICE

County Technical Assistance Service
INSTITUTE FOR PUBLIC SERVICE

2018 ADA COMPLIANCE OFFICER TRAINING HANDOUT

June 5-7, 2018

MATERIALS CONTRIBUTION:

Frances Adams-O'Brien, MTAS Librarian
Kristy Brown, CTAS Attorney
Stephanie Brewer Cook, City of Knoxville ADA Coordinator
Gary Jaeckel, MTAS Management Consultant
Stephanie O'Hara, MTAS Attorney
Richard Stokes, MTAS HR Consultant

INSTRUCTORS:

Frances Adams-O'Brien, MTAS Librarian
Stephanie Brewer Cook, City of Knoxville ADA Coordinator
Gary Jaeckel, MTAS Management Consultant
Stephanie O'Hara, MTAS Attorney
Richard Stokes, MTAS HR Consultant

Contents

Background of the Americans with Disabilities Act ("ADA")

ADA was signed into law July 26, 1990 by President George H.W. Bush. The law prohibits discrimination on the basis of disability and protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas. ADA also requires newly designed and constructed or altered state and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.*

The ADA protections are divided into five titles:

- Title I: Employment. This title requires covered employers to provide reasonable accommodations for applicants and employees with disabilities and prohibits discrimination on the basis of disability in all aspects of employment.
- Title II: Public Services. Public services, including state and local agencies, are prohibited from denying services to qualified individuals with disabilities or participation in programs or activities that are available to people without disabilities. Public transit systems must also be accessible to individuals with disabilities.
- Title III: Public Accommodations. Public accommodations include facilities such as restaurants, hotels, grocery stores, retail stores, etc., as well as privately owned transportation systems. This title requires that all new construction and modifications must be accessible to individuals with disabilities. For existing facilities, barriers to services must be removed if readily achievable.
- Title IV: Telecommunications. Telecommunications companies offering telephone service to the general public must have telephone relay service to individuals who use telecommunication devices for the deaf (TTYs) or similar devices.
- Title V: Miscellaneous. This title provides miscellaneous provisions that are intended to apply broadly across all the other titles and includes a provision prohibiting retaliation of, intimidation of, coercion of, threats to, or interference with individuals with disabilities or those attempting to aid people with disabilities in asserting their rights under the ADA.

This training class covers pertinent portions of titles I and II. Title II includes the following subparts:

- Subpart A – General
- Subpart B – General Requirements
- Subpart C – Employment
- Subpart D – Program Accessibility
- Subpart E – Communications
- Subpart F – Compliance Procedures

Under the ADA, the Attorney General issues regulations implementing subpart A of title II and the Secretary of Transportation issues regulations implementing part B of title II. Title II

regulations are codified at 28 CFR part 35. The regulations were revised in 2010 and include revisions to the ADA Standards for Accessible Design.

Basics of the ADA

The ADA protects the rights of people who have a physical or mental impairment that substantially limits their ability to perform one or more major life activities. Title II of the ADA applies to all state and local governments and all departments, agencies, special purpose districts, and other instrumentalities of State or local government ("public entities"). It applies to all programs, services, or activities of public entities, from adoption services to zoning regulation.

Examples of prohibited actions are:

1. A city museum with an oriental carpet at the front entrance cannot make people who use wheelchairs use the back door out of concern for wear and tear on the carpet, if others are allowed to use the front entrance.
2. A public health clinic cannot require an individual with a mental illness to come for check-ups after all other patients have been seen, based on an assumption that this patient's behavior will be disturbing to other patients.
3. A county parks and recreation department cannot require people who are blind or have vision loss to be accompanied by a companion when hiking on a public trail.

Public entities can implement rules necessary for safe operation of a program, service or activity as long as the rules are based on an objective assessment of actual risk. Some examples:

1. A parks and recreation department may require all participants to pass a swim test in order to participate in an agency-sponsored white-water rafting expedition. This policy is legitimate because of the actual risk of harm to people who would not be able to swim to safety if the raft capsized.
2. A rescue squad cannot refuse to transport a person based on the fact that he or she has HIV. This is not legitimate, because transporting a person with HIV does not pose a risk to first responders who use universal precautions.
3. A Department of Motor Vehicles may require that all drivers over age 75 pass a road test to renew their driver's license. It is not acceptable to apply this rule only to drivers with disabilities.

ADA requires "reasonable" accommodations be made if necessary for persons with disabilities to have a fair and equal opportunity to participate in civic programs and activities. Examples of reasonable accommodations:

1. Service animals
2. Mobility devices such as wheelchairs
3. Auxiliary aids and services such as text telephones (TTYs) and Braille

Basic Requirements for Compliance

1. ADA Coordinator (28 C.F.R. pt. 35, § 35.107(a))
    a. Public entities that have 50 or more employees are required to have a grievance procedure and to designate at least one responsible employee to coordinate ADA compliance. The term "ADA Coordinator" is commonly used as a title for this employee.
    b. ADA Coordinator's role is to coordinate the government entity's efforts to comply with the ADA and investigate any complaints that the entity has violated the ADA. The Coordinator serves as the point of contact for individuals with disabilities to request auxiliary aids and services, policy modifications, and other accommodations or to file a complaint with the entity; for the general public to address ADA concerns; and often for other departments and employees of the public entity. The name, office address, and telephone number of the ADA Coordinator must be provided to all interested persons.
    c. According to the *ADA Best Practices Tool Kit for State and Local Governments*, the following qualifications would help an ADA Coordinator be effective:
        i. familiarity with the state or local government's structure, activities, and employees
        ii. knowledge of the ADA and other laws addressing the rights of people with disabilities, such as Section 504 of the Rehabilitation Act, 29 U.S.C. § 794
        iii. experience with people with a broad range of disabilities
        iv. knowledge of various alternative formats and alternative technologies that enable people with disabilities to communicate, participate, and perform tasks
        v. ability to work cooperatively with the local government and people with disabilities
        vi. familiarity with any local disability advocacy groups or other disability groups
        vii. skills and training in negotiation and mediation
        viii. organizational and analytical skills
2. Notice of the ADA's provisions (28 C.F.R § 35.106)
    a. ADA public notice requirement applies to all public entities, regardless of size.
    b. Three main considerations for the notice: (1) target audience; (2) information to be included; and (3) where and how notice is to be provided.
3. Grievance Procedures (28 C.F.R. § 35.107(b))
    a. Local governments with 50 or more employees are required to adopt and publish procedures for handling grievances related to Title II of the ADA.
    b. Procedures should include:
        i. a description of how and where a complaint under Title II may be filed with the government entity;

ii. if a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative;
iii. a description of the time frames and processes to be followed by the complainant and the government entity;
iv. information on how to appeal an adverse decision; and
v. a statement of how long complaint files will be retained.

c. Procedures must be available in alternative formats so they are accessible to all persons with disabilities.

4. Other Requirements
   a. All public entities, regardless of size, are required to evaluate all of their services, policies, and practices and to modify any that did not meet ADA requirements.
   b. Public entities with 50 or more employees were required to develop a transition plan detailing any structural changes that would be undertaken to achieve program access and specifying a time frame for their completion. The 2010 Standards encourage public entities to conduct new self-evaluations and develop new transition plans.

Access to Facilities

Any facility built or altered after January 26, 1992, must be "readily accessible to and usable by" persons with disabilities.

- Requirements differ for existing versus altered or new facilities.
- Structural changes are not required when other accommodations are feasible.
- Entities are not required to take any action that would result in undue financial and administrative burdens. Undue hardship is determined on a case-by-case basis.
- While public programs and services must generally be accessible, not all facilities must necessarily be accessible. For example, if a local government has several swimming pools and cannot afford to make all pools accessible, the government can choose to only make some pools accessible considering the location of the pools, the availability of public transportation, hours of operation and programs offered at each site. However, the general location of these accessibilities is also considered for reasonableness.
- A safe harbor exists for existing facilities with regards to compliance with the 2010 ADA Standards. Under the safe harbor, if a facility was in compliance with the 1991 Standards or Uniform Federal Accessibility Standards as of March 15, 2012, a public entity is not required to make changes to meet the 2010 Standards. There are some areas not subject to the safe harbor (because they were not addressed in the original standards). These include swimming pools, play areas, exercise machines and equipment, court sport facilities, and boating and fishing piers.
- When an entity alters a facility, the facility must comply with the 2010 ADA Standards. An alteration is defined as remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts or elements, changing or rearranging plan

configuration of walls and full-height or other fixed partitions, or making other changes that affect (or could affect) the usability of the facility. Newly constructed facilities must also meet the 2010 Standards.

- Some areas addressed by the 2010 Standards:
  - Parking—minimum number of accessible spaces
  - Accessible entrances
  - Accessible routes to programs and services
  - Shelves, counters and aisles

Government Programs and Services

Title II applies to state and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive Federal financial assistance

- This Title prohibits discrimination in the way local governments provide or offer **services**, programs, or activities, including public transportation, public education, employment, **recreation**, health care, social services, courts, voting, and town meetings.

Public entities are required to give primary consideration to the type of auxiliary aid or service requested by the person with the disability. They must honor that choice, unless they can demonstrate that another equally effective means of communication is available or that the aid or service requested would fundamentally alter the nature of the program, service, or activity or would result in undue financial and administrative burdens.

The ADA requires more than a plan to get everyone into our buildings, but we must also provide full access to our programming.

Project Civic Access, a wide-ranging effort to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life.

How do I know they are disabled? You cannot ask about medical issues but can ask if disabled, if they need an accommodation and what is needed.

Public entities may not ask individuals using such devices about their disability but may ask for a credible assurance that the device is required because of a disability. If the person presents a valid, State-issued disability parking placard or card or a state-issued proof of disability, that must be accepted as credible assurance on its face. If the person does not have this documentation, but states verbally that the device is being used because of a mobility disability that also must be accepted as credible assurance, unless the person is observed doing something that contradicts the assurance. For example, if a person is observed running and jumping, that may be evidence that contradicts the person's assertion of a mobility disability. However, the fact

that a person with a disability is able to walk for some distance does not necessarily contradict a verbal assurance -- many people with mobility disabilities can walk, but need their mobility device for longer distances or uneven terrain. This is particularly true for people who lack stamina, have poor balance, or use mobility devices because of respiratory, cardiac, or neurological disabilities.

We must train our employee population to understand this as well.

Here are few examples for courts, jails, recreation and solid waste.

- Parks and recreation department cannot require people who are blind or have vision loss to be accompanied by a companion when hiking on a public trail.
- Parks and recreation department may choose to provide a special swim program for people with arthritis. But it may not deny a person with arthritis the right to swim during pool hours for the general public.
- Rules that are necessary for safe operation of a program, service, or activity are allowed, but they must be based on a current, objective assessment of the actual risk, not on assumptions, stereotypes, or generalizations about people who have disabilities. For example:
- A parks and recreation department may require all participants to pass a swim test in order to participate in an agency-sponsored white-water rafting expedition. This policy is legitimate because of the actual risk of harm to people who would not be able to swim to safety if the raft capsized.
- Requiring people to show a driver's license as proof of identity in order to enter a secured government building would unfairly screen out people whose disability prevents them from getting a driver's license. Staff must accept a state-issued non-driver ID as an alternative.
- A rescue squad cannot refuse to transport a person based on the fact that he or she has HIV. This is not legitimate, because transporting a person with HIV does not pose a risk to first responders who use universal precautions.
- A public health clinic cannot require an individual with a mental illness to come for check-ups after all other patients have been seen, based on an assumption that this patient's behavior will be disturbing to other patients.
- Cannot require people with a mobility disability to put solid waste at the curb for pick-up.

Emergency Communications

The telecommunications relay service (TRS), reached by calling 7-1-1, is a free nationwide network that uses communications assistants (also called CAs or relay operators) to serve as intermediaries between people who have hearing or speech disabilities who use a text telephone (TTY) or text messaging and people who use standard voice telephones. The communications assistant tells the voice telephone user what the TTY-user is typing and types to the TTY-user what the telephone user is saying. When a person who speaks with difficulty is using a voice

telephone, the communications assistant listens and then verbalizes that person's words to the other party. This is called speech-to-speech transliteration.

Video relay service (VRS) is a free, subscriber-based service for people who use sign language and have videophones, smart phones, or computers with video communication capabilities. For outgoing calls, the subscriber contacts the VRS interpreter, who places the call and serves as an intermediary between the subscriber and a person who uses a voice telephone. For incoming calls, the call is automatically routed to the subscriber through the VRS interpreter.

Staff who answer the telephone must accept and treat relay calls just like other calls. The communications assistant or interpreter will explain how the system works.

The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and case law under section 504 of the Rehabilitation Act and are to be determined on a case-by-case basis.

Access to Open Records and Open Meetings

1. ADA Title II requires local governments to provide effective communication with disabled persons. Persons with disabilities must be able to receive information from local governments and convey information to local governments.
2. Local governments must provide auxiliary aids and services (examples include providing a reader, large print or an interpreter) to enable effective communication.
3. Local governments may require reasonable advance notice of the need for aids or services.
4. Local governments are permitted to utilize an alternative aid or service (one different from the aid or service requested by the disabled person) if the entity can demonstrate that the alternative is equally effective or that the requested aid or service would result in a fundamental alteration of the goods or services provided to the public or in an undue financial and administrative burden. "Undue burden" is defined as a significant difficulty or expense. This determination should be made by a high level official—no lower than a department head and the determination must be in writing and state the reasons for the decision.
5. According to the Open Records Counsel, they have not issued any opinions on ADA issues.

Employment Issues

As outlined above, the ADA has five titles, but only Titles I and II apply to local governments. Title I prohibits employment discrimination and includes local governments in the definition of "employer."

> Title I of the Americans with Disabilities Act of 1990 prohibits private employers, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including State and local governments. It also applies to employment agencies and to labor organizations.

Title I prohibits employers from discriminating against a "qualified individual with a disability." It covers job applications, hiring, advancement, discharge, compensation, training, and any other employment term, condition, or privilege. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship. Religious entities with 15 or more employees are covered under title I. [56 Fed. Reg. 35736]

Title I complaints must be filed with the U. S. Equal Employment Opportunity Commission (EEOC) within 180 days of the date of discrimination, or 300 days if the charge is filed with a designated State or local fair employment practice agency. Individuals may file a lawsuit in Federal court only after they receive a "right-to-sue" letter from the EEOC.

Charges of employment discrimination on the basis of disability may be filed at any U.S. Equal Employment Opportunity Commission field office. Field offices are located in 50 cities throughout the U.S. and are listed in most telephone directories under "U.S. Government." For the appropriate EEOC field office in your geographic area, contact:

> (800) 669-4000 (voice)
> (800) 669-6820 (TTY)
>
> www.eeoc.gov

While the employment provisions of the ADA apply to employers of fifteen employees or more, the Title II provisions apply to all sizes of local entities, regardless of number of employees. State and local governments, therefore, must comply with some ADA requirements regardless of size.

Title II prohibits discrimination in the way local governments provide or offer services, programs, or activities, including public transportation and facilities. It requires that employers give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, **employment**, transportation, recreation, health care, social services, courts, voting, and town meetings). Individuals with disabilities must be able to access employment services of the organization.

State and local governments are required to follow specific architectural standards in the new construction and alteration of their buildings. They also must relocate programs or otherwise provide access in inaccessible older buildings, and **communicate effectively with people who have hearing, vision, or speech disabilities**. Public entities are not required to take actions, however, that would result in undue financial and administrative burdens. They are required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

Complaints of Title II violations may be filed with the Department of Justice within 180 days of the date of discrimination. In certain situations, cases may be referred to a mediation program sponsored by the Department. The Department may bring a lawsuit where it has investigated a matter and has been unable to resolve violations. For more information, contact:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Disability Rights Section - NYAV
Washington, D.C. 20530

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

www.ada.gov

Title II may also be enforced through private lawsuits in Federal court. It is not necessary to file a complaint with the Department of Justice (DOJ) or any other Federal agency, or to receive a "right-to-sue" letter, before going to court.

What does Title I of the ADA Require?

- Employers may not discriminate with regard to employment terms, conditions, or privileges.
- Employers can't segregate qualified disabled employees into separate work areas or separate lines of advancement (56 Fed. Reg. 35746).
- Any qualification standard, employment test, or other criteria that screens out or tends to screen out a disabled person (or a class of such persons) on the basis of disability is prohibited-unless shown to be job related and consistent with business necessity. An employer may require, as a qualification standard, that persons not pose a direct threat to their health and safety or that of others (56 Fed. Reg. 35737).
- Employers may not discriminate against a qualified individual because the person has a family, business, social, or other relationship with a disabled person, but they don't have to accommodate these nondisabled persons (56 Fed. Reg. 35737).
- Employers must make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless it would impose an undue hardship on government operations (56 Fed. Reg. 35737).

- Employers can't deny employment opportunities to the otherwise qualified because you would have to make reasonable accommodation for an individual's physical or mental impairments (56 Fed. Reg. 5737; 35749).
- Discrimination is prohibited against a person who opposes a practice made unlawful by the ADA or because a person makes a charge, testifies, assists, or participates in an investigation, proceeding, or hearing to enforce the ADA (56 Fed. Reg. 35737).
- Employers can't coerce, intimidate, threaten, harass, or interfere with someone exercising the rights granted and protected by the ADA, nor someone aiding/ encouraging exercise of the rights [56 Fed. Reg. 35737].
- Employers can't conduct a medical examination of applicants or employees, nor make inquiries as to whether they are disabled or the nature or severity of a disability [56 Fed. Reg. 35737].

Who is Protected Under Title I?

- Qualified persons with a disability.
- Persons who have a known association with a disabled person.
- Persons who aid or encourage others to exercise any right granted or protected under the ADA.
- Individuals regarded as disabled.

Who is Disabled?

The regulations define a person as disabled if the individual meets any one of three tests: a physical or mental impairment substantially limiting one or more of the "major life activities," a record of such an impairment, or being regarded as having such an impairment (56 Fed. Reg. 35735). A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems listed in 56 Fed. Reg. 35735.

Impairments do not include physical, psychological, environmental, cultural, or economic characteristics. Age itself is not an impairment, but conditions commonly associated with age, such as hearing loss or arthritis, are impairments (56 Fed. Reg. 35741). The existence of an impairment is determined without regard for mitigating measures such as medicines, or assistive or prosthetic devices [56 Fed. Reg. 35740].

"Substantially limits" means unable to perform -or significantly restricted (in condition, manner, or duration) in performing - a major life activity that the average person can perform. Impairments may be substantially limiting for some, but not for others. It depends on, for example, the stage of a disease or the presence of other impairments. Here are some factors to consider:

- the nature and severity of the impairment;
- the duration or expected duration of the impairment; and

- the permanent or long-term impact (or the expected impact) of the impairment.

Decisions on whether a person is substantially limited in a major life activity must be made on a case-by-case basis.

"Major life activities" are activities the average person can perform with little or no difficulty. These include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Multiple impairments that combine to substantially limit one or more of a person's major life activities also constitute a disability (56 Fed. Reg. 35742).

A person is substantially limited in the major life activity of working if the person is significantly restricted in the ability to perform a class of work- or a broad range of jobs in various classes - when compared to an average person with comparable training and skills. The inability to perform one particular job or narrow range of jobs doesn't constitute a substantial limitation in the major life activity of working.

"Record of impairment" covers individuals such as recovering alcoholics or rehabilitated drug users -people with a history of disability and includes people misclassified as having a mental or physical impairment. The record establishing the disability may be an educational, medical, or employment record. However, a record identifying a person as disabled for some other purpose (identifying someone as a disabled veteran, for example) may not necessarily establish that person as disabled under the ADA [56 Fed. Reg. 35742].

Determining whether an individual is regarded by an employer as having an impairment that substantially limits a major life activity can be discerning because this issues addresses discrimination by an employer because of myths, fears, or stereotypes caused by the impact of the employee's medical condition on productivity, safety, insurance, liability, attendance, acceptance by coworkers or the public, or cost of accommodation or workers compensation.

There are three ways a person may be regarded as having a disability. The person may:

1. have an impairment not substantially limiting but perceived by the employer as substantially limiting.
2. have an impairment that is only substantially limiting because of the attitudes of others toward the impairment.
3. have no impairment at all, but is regarded by the employer as having a substantially limiting impairment.

Who is a Qualified Individual With A Disability?

A "qualified individual with a disability" is a person who:

1. satisfies the skill, experience, education, and other job-related requirements, and
2. with or without a reasonable accommodation, can perform the essential functions of the positon [56 Fed. Reg. 35743].

This analysis should be made when hiring a disabled person and based on the person's capabilities at that time. You can't speculate that the employee may become unable to do the job in the future or that employing the person may increase health insurance premiums or workers compensation costs (56 Fed. Reg. 35743].

Can Applications and Test Be Used?

Employers can generally ask about an applicant's or employee's ability to perform a job, but can't ask if someone has a disability or subject a person to tests that tend to screen out the disabled. Applications should be narrowly tailored to address only job-related needs consistent with business necessity. Any test or question must be an accurate reflection of the skills or qualifications needed for the job; even then, it's subject to challenge if a qualified applicant or employee could meet the job performance standards with a reasonable accommodation.

Job criteria that-even unintentionally-screen out or tend to screen out disabled persons (or a class of disabled persons) because of their disabilities may not be used unless the employer demonstrates the criteria are job-related and consistent with business necessity. Selection criteria such as vision, hearing, walking, and lifting requirements; safety requirements; and employment tests, even if job-related, can't be used to exclude a disabled person if that person could satisfy the criteria with a reasonable accommodation. To show a safety requirement is job-related, the requirement must satisfy the "direct threat" standard.

An employer cannot ask about an individual's workers compensation history or the extent of leave necessary to accommodate a disability, although the employer may state the attendance requirements of the position and ask whether the employee can meet them [56 Fed. Reg. 35732; 35737).

An employer must ensure that the interview or test site and the application process are accessible. Disabled persons can't be excluded from jobs merely because a disability prevents them from taking a test, or negatively influences the results of a test. Employment tests must be administered to eligible applicants or employees with sensory, manual, and speaking disabilities in a way that doesn't require the use of the impaired skill.

Employment tests that require the use of sensory, manual, or speaking skills, where the tests are intended to measure those skills, are permissible (if the skill is an essential function of the job). A disabled person may not realize prior to the administration of a test that an accommodation will be needed to take the test. In such a situation, upon becoming aware of the need for an accommodation, the person must inform the employer.

The employer may ask, on a test announcement or application form, that disabled persons who need reasonable accommodation to take a test tell the employer within a reasonable time before the test. The employer may also ask that documentation of the need for an accommodation accompany the request [56 Fed. Reg. 35750).

An employer isn't required to offer every applicant a choice of test format. When it's not possible to test in an accessible format, the employer may be required, as a reasonable accommodation, to evaluate the skill of the person in another manner.

Can Physical Agility Testing Be Used?

Physical agility tests aren't medical examinations and may be given to applicants and employees. Such tests must be given to all similarly situated applicants or employees regardless of disabilities. If the test would screen out or tend to screen out disabled persons, the employer must show that the test is job-related and consistent with business necessity and that performance can't be achieved with a reasonable accommodation [56 Fed. Reg. 35750). Because they may tend to screen out the disabled, policies requiring agility tests should be closely examined to ensure they're job-related and not really a medical exam.

How Are Medical Exams and Questions Affected By The ADA?

Medical exams and inquiries must serve a legitimate business purpose. Medical information is required to be kept confidential, except that:

- supervisors may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- government officials investigating compliance with the ADA shall be provided with relevant information upon request.

Medical information may not be used for any purpose inconsistent with the ADA.

Pre-employment (Job applicants)

- Employers may ask narrowly tailored pre-employment medical questions about the applicant's ability to perform job-related functions.
- Employers can collect voluntary data necessary to satisfy affirmative action requirements of the Rehabilitation Act.
- Employers can't inquire as to whether an applicant has a disability.
- Employers can't inquire about an applicant's workers compensation history.

Post-offer (pre-employment)

Employers may condition an offer of employment on the result of a medical exam required post-offer and before the applicant begins employment duties if all entering employees in the same job category are subjected to such an examination. Medical examinations not uniformly given or which tend to screen out the disabled must be job-related and consistent with business necessity. All decisions based on medical exams, whether business related or not, are subject to the reasonable accommodation requirement. That is, even if the applicant's medical exam reveals a disability, the employer may not refuse to hire if the disability can be reasonably accommodated.

Employees

- Employers may require a medical exam or ask questions when needed for an accommodation process.
- Employers may require a medical exam (fitness for duty) or other medical monitoring if job-related and consistent with business necessity. As an example, federal and state laws or a licensing process could require periodic exams for bus drivers or police officers [56 Fed. Reg. 37751].
- Employers may conduct voluntary medical examinations and activities, including voluntary medical histories that are part of an employee health program available to employees at the work site.

Can Different Benefits Be Offered?

The ADA requires an employer to provide equal access to whatever insurance is provided the non-disabled employees. A local government can't refuse to hire a disabled individual because insurance rates or workers compensation claims will rise. However, employers can offer policies with pre-existing condition clauses, or policies that limit coverage for certain procedures to a specific number per year, even if these policy provisions have a disparate impact on the disabled. No regulations have been issued yet on whether policies with a lifetime limit on amount of benefits for certain conditions, such as AIDS, will be allowed.

The ADA doesn't limit insurance plans based on underwriting risks or classifying risks. Thus, the employer may treat a disabled employee differently under an insurance or benefit plan because the disabled represent an increased hazard of death or illness. Even-handed application of actuarial principles in providing benefits is allowable (56 Fed. Reg. 35753].

What is a Reasonable Accommodation?

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables a person with a disability to enjoy equal employment opportunities. It is a means to remove equal employment barriers [56 Fed. Reg. 35747]. Employers are only required to make accommodation to the physical and mental limitations they know about. It's the responsibility of the disabled employee to inform the employer of needed accommodation [56Fed. Reg. 35748]. A fundamental alteration in the nature of a job or the elimination of an essential job function isn't a reasonable accommodation.

A disabled employee cannot be forced to accept an accommodation. If the employee, however, refuses the accommodation and, as a result, is unable to perform an essential function, the employee is no longer a qualified person with a disability [56 Fed. Reg. 35749].

There are three categories of reasonable accommodation. They are:

- accommodations required to ensure equal opportunity in the application process;
- accommodations that enable employees with disabilities to perform the essential functions of the position; and