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SUBJECT: Policy on American Disabilities Act		
Ted Stewart, Executive Director		

I. PURPOSE

To remove the barriers preventing qualified individuals with disabilities from enjoying the same employment opportunities available to persons without disabilities. The act does not establish quotas or require preferential treatment of individuals with disabilities over those without them.

The ADA's employment provisions extend to disabled employees of state and local governments as well as private employers. The Rehabilitation Act of 1973 prohibited these entities from denying employment opportunities to disabled individuals or in other ways affecting the terms, conditions or privileges of their employment because of the individuals handicap.

II. POLICY

A. The act contains five separate titles:

Title I prohibits discrimination on the basis of disability by covered entities in all employment practices, including job application procedures, hiring, firing, promotions compensation, training and other terms, conditions and privileges of employment.

Title II does two things:

1. It applies the disability discrimination prohibitions found in Section 504 of the Rehabilitations Act of 1973, to all programs, activities and services provided or made available by state and local governments.
2. It clarifies the requirements of Section 504 for public transportation entities.

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Title III extends Section 504's general disability discrimination prohibitions to privately operated public accommodations. This title is generally concerned with the physical accessibility of facilities for individuals with disabilities.

Title IV deals with furthering the accessibility of telecommunications for individuals with disabilities, particularly those with hearing and speech impairments.

Title V contains a number of miscellaneous provisions, including some which apply to regulations of the Architectural and Transportation Barriers Compliance Board.

- B. Each title of the ADA establishes its own effective date. For private employers with 25 or more employees, the employment title (Title I) officially goes into effect on July 26, 1992. It becomes effective on July 26, 1994, for private employers with 15 or more employees.

The title which impacts state and local government employers directly is Title II. The Department of Justice has determined that this title, which prohibits employment discrimination against the disabled by public sector entities, will go into effect on January 26, 1992.

The regulations controlling Title II also became effective on January 26, 1992.

The regulations controlling Title IV have already come into effect as of September 30, 1991.

As far as Title V is concerned, the Federal Architectural and Transportation Barriers Compliance Board has already issued guidelines establishing accessibility standards for new construction and alterations in places of public accommodation and commercial facilities for disabled individuals.

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- C. The fundamental requirement of the ADA's employment title is that covered entities (which will include practically all employers by 1994, but specifically state and local governments starting January 26, 1992) may not discriminate against qualified individuals with disabilities because of their disabilities, in regard to various employment practices.

In order to comply with the act, we must first understand who "qualified individuals" are.

"Qualified individuals - the ADA defines this term to mean any individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that the individual holds or desires."

The reasonable accommodation requirement applies to all employment decisions including the job application process and to all services and programs provided in connection with employment.

Thus, the ADA prohibits employers from failing to provide reasonable accommodation for the known physical or mental impairments of an otherwise qualified individual. It also prohibits denying employment to an applicant or employee on the basis of the need to provide reasonable accommodation to the individuals' physical or mental impairment, unless the employer can demonstrate that the accommodation would impose an undue hardship. However, because of the resources available to the state, and because the state is looked upon as a single employer, legal experts warn that it will be very difficult for a department to show providing reasonable accommodation to someone would pose an undue hardship.

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When a disabled employee requests that he/she be reasonably accommodated, such accommodation can be provided in the form of job restructuring, part-time or modified work schedules, reassignment, purchase or modification of equipment or devices, appropriate adjustment of examinations and training materials or policies, and the providing of qualified readers or interpreters. Please keep in mind, however, that the act does not require reasonable accommodation if it is not requested by the applicant or employee and the limitation is not known.

As far as applicants are concerned, reasonable accommodation will not be considered until it is determined by the Human Resource office that the applicant meets the minimum qualifications for the position.

Example: Reasonable accommodation is not required for a disabled applicant who applies for a senior engineer position until it is shown that the applicant has a Professional Engineering license.

Example: Reasonable accommodation is not required for a disabled applicant who applies for a secretary 15 position if his/her typing score from Job Service is less than 60 WPM (below the minimum qualifications standard set by the class specification).

The initial determination of minimum qualifications is made without regard to the disability of the applicant (if known). A disabled applicant cannot be disqualified because the disability prevents him/her from performing even the most essential job functions, if the disability can be reasonably accommodated (without imposing an undue hardship).

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However, if the applicant cannot perform an essential function of the job because of his/her disability, and the department can show there is no way to reasonably accommodate the individual's disability in the performance of that function, the individual can be rejected from further consideration.

Keep in mind that all marginal job functions must be reasonably accommodated. It is critical, therefore, that division management know what the essential functions of each position are.

In determining the essential functions of the job, ask the question, "If the function were removed, would it fundamentally alter the position?" Also ask, "What are the consequences of failing to require the employee to perform the function?"

One legal opinion cites the following example where an employer illegally rejected a disabled employee because the essential functions of the position were not understood, and reasonable accommodation was not provided when it should have been:

A person with epilepsy applies for a job of group counselor at a juvenile hall. After receiving a job offer, the offer is withdrawn when the employer learns that the applicant does not have a drivers license. While driving is required for emergencies, it is not essential that all group counselors be available to drive. On any given shift, another counselor could perform the driving duty.

If the disabled applicant meets the minimum qualifications for the position and requests reasonable accommodation, he/she must provide it throughout the

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selection process. This would include providing such accommodation as an interpreter at the interview for a hearing impaired applicant, or a verbal test in place of a written one for a visually impaired applicant. Furthermore, all facilities where tests or interviews are given must be accessible to disabled individuals.

In short, a disabled individual must meet a three prong test in order to satisfy the qualified provision of the act:

1. The applicant must meet the minimum requirements of the position as indicated in the position's approved class specification.
2. The applicant must meet the definition of disabled as defined in the act (discussed below).
3. The applicant must be able to perform the essential functions of the position with or without reasonable accommodation.

D. Disability defined. The act defines a disability as:

1. a physical or mental impairment that substantially limits one or more of the major life activities;
2. a record of such an impairment;
3. being regarded as having such an impairment.

There are three ways then that a person can meet the definition. The first prong of the definition makes clear that the ADA protects persons who have substantial, as distinct from minor, impairments and those impairments must limit major life activities.

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Major life activities are defined as those activities which the average person in the general population can perform with little or no difficulty. This would include such activities as seeing, hearing, speaking, walking, breathing, performing manual task, learning, caring for oneself and working (this is not an exhaustive list). Again, the mere existence of an impairment does not by itself establish a disability. The disability must also substantially limit a major life activity.

Thus, an individual with AIDS, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, paralysis, a substantial visual or hearing impairment, mental retardation, a learning disability, able to walk for only brief periods, as well as other impairments, would be covered under the act.

Individuals with minor, non-chronic conditions of short duration, such as a sprain, pregnancy, infection or broken limb, generally would not be covered. Individuals currently engaged in the use of illegal drugs or illegal use of prescription drugs are also not covered under the definition of disabled.

Recovering alcoholics or recovering drug addicts who have been through a rehabilitation program, however, are covered under the act and are entitled to the same protections afforded to all other individuals with disabilities.

Part two of the definition (a record of having a disability) would cover, for instance, a person with a history of cancer or a person with a history of mental illness. Under the ADA, an individual is considered to have a record of an impairment if he/she has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more

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major life activities. The purpose of this provision is to ensure that people are not discriminated against either because they had a prior disability or have been misclassified as disabled.

Part three of the definition protects persons who are regarded as being disabled even though they may not be. This protects certain individuals from others who have unsubstantiated fears or discriminatory attitudes. For instance, it would be illegal for an employer, without being requested to do so, to transfer or reassign an employee to less strenuous tasks because that employee was being treated for high blood pressure and the employer was fearful the employee would suffer a heart attack.

Another example is an employee who has a prominent facial scar or disfigurement or some other condition such as a periodic involuntary jerk of the head which does not limit his major life activities, but the employer discriminates against him because of anticipating negative reactions by customers.

Rumors, myths about a disease (AIDS) and stereotypical attitudes about the disabled must not be used in employment decisions.

The act does not cover in its definition of disability, homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, obesity, kleptomania, pyromania or abuse of illegal drugs.

E. Pre-employment inquires.

1. Interviews - interview questions to disabled applicants must be job related and carefully worded. A supervisor may not make pre-employment inquiries of a job applicant as to whether such

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applicant is an individual with a disability or as to the nature or severity of the disability. However, a supervisor may make pre-employment inquiries of the ability of an applicant to perform job related functions.

For instance, a supervisor cannot ask, "Do you have a disability which would prevent you from being a park ranger?" The correct way to ask this question is, "Are you physically able to perform the essential duties of a park ranger with or without reasonable accommodation?"

A supervisor may ask whether an applicant has a drivers license if driving is an essential function of the job. The supervisor may not ask if the applicant has a visual disability that would prevent him/her from driving. Interview questions must not contain any reference to disability.

A supervisor may ask an applicant to describe or demonstrate the essential job functions and inquire whether or not the applicant can perform those functions with or without reasonable accommodation.

For example, an employer may explain that an essential function of the job requires assembling small parts and can ask if the individual will be able to perform that function, with or without reasonable accommodation. The supervisor may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform essential job-related functions. However, the supervisor must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the

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accommodation, he/she will perform the function. Such demonstrations should be required of all applicants, not just those you suspect are somehow disabled.

If the job function is not essential, the supervisor may not exclude the applicant with the disability solely because of the applicant's inability to perform that function. If it is an essential function, supervisors must be sure they cannot provide reasonable accommodation before eliminating a disabled applicant for further consideration.

All interview questions or pre-employment inquiries must be job-related and made with the essential functions of the position in mind.

Department managers must understand and identify what the essential functions of the position are before sending a recruitment request to the Human Resource office. These duties should be listed as such in the announcement.

2. Medical examinations - the ADA's prohibition against discrimination in employment also includes medical examinations. It is illegal for a division to conduct pre-employment medical examinations. This is to eliminate the possibility of not hiring a disabled person solely as a result of his/her disability. This prohibition does not include drug or alcohol testing.

The act does allow a department to require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of employment. The department may

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condition an offer of employment on the results of such an examination. However, it must be required of all applicants or employees regardless of disability. For example:

A supervisor makes a conditional offer of employment to an applicant based on his ability to work every day for the next three months (assuming such attendance was essential and could not otherwise be reasonably accommodated). An entrance medical examination reveals that the applicant has a disabling impairment that will require treatment during a portion of the three month period. Under those circumstances, the employer may withdraw the employment offer consistent with the requirements of the ADA.

3. Testing - as with all protected classes or groups, any pre-employment test or procedure (such as physical agility tests) which disparately impacts that group (such as those with disabilities) must be justified and based on business necessity.
4. Direct threat - a position may require, as a qualification standard that the incumbent not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities.

If an individual poses a direct threat as a result of his/her disability, the employer must determine whether reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would do

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either of these, the division may refuse to hire an applicant or discharge an employee who poses a direct threat.

Determining whether an individual poses a significant risk or substantial harm to others, and whether or not he/she can be reasonably accommodated, must be made on a case-by-case basis.

F. Remedies/relief.

The act gives any employee or applicant the same powers, remedies and procedures available to them under Title VII of the Civil Rights Act of 1964. These procedures range from Equal Employment Opportunity Commission investigations to civil actions.

Furthermore, the Civil Rights Act of 1991 allows the complaining party to recover punitive and compensatory damages for violations of the ADA and Title VII. Previous to the Civil Rights Act of 1991, a complaining party was generally only able to receive back that which they would have received but for the discrimination (back pay, interest, etc.).

The Civil Rights Act of 1991 also allows the complaining party the right to a trial by jury. This was not allowed under the 1964 act.

G. Summation.

On January 26, 1992, Title II of the ADA was implemented for state and local governments. Disabled individuals refer to the act as the Emancipation Proclamation of the 1990s. The act will require the department to institute sweeping changes in the way disabled employees and applicants are treated.

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The following are some of the most important points to remember about the act:

1. The ADA prohibits discrimination against a qualified individual with a disability in all aspects of the employment relationship.
2. A qualified individual with a disability means an otherwise qualified individual who can perform the essential functions of the position in question, with or without reasonable accommodation.
3. Disability is defined as a physical or mental impairment which substantially limits one or more major life activities.

To receive protection under the act, then, a person must be qualified for the position, meet the definition of disabled and be able to perform the essential, functions of the job with or without reasonable accommodation.

Although the act will not be totally new to us because we have been in compliance with the rehabilitation act, the new Civil Rights Act of 1991 greatly increases the liability of non-federal employers who violate either Title VII or the ADA. This increased liability includes both punitive and compensatory damages as well as the complainant's right to a trial by jury.

The Department has a legal obligation to openly accept the ADA. The Human Resource office will oversee department compliance.