

## **AMERICANS WITH DISABILITIES ACT**

**PURPOSE:** To inform County Departments and to comply with the requirements of the Americans with Disabilities Act (ADA).

**SCOPE:** This policy applies to all County Offices and Employees

**POLICY STATEMENT:** The Americans with Disabilities Act (ADA) requires businesses to take specific steps to ensure that individuals with disabilities do not experience discrimination in the employment process. In addition, the ADA provides that an individual with a covered disability shall not be denied access to public programs, activities or services.

The focus of this EPP will be the requirements under Title I, the employment section, of the ADA. All state and local government agencies are covered whether or not they receive federal funds. Employers with 25 or more employees will be covered by the ADA effective July 26, 1992. The Equal Employment Opportunity Commission has been granted enforcement authority for the employment provisions of the Americans with Disabilities Act.

All supervisors of Clackamas County should become familiar with the provisions of the ADA and are expected to adhere to it when making employment decisions.

### **I. DEFINITION**

Disability under the ADA is defined as:

- A. A physical or mental impairment that substantially limits a major life activity. Major life activities include, but are not limited to:
  - 1. In general: caring for oneself, performing manual tasks, seeing hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.
  - 2. Major bodily functions: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- B. A record of impairment; or
- C. Being regarded as having such an impairment

Under this definition, a physical or mental impairment is not a disability unless its severity is to the extent that it substantially limits one or more major life activities. Also included in the definition is anyone who has a record of or has been misclassified as having a mental or physical impairment which substantially limits one or more major life

activities. The final inclusion under the term disability is anyone who is regarded as having a covered impairment. This means that the impairment itself may not substantially affect a major life activity; however, if others view the impairment as substantially affecting a major life activity, then the person with the impairment is covered. The ADA also specifically excludes an individual who currently uses illegal drugs from coverage. However, someone who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated and no longer uses illegal drugs may be covered under the Act.

The definition of disability will be interpreted broadly. Mitigating measures other than ordinary eyeglasses or contact lenses shall not be considered when assessing whether an individual has a disability. In addition, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

## **II. OBLIGATIONS UNDER THE ACT**

### **A. Prohibition of Employment Discrimination**

Discrimination based on a person's disability with respect to any term, condition, or privilege of employment including hiring is prohibited under the Act. Included under this would be the following:

1. Classifying applicants or employees with disabilities in any way that adversely affects their opportunities or status.
2. Participating in any arrangement with another organization that has the effect of discriminating against applicants or employees with disabilities. This would include entering into service contracts or collective bargaining agreements when such contracts include arrangements which discriminate against a particular group of applicants or employees.
3. Using standards or methods that have the effect of discriminating or perpetuating discrimination.
4. Denying equal jobs or benefits because of a relationship or association with a person with a disability. This would include the situation of not hiring a person who has a sick dependent that would tap benefit resources or refusing to hire someone who is known to do volunteer work with someone who has a disability such as a person who has AIDS, epilepsy, etc.
5. Refusing to make reasonable accommodation unless the accommodation would impose undue hardship. Also denying employment opportunities to an otherwise qualified individual with a disability to avoid making a reasonable accommodation would be prohibited.
6. Using standards or tests that tend to screen out individuals with disabilities unless the tests are job related and consistent with business necessity.
7. Failing to select and administer tests in the most effective manner to ensure that the results accurately reflect skills, aptitude, etc. An example of this would be a

situation where the standard recruitment procedure for a position includes a written test. If, due to a disability, as defined under the Act, someone could not read the instructions and questions, then the test should be read to them.

8. Denying health insurance benefits to a person covered under the Act.

#### B. Reasonable Accommodation

As an employer, we have an obligation to make reasonable accommodations. An employer cannot base an employment decision on an individual's need for reasonable accommodation. Reasonable accommodation includes making physical modifications to the facilities and providing equipment to assist in the performance of job duties. Also non-physical accommodations such as job restructuring, modifying work schedules, and reassignment to vacant positions would be included in types of accommodations. If an applicant or employee discloses a disability and requests accommodation, a dialogue should take place with the applicant or employee to determine what would be an appropriate and reasonable accommodation. An individual who is regarded as having a covered impairment is not entitled to reasonable accommodation. An individual needs to have a disability as defined under the ADA before being considered for reasonable accommodation.

In determining what is reasonable, the standard "undue hardship" is used. Undue hardship refers to an action that is unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature of the program. When considering cost of an accommodation, the employer cannot consider a cost that is borne by another agency or organization. In some instances a person with a disability may already have equipment which could be used at the work site or may have access to grants from another agency to purchase such equipment. Also, if two options for accommodation are available, it is the employer's right to choose the least expensive option. However, advancement of the person on the job and future needs as the person develops in the position should be taken into consideration when determining what is an appropriate and reasonable accommodation. The accommodations made should not limit an employee's opportunities for advancement. (For further information on providing a reasonable accommodation refer to Attachment.)

#### C. Employment Related Physical and Psychological Examinations

Under the Americans with Disabilities Act, any pre-offer physical or psychological examination is prohibited.

A job offer can be made on the condition that the applicant pass a physical and/or psychological examination if all entering employees in the same job category are subject to such an examination and/or inquiry regardless of disability. The job offer must first be made and it is essential to clearly state that the offer is contingent on the results of the exam. Under any circumstance, an examination must meet the test of job relatedness and be consistent with business necessity. This would also be the criteria for any post-employment exams. In order to utilize employment related physical and psychological exams as an employment criteria, an assessment of the position must first be made by an approved agency. (See EPP #24 for further information on employment related physical/psychological exams.) Physical agility

tests which may be used in screening for law enforcement positions are not considered physical exams. Any physical/psychological exam beyond this must meet the above criteria.

Medical inquiries must be made on separate forms from other application materials. Medical information must also be kept confidential and separate from other employee files. It will be critical that results of physical/psychological exams and drug testing be accessible only to individuals on a need-to-know basis. Results of employment related physical and psychological examinations must be forwarded to the Risk & Benefits Division where they will be maintained separate from the employee's personnel file and secured with restricted access. Departments may not retain copies of any employee medical information under any circumstances. (See EPP #42 – Employment Records.)

#### D. Pre-Employment Inquiries/Determination of Essential Job Functions

An employer may inquire as to an applicant's ability to perform essential job related functions. Further, an employer may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform essential job related functions.

Determining essential job functions requires an analysis of the position to determine what functions are essential as a matter of business necessity. Determining essential functions of a position should be completed before a recruitment is opened for a position. Those fundamental or essential job functions should then be documented on various instruments including position classification questionnaires, classification specifications, recruitment matrixes, and job announcements. A job function may be considered essential for any of several reasons. The primary reasons are as follows: 1) the reason the position exists is to perform that function; 2) there is a limited number of employees available among whom the performance of that job function can be distributed; and/or 3) the function is highly specialized so that the incumbent in the position is hired to perform that particular function. Some ways to substantiate this are through the amount of time spent performing the function and the consequences of not requiring a person in the job to perform that function.

For example, if lifting 50 pounds is an essential function of a position, it would be appropriate to ask an applicant, "Can you lift 50 pounds ten times an hour?" However, it would be inappropriate to inquire, "Do you have any disabilities which would prohibit you from lifting 50 pounds at a time?" The first manner of inquiry does not solicit information as to why the person may not be able to perform the function, merely if they are able to perform an essential function of the position. Note that if the inquiry is being made about lifting, then it should be an essential function of the job. Inquiries or assessments involving physical standards must first be approved by an appropriate medical agency based on job requirements and business necessities. If the function can be eliminated or removed from the job then the function is probably not essential and inquiries on the subject should be avoided as they cannot be used as a basis for screening out otherwise qualified applicants with disabilities.

#### E. Alcohol and Illegal Drug Usage

Current use of an illegal substance is not considered a disability under the Act. However, if someone currently uses illegal drugs and has another covered disability, that person would be covered under the ADA based on the other covered disability. Under the ADA, an employer still has the right to prohibit the use of alcohol or illegal drugs at the work place and may still prohibit employees from being under the influence of alcohol or illegal drugs at the work place. A drug user or alcoholic may be held to the same qualification standards for employment or job performance and behavior standards as other employees. If someone's substandard work performance is related to alcohol or illegal drug usage, that person may still be disciplined for the work performance and held to the same standards as other employees.

#### F. Positions Involving Food Handling

The ADA recognizes that persons with certain communicable diseases should not be employed in positions involving food handling. The Secretary of Health and Human Services has the responsibility for maintaining a list of diseases which are transmitted through the handling of food. An employer may refuse to assign or may discontinue assigning an individual with such a disease to a job which includes food handling.

#### G. Prohibition Against Retaliation and Coercion

Threatening, coercing, intimidating or otherwise interfering with someone's rights under the ADA is prohibited. The ADA specifically protects from retaliation individuals who oppose any act made unlawful by the ADA. In addition, anyone who makes a charge, testifies, or participates in any investigation covered under the ADA is protected from retaliation, intimidation and harassment.

#### H. Physical Barriers

New buildings must be built so that they are readily accessible to individuals with disabilities. Architectural barriers must be removed from existing buildings if such removal is "readily achievable." Readily achievable is a standard which allows organizations to determine if the changes can be made without great difficulty or expense. If a facility is undergoing renovation, then the renovated area must be made accessible.

Another aspect of being accessible to individuals with disabilities is providing special phone service for the hearing impaired. County departments should be accessible to hearing impaired individuals. Numbers for phone lines for the hearing impaired should be published in local phone directories.

In all instances, the Department of Employee Services is available to assist departments in working through individual issues surrounding the ADA such as determining what reasonable accommodation would be for a particular position, defining the essential functions of a position, or determining appropriate pre-employment inquiries.

### **III. SUMMARY OF THE AMERICANS WITH DISABILITIES ACT**

- A. The ADA was adopted to ensure that individuals with covered disabilities do not experience discrimination in the employment process. In addition, it seeks to ensure that individuals with covered disabilities are not denied access to public programs, activities or services due to a qualified disability.
- B. Disability is defined under the ADA as: a) a physical or mental impairment that substantially limits a major life activity; b) a record of impairment; or c) being regarded as having such an impairment.
- C. Prior to opening a recruitment, the position should be reviewed to determine essential job functions and to ensure standards for the position are job related and consistent with business necessity.
- D. Pre-employment inquiries may not address an applicant's disabilities in any way. Pre-employment inquiries must be limited to the applicant's ability to perform essential job related functions without inquiring as to why the person may or may not be able to perform those job functions.
- E. An applicant or employee may only be requested to undergo an employment related physical after a job offer has been made. The job offer must first be made and it should be contingent upon the applicant's successful completion of an employment related physical.
- F. Medical records and results of employment related physicals must be kept separate from other applicant and employee files. Departments should never retain copies of medical records or employment related physical or psychological examinations.
- G. If an applicant or employee initiates a discussion regarding reasonable accommodation, the employer should discuss with the applicant/employee what reasonable accommodation can be made. In all instances the Department of Employee Services should be consulted to discuss what would constitute appropriate and reasonable accommodation in any particular situation.
- H. Threatening, coercing, intimidating, or otherwise interfering with someone's rights under the ADA is prohibited.

### **INTERNET LINKS**

County Ordinance (<http://www.clackamas.us/docs/code/title2.pdf>)

Job Accommodation Network ([www.jan.wvu.edu](http://www.jan.wvu.edu))

## **PROCESS FOR PROVIDING REASONABLE ACCOMMODATION**

The process of identifying if, and to what extent, a reasonable accommodation is required should be flexible, and involve both the employer and the individual with the disability. Determinations as to a particular individual's qualifications and any potential accommodation must necessarily be made on a case-by-case basis.

To determine the appropriate reasonable accommodation, it will be necessary for the employer to initiate an interactive process with the qualified individual once the individual has disclosed a disability or requested accommodation. This interactive process is helpful as the individual seeking the accommodation may not be familiar enough with the employer's equipment or work site to suggest an appropriate accommodation. Also the employer may not know enough about the disability or its limitations on the job at issue to suggest an accommodation.

Attached are forms to use that will assist with the reasonable accommodation process. The Department of Employee Services should be notified and involved in all but the simplest requests (such as a one-time purchase for the employee's workstation):

1. The Employee Accommodation Request is to be completed in every situation involving a request for reasonable accommodation by an employee or applicant. Upon completion, this form should be forwarded to the Department of Employee Services, where it will be filed separately from personnel and other records.
2. The Employer Accommodation Decision Guide and the ADA Checklist may be used by the Department of Employee Services to assist further with the interactive dialogue process and analysis of the request.

The Equal Employment Opportunity Commission suggests that an employer faced with a request for a reasonable accommodation from a qualified individual with a disability take the following analytical approach:

1. Prior to opening a recruitment for a position, analyze the job to determine its purpose and essential functions. These must be documented on the classification specifications.
2. Consult with the individual with the disability to ascertain the precise job-related limitations imposed by the disability and how those limitations can be overcome.
3. With the individual with the disability's assistance, identify potential accommodations and assess the effectiveness of each in enabling the individual to perform the essential functions of the job.
4. Consider the individual with the disability's accommodation preferences and select and implement the accommodations most appropriate for both the employee and the employer.

## **"UNDUE HARDSHIP" EXCEPTION FROM REASONABLE ACCOMMODATION**

The failure to provide reasonable accommodation may be justified where the covered entity can demonstrate that the accommodation would impose undue hardship on the operation of its business. This must be determined on a case-by-case basis, since what may pose an undue hardship for one employer may not pose a hardship for another employer or in another setting.

"Undue hardship" is defined as any action requiring significant difficulty or expense, taking into account such factors as:

- ◆ The nature and cost of the accommodation required. When considering cost of an accommodation, the employer cannot consider a cost that is borne by another agency or organization.
- ◆ The overall financial resources of the facility involved in the provision of the accommodation.
- ◆ The number of persons employed at the facility.
- ◆ The effect of the accommodation on expenses and resources.
- ◆ The impact of the accommodation on the operation of the facility.
- ◆ The overall financial resources of the covered entity.
- ◆ The overall size of the covered entity's business with respect to the number of employees.
- ◆ The number, type, and location of its facilities.
- ◆ The type of operation of the covered entity, including the composition, structure, and function of its work force.
- ◆ The geographic separateness of the facility.
- ◆ The administrative or fiscal relationship of the facility to the covered entity.

All of these factors should be considered in determining whether providing an accommodation would impose an undue hardship on the covered entity. The weight given to each factor will vary depending on the facts of the particular situation.

The Job Accommodation Network, 1-800-526-7234 or [www.jan.wvu.edu](http://www.jan.wvu.edu), provides a free service to employers to assist in finding appropriate accommodation on a case-by-case basis.

**LINKS TO COUNTY FORMS & INFORMATION:**

Employee Reasonable Accommodation Request Form:  
(<http://www.clackamas.us/docs/des/adaemployee.doc>)

Employer Decision Guide for Reasonable Accommodation:  
(<http://www.clackamas.us/docs/des/adaemployer.doc>)

Frequently Asked Questions: (<http://www.clackamas.us/des/ada.htm>)