

**EMPLOYER RESPONSIBILITIES UNDER THE  
AMERICANS WITH DISABILITIES ACT (ADA)**

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## Table of Contents

- I. Introduction
  - A. ADA Overview
  - B. Definitions
    - Accommodations
    - Disability
    - Employment discrimination
    - Essential job functions
    - Major life activities
    - Marginal job functions
    - Qualified individual
    - Reasonable accommodation
    - Substantially limiting impairment
    - Undue hardship
- II. Reasonable Accommodations
- III. The Interactive Accommodation Process
  - A. Triggers to Initiate the Process
  - B. Process Steps
- IV. Examples of Reasonable Accommodations
- V. Examples of Accommodations that may be Unreasonable
- VI. Temporary Impairments and Injury/Illness Outside the ADA
- VII. “Episodic” or “in remission” Impairments
- VIII. Health and Safety Concerns
- IX. Travel Issues
- X. Service Animals
- XI. ADA Issues and the Selection Process
  - A. Job Descriptions and Position Postings
  - B. Accommodations During the Selection Process
  - C. Interview Questions
  - D. Hiring Decisions
- XII. Frequently Asked Questions
- XIII. Additional Reference Resources

## **I. Introduction**

### **A. ADA Overview**

The ADA protects **qualified individuals** with **disabilities** from **employment discrimination**. Under the ADA, a disability is a physical or mental impairment that substantially limits a **major life activity**. The ADA also protects individuals who have a record of a **substantially limiting impairment**, and people who are regarded as having a substantially limiting impairment.

NDE complies with the ADA and corresponding state laws by practicing equal opportunity principles and prohibiting unlawful employment practices. Prohibitions against discrimination based on disabilities can be found in Chapter 4, Section 004 of the NDE Personnel Rules, (Title 93, Nebraska Administrative Code, Chapter 4). Unlawful work place discrimination (harassment) constitutes grounds for corrective or disciplinary action under the terms of the NDE Personnel Rules and the NDE-NAPE/AFSCME Bargaining Agreement. Procedures for reporting unlawful work place discrimination (harassment) can be found in NDE Administrative Memorandum #505.

NDE encourages supervisors to work diligently to provide a friendly and supportive employment environment to qualified individuals with disabilities. This document is intended to educate supervisors about working with employees and/or job applicants who experience disabilities. NDE wants to proactively equip supervisors with the information necessary to effectively and appropriately handle disability issues.

The NDE Human Resources Office (HR) is ready to assist supervisors with questions, or concerns related to employees or job applicants who have or are suspected of having a disability.

### **B. Definitions**

**Accommodations** are modifications or adjustments to the job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity and satisfy the requirements of the job.

**Disability** includes physical impairments [any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems (including but not limited to neurological, musculoskeletal, sense organs, respiratory, cardiovascular, reproductive, digestive, lymphatic] or mental impairments [any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities].

NOTE: Temporary impairments are not typically covered by the ADA, but when considering whether or not the impairment rises to the level of a disability, you must consider the extent, duration and impact of the impairment. (See also Section VI-Temporary Impairments and Injury/Illness Outside the ADA below on page 7)

**Employment discrimination** includes disparate treatment in matters regarding hiring, promotion, duty assignment, training, evaluation, correction/discipline, advancement opportunities, classification/compensation, and all other benefits and privileges of employment.

**Essential job functions** are those job duties that are fundamental and not marginal. It is helpful to summarize the core purpose of the job and then look at the importance of actual job functions in achieving the purpose. Evaluating the frequency with which a function is performed, the amount of time spent on the function and the consequences if the function is not performed is necessary to determine if a function is "essential" or marginal.

**Major life activities** include hearing, seeing, speaking, breathing, eating, performing manual tasks, walking, sitting, standing, lifting, reaching, thinking, concentrating, interacting with others, sleeping, caring for oneself, learning or working (generally in a broad category of job, not a single line of work), and major bodily functions, (including immune systems, cell growth, digestive, bowel, bladder, neurological, brain and reproductive functions).

**Marginal job functions** include duties that are incidental or ancillary to the purpose and nature of the job. Marginal job functions are not "essential" to the job.

**Qualified individual** means one that satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position.

**Reasonable accommodations** are modifications or adjustments to a job, the work environment, or the way things usually are done, to enable a qualified individual with a disability an equal opportunity to participate in the application process, to perform essential job functions or to receive equal benefits and privileges of employment. The reasonableness of an accommodation depends on a fact-specific, case-by-case analysis of the job and disability issues. Reasonableness depends on the size of the employer's workforce, the costs associated with the accommodation, and the availability of vacancies consistent with a disabled employee's physical condition.

**Substantially limiting impairment** means a significant impairment as compared to an average person in the general population. The determination of whether an impairment substantially limits a major life activity is to be made without regard to the effects of mitigating measures such as medication, a prosthesis, a hearing aid, etc.

**Undue hardship** refers to any accommodation that would be unduly costly, extensive, substantial or disruptive considering the resources and circumstances of the particular employer in the relationship to the cost or difficulty of providing a specific accommodation. Undue hardships can also refer to those accommodations that would fundamentally alter the nature of operation of the business. This is a case-by-case determination. Considerations include: nature of the accommodation, net cost, total available financial resources of the employer, and impact of the accommodation on operations and other employees.

## **II. Reasonable Accommodations**

NDE is required to make a **reasonable accommodation** to the known physical or mental impairments of an otherwise qualified individual with a disability unless doing so gives rise to **undue hardship**. Reasonable accommodations are modifications or adjustments to a job, the work environment, or the way things usually are done, to enable a qualified individual with a disability an equal opportunity to either (1) participate in the application process, (2) perform essential job functions or (3) receive equal benefits and privileges of employment. Receiving equal "benefits and privileges of employment" includes equal opportunities for professional advancement, to receive training, to participate in social events and to have access to non-work areas such as restrooms and break rooms.

The willingness to provide reasonable accommodations is an ongoing duty that applies to all aspects of employment, beginning with the selection process and continuing any time an employee's disability or job changes.

NOTE: HR can help supervisors evaluate whether or not an accommodation burden rises to the level of an undue hardship.

Once a supervisor learns or has a reason to believe that an employee with a disability needs a reasonable accommodation to satisfactorily perform the job, NDE has a duty to initiate an interactive process with the employee to determine what the reasonable accommodation should be. This interactive process will include the cooperation of the supervisor and the employee. Both parties have some responsibilities.

## **III. The Interactive Accommodation Process**

### **A. Triggers to Initiate the Process**

Applicant or Employee Request. In general, it is the responsibility of an applicant or employee with a disability to inform NDE that an accommodation is needed to either (1) participate in the application process, (2) to perform an essential job function, or, (3) to receive equal benefits and privileges of employment. Once an applicant or employee makes a request, NDE must go through the interactive accommodation process with the individual.

Supervisors should be sensitive to how applicants or employees verbalize their requests. The applicant or employee might have difficulty expressing their request. An individual might not clearly state "I am requesting an accommodation." If supervisors suspect that an individual is attempting to request an accommodation, the supervisor should specifically ask the individual if they are requesting a specific accommodation or ask if the individual would like to go through the interactive accommodation process to explore their options. In some cases the individual may want some assistance, but they don't know exactly what accommodation to request.

Supervisor Initiated Discussion. If a supervisor knows or suspects that an individual has a disability and observes that the individual is having difficulty with either (1) the application process, (2) performing essential job functions, or (3) accessing equal benefits and privileges of employment, then the supervisor has a duty to ask if the individual would like to go through the interactive accommodation process in an effort to address the difficulty. If the individual declines the opportunity, the supervisor should document the offer and the individual's response. If the employee's job performance is at issue, then the supervisor should move forward with the necessary corrective or disciplinary action to address the deficiency(ies).

## **B. Process Steps**

Remember that accommodations are a way to bridge the distance between the maximum ability of the individual and the essential functions of the job. In order to construct that bridge, the parties need to work together to identify answers to specific accommodation questions. *(Although the interactive accommodation process can be used for applicants, the following steps have been written with current employees in mind.)* It is essential for the employer to have a cooperative, timely, discussion with the employee in order to achieve a successful accommodation outcome. **Supervisors must contact HR for assistance before beginning this process.**

- 1) Identify Purpose and Duties. The supervisor reviews the employee's job description with HR in order to identify the purpose of the job and all the duties/responsibilities. The supervisor should then engage the employee in a discussion to make sure all duties have been identified.

NOTE: If an updated job description is developed during this step, a copy should be filed with HR.

- 2) Identify Nature of Duties. HR and the supervisor determine which of the duties are **essential functions** and which duties are **marginal functions**. The following questions and the guidelines in the chart below may help determine if a function is essential or marginal:

- Does the position exist to perform the function in question?
- Are there other employees available to perform the function? If so, how many?
- Is the function highly specialized and was the employee hired for their special expertise or ability to perform it?
- Was the function identified in the job posting at the time of hire?
- Is the function identified in the job description and/or performance appraisals?
- How much time is spent performing the function?
- What would be the consequences of not requiring the employee to perform the function?

<b>Considerations</b>	<b>Essential Functions</b>	<b>Marginal Functions</b>
Percentage of time spent on task	Significant percentage of time, often 20% or more, is spent on task.	Generally less than 10% of time is spent on task.
Frequency of task	Task is performed regularly: daily, weekly, or monthly.	Task is performed infrequently or when substituting in part of another job.
Importance of task	Task affects other parts of job and other jobs.	Task is unrelated to job, and there are few consequences if not performed.

3) Identify Restrictions/Limitations. HR and the supervisor consult with the employee to identify each physical or mental restriction/limitation that may affect the employee's ability to engage in the job duties or responsibilities. Here are some sample questions that may be asked:

- What limitations are you experiencing?
- How do the symptoms or limitations affect your job performance?
- What specific job tasks are problematic as a result of these symptoms and limitations?
- Are you aware of any potential accommodations that would reduce or eliminate these problems?

NDE can request medical documentation as part of this step by asking the employee's medical provider for a description of the limitation and an estimate for the length of time the limitation will be in place (if the limitation is temporary). Any request for medical documentation should relate only to the limitation on a work-related function without inquiring into the nature or extent of the illness. For instance, asking the medical care provider about a limitation on using pneumatic tools instead of asking for a diagnosis or inquiring about underlying medical issues. If medical documentation is received, the documentation should be maintained in a separate medical file for the employee in the HR office.

4) Determine if ADA Applies. HR and the supervisor determine if the employee is covered by the ADA as (a) a qualified individual with disability (b) an individual who has a record of a substantially limiting impairment, or (c) an individual who is regarded as having a substantially limiting impairment. If an individual is only "regarded" as having a substantially limiting impairment, no reasonable accommodation is required.

If the disability or the need for an accommodation is not obvious, you may arrange for the employee to submit a note or statement from their medical care provider that identifies the limitation on the physical or mental ability. Do not request medical documentation if the disability is obvious.

NOTE: Temporary impairments are not typically covered by the ADA, but when considering whether or not the impairment rises to the level of a disability, you must consider the extent, duration and impact of the impairment.

- 5) Discuss Accommodation Options. HR and the supervisor meet with the employee to identify and discuss potential accommodations (if any) that would permit the employee to perform all of the essential job functions.

NOTE: Information about possible accommodations can be obtained from staff experts in the Vocational Rehabilitation or Assistive Technology Partnership programs.

- 6) Identify if Undue Hardship Exists. If any requested accommodation imposes an *undue hardship* on NDE or other employees, HR and the supervisor must fully identify, consider and document those factors as part of this interaction process.

Remember, undue hardship refers to any accommodation that would be unduly costly, extensive, substantial or disruptive considering the resources and circumstances of the particular employer in the relationship to the cost or difficulty of providing a specific accommodation. Undue hardships also refer to those accommodations that would fundamentally alter the nature of operation of the business. This is a case-by-case determination. Considerations include: nature of the accommodation, net cost, total available financial resources of the employer, and impact of the accommodation on operations and other employees.

- 7) Accommodation Offer. After considering the employee's accommodation preference and any undue hardships associated with the potential accommodations, HR and the supervisor should select and offer the reasonable accommodation that is most appropriate for NDE and the employee. If no reasonable accommodation exists, then HR and the supervisor need to notify the employee that an accommodation cannot be offered.
- 8) Decision Documentation. HR and the supervisor must document the interactive process that was used and the agreed-upon plan for implementing the selected accommodation. If no reasonable accommodation exists or the employee declines the accommodation offer, HR and the supervisor must document that decision and the rationale.
- 9) Monitoring. If an accommodation is provided, the supervisor must periodically monitor the plan by meeting with the employee to (a) establish or implement the accommodations and (b) periodically confirm that the accommodations are effective. Monitoring should begin soon after initial implementation of the accommodation. Thereafter, monitoring should take place at least annually and may be done in conjunction with the performance appraisal process.

#### **IV. Examples of Reasonable Accommodations**

Although the reasonableness of any accommodation depends on a fact specific analysis of the job and disability issues, the following examples are commonly accepted as "reasonable." Examples include, but are not limited to:

- Acquiring or modifying equipment or devices
- Job restructuring, including reassigning marginal duties to other employees
- Part-time or modified work schedules
- Reassignment to a vacant position (only required for current employees, not applicants)
- Adjust or modify examinations, training materials or policies
- Providing readers and interpreters
- Providing written materials in accessible formats, such as large print, Braille, or audiotape
- Physically modifying the workplace to be readily accessible/usable

#### **V. Examples of Accommodations that may be Unreasonable**

- Transportation to and from work (unless transportation is provided for other employees)
- Paying for personal care attendants (unless there is a work-related trip that necessitates an additional cost to the employee)
- Paying for personal care items that assist an individual in their daily life, both on and off the job (e.g., eyeglasses, hearing aids, service animals, wheelchairs)
- Lowering performance standards
- Providing extra paid leave
- Waiving warranted discipline, even if disability played a role in causing the conduct
- Removing or reallocating essential job functions
- Creating a new position or bumping another employee to create a vacancy for reassignment
- Promoting an individual with a disability as an accommodation

#### **VI. Temporary Impairments and Injury/Illness Outside the ADA**

Only individuals who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA. Some injuries or illnesses may cause physical or mental impairments, but the impairment may not be severe (in extent or impact) enough to substantially limit a major life activity. Other impairments may be severe but they are temporary in nature and heal within a short period of time with little or no long-term or permanent impact. Therefore, pregnant or injured employees who qualify for benefits under Workers' Compensation or other disability benefits laws may not be protected by the ADA.

Even though temporary conditions are not considered disabilities under the ADA, NDE may be available to assist an employee who is experiencing a temporary condition or injury. Supervisors

should request assistance from HR to address those situations. HR needs to be involved in order to identify options and maintain consistently in employee benefits throughout the Department.

NOTE: Be aware that disparate treatment of employees with temporary conditions, while not within the ADA, may be subject to other employment discrimination laws, i.e. discrimination based on gender in the case of pregnancy.

### **VII. “Episodic” or “in remission” Impairments**

These impairments may be disabilities under the ADA if the impairment would substantially limit a major life activity when active.

### **VIII. Health and Safety Concerns**

The ADA does not require NDE to allow an employee to pose a direct threat to their personal health or safety, or to the health and safety of co-workers or other individuals in the workplace. A direct threat is a significant risk that cannot be eliminated or reduced through reasonable accommodation. Direct threats must be evaluated on a stringent standard, based on an individualized assessment of an employee's present ability to safely perform the essential job functions. A decision that an employee poses a direct threat must be based on medical or other objective evidence, not opinion or speculation. In determining whether an employee poses a health or safety risk in the workplace, consideration must be given to:

- 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.

If a supervisor observes a health or safety concern they should initiate the interactive accommodation process steps immediately to address the situation.

### **IX. Travel Issues**

Issues involving an employee's ability to travel, and related accommodations should be addressed through the interactive accommodation process identified above in Section III.

When posting a vacant position, travel requirements for the position should be identified. If the position requires the employee to drive and there is no reasonable accommodation that could be provided in lieu of requiring the employee to drive, job postings should state an essential function as "possess a valid driver's license and independently travel." Supervisors should be prepared to explain to HR why no reasonable accommodations would be available for the position's driving requirements prior to posting the vacancy.

## **X. Service Animals**

Service animals may be used to accommodate an individual with a disability. A service animal is any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government. A pet or an animal companion is not the equivalent of a service animal.

Service animals perform some of the functions and tasks that the individual with a disability cannot perform for themselves (e.g., alerting persons with hearing impairments to sounds, seeing eye dogs, pulling wheelchairs or carrying and picking up things for persons with mobility impairments, and assisting persons with mobility impairment with balance).

NDE may exclude a service animal from our place of employment if the animal's behavior poses a direct threat to the health or safety of others. Each situation must be considered separately. An employer cannot make assumptions about the service animal based on experience with other animals.

When considering an accommodation request for a service animal, the following questions should be discussed.

- How will the animal assist the employee in performing their job functions or tasks?
- Is the animal necessary for the employee to travel to and from work?
- Who will clean up after the service animal and be responsible for the animal's needs?
- What are acceptable versus unacceptable behaviors on the part of the service animal?
- What alternative reasonable accommodations are available for the employee?

## **XI. ADA Issues and the Selection Process**

### **A. Job Descriptions and Position Postings**

Developing a job description is an important first step in the selection process. Spending the time to accurately describe the job will result in a position posting that attracts the best applicant pool for the position. In addition, having an accurate job description will help interviewers focus on the essential functions of the job while going through the selection process.

NOTE: Current job descriptions must be submitted to HR along with the Authorization to Post/Hire form as required by Administrative Memorandum #501.

Job descriptions become very important when ADA issues arise. Job descriptions must be current in order to accurately reflect what the employee in that position is required to do. The description should also distinguish between essential and marginal functions of the job in order to appropriately deal with accommodation issues that may arise. Be cautious in respect to physical tasks. Requirements should be job related and consistent with business necessity.

## **B. Accommodations During the Selection Process**

NDE is required to provide reasonable accommodations during the selection process. For example, providing a sign language interpreter during a job interview would be considered a reasonable accommodation.

## **C. Interview Questions**

The ADA prohibits employers from making pre-employment inquiries into the existence or nature of a disability, either on applications, during interviews or when contacting references. Pre-employment questions must be limited to the applicant's ability to perform the job's functions.

Generally, NDE cannot ask all applicants whether they would need reasonable accommodation to perform a job because the answer to this question is likely to reveal whether an applicant has a disability. However, an interviewer may ask whether the individual can perform the job duties with or without reasonable accommodation.

If the individual has an obvious disability, an interviewer can ask the individual to describe how they would perform the job with or without reasonable accommodation. If an interviewer takes this extra step and asks for a description, they should do so with all applicants who have obvious disabilities to insure equal treatment. An interviewer should not ask questions about the underlying medical issue and should keep in mind that the more disability/medical information is obtained during the selection process, the more the selection process has the potential to be scrutinized.

Below is a chart illustrating the differences between prohibited and acceptable interview questions.

 DO NOT ASK	 DO ASK
Do you have any physical or mental disabilities?	How would you perform the essential tasks of the job for which you have applied?
Why are you using crutches, and how did you become injured?	If hired, which tasks outlined in the job description that you reviewed would be more enjoyable and most difficult?
How many times were you absent due to illness in the past two years?	Describe your attendance record on your last job.
Have you been treated for any of the following medical conditions?	Describe any problems you would have reaching the top of a six-foot filing cabinet.
Have you ever filed for or collected worker's compensation?	What did your prior job duties consist of, and which ones were the most challenging?

## **D. Hiring Decisions**

It is unlawful for NDE to refuse to hire a qualified applicant with a disability because they are disabled or because a reasonable accommodation is required to make it possible for this person to perform essential job functions. NDE cannot reject an applicant because they have a disability that prevents them from performing minor duties that are not essential to the job. The ADA does not require NDE to hire disabled persons if, with or without reasonable accommodations, they are unable to perform essential job elements.

## **XII. Frequently Asked Questions**

### ***Accommodations***

- Q. Can NDE be required to reallocate an essential function of a job to another employee as a reasonable accommodation?
- A. No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.
- Q. What should a supervisor do if the employee refuses to use an agreed upon accommodation?
- A. The supervisor should ask the employee why they are not using the agreed upon accommodation and then document the discussion. Typically, a supervisor should not try to force an employee to use an accommodation. However, if health and safety concerns exist, the supervisor can require that the employee take steps (including use of an accommodation) to perform their duties in a safe manner.

### ***Alcohol/Drug Use***

- Q. Are alcoholics covered by the ADA?
- A. Yes. A person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if they are qualified to perform the essential functions of the job. An employer may be required to provide a reasonable accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Note: while an employer can discipline an alcoholic employee for performance issues, the employer can't discipline the employee more severely than it does other employees for the same performance or conduct.

- Q. Are applicants or employees who currently use drugs covered by the ADA?
- A. No. Individuals who currently engage in drug use (*including both the use of illegal drugs and the illegal use of legal drugs*) are specifically excluded from the definition of a

“qualified individual with a disability” protected by the ADA when the employer takes action on the basis of their drug use.

However, individuals will be protected against discrimination under the ADA if they are rehabilitated and not currently using drugs. Individuals are also protected from discriminatory actions due to a history of addiction or if they are regarded as being addicted.

### ***Attendance***

Q. Can a supervisor establish specific attendance and leave policies?

A. Yes. A supervisor can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. Remember, adjustments in leave policies can be a reasonable accommodation in some cases. While employers are not obligated to provide additional *paid* leave, accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of their disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

### ***Disciplinary Action***

Q. Can a supervisor terminate employment with an employee who has a disability?

A. Yes. A supervisor can terminate the employment of an employee with a disability under three conditions: (1) The termination is unrelated to the disability, (2) the employee does not meet legitimate requirements for the job, such as performance or production standards, with or without a reasonable accommodation; and/or (3) because of the employee’s disability, the employee poses a direct threat to health or safety in the workplace.

NOTE: Article 2.2E of the NDE-NAPE/AFSCME Bargaining Agreement states that it is a management right to dismiss an employee from employment in the event the employee is unable to perform the essential functions of the position due to physical or mental impairments, even with reasonable accommodations.

### ***Health and Safety Considerations***

Q. Can NDE consider health and safety issues when deciding whether to hire an applicant or retain an employee with a disability?

A. Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of the individual or others, if that risk cannot be eliminated or reduced below the level of a “direct threat” by reasonable accommodation. However, an

employer may not simply assume that a threat exists. Employers must base a decision on objective, medically supportable information or documentation that demonstrates a significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on ignorance, fear, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

### ***Hiring***

- Q. Does NDE have to give preference to a qualified applicant with a disability over other applicants?
- A. No. An employer is free to select the *most* qualified applicant available and to make decisions based on reasons unrelated to a disability. For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed.

### ***Life Threatening Illnesses***

- Q. Are life-threatening illnesses covered by the ADA?
- A. Yes. The United States Supreme Court has determined that individuals with life-threatening illnesses such as leukemia, cancer, or AIDS are covered by the ADA.

### ***Medical Information***

- Q. Should supervisors encourage or require employees to share their medical history and information?
- A. No. An employee's medical history and information are private matters. Supervisors should focus on the employee's job performance and job issues. If supervisors have concerns about job performance that may be affected by medical or disability issues, they can make limited inquiries. Inquiries should relate only to the limitation on a work-related function without inquiring into the nature or extent of the illness. (*Step 3 in the interactive accommodation process in Section III can be used as guidance.*)

If employees want to volunteer personal medical history and information, supervisors should attempt to limit disclosures to information that is work-related, i.e. limitations that impact their ability to perform this job.

## ***Obesity***

Q. Is obesity considered a disability?

A. It depends. Normal deviations in weight are not impairments; however, severe morbid obesity, defined as 100% over the norm, may constitute a disability.

## ***Performance Standards***

Q. Can a supervisor maintain existing production/performance standards for an employee with a disability?

A. Yes. An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring, but may not exclude an individual with a disability who is satisfactorily performing a job's essential functions.

## ***Reasonable Accommodations***

Q. Can a "reasonable" accommodation become "unreasonable" over time?

A. Yes. There are many factors that determine whether or not an accommodation is reasonable. If the work situation or the employee's disability change over time, an accommodation could become unreasonable since the reasonableness of an accommodation depends on a fact-specific, case-by-case analysis of the job and disability issues. Reasonableness may turn on the size of the employer's workforce, the costs associated with the accommodation, and the availability of vacancies consistent with a disabled employee's physical condition.

Conversely, if there haven't been any changes in the work situation or the employee's disability, there would not be any justification for an employer to decide that an accommodation "became" unreasonable.

## ***Relationship or Association Discrimination***

Q. What is discrimination based on "relationship or association" under the ADA?

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people

with AIDS from a discriminatory employment action motivated by that relationship or association.

### **XIII. Additional Reference Resources**

Equal Employment Opportunity Commission (EEOC). The EEOC is a federal agency whose mission is to eliminate illegal discrimination in the workplace. The EEOC's website contains many helpful assistance documents for employers and individuals with disabilities including a comprehensive ADA Technical Assistance Manual. Website: **<http://www.eeoc.gov>**.

Job Accommodation Network. The Job Accommodation Network (JAN) is a service of the Office of Disability Employment Policy (ODEP) of the U.S. Department of Labor. JAN's mission is to facilitate the employment and retention of workers with disabilities by providing employers, employment providers, people with disabilities, their family members and other interested parties with information on job accommodations, self-employment and small business opportunities and related subjects. Website: **<http://janweb.icdi.wvu.edu>**. Telephone: **800-526-7234**.

NDE Human Resources (HR). Assistance in distinguishing between essential and marginal job functions can be obtained from the HR staff. HR can also obtain guidance about job accommodations and arrange for a job/accommodation evaluation from staff in the Assistive Technology Partnership (ATP). Please contact Joel Scherling at **402-471-4736** to receive services from HR or to arrange for ATP assistance.

NDE General Counsel's Office. Legal advice and other ADA written resources are available upon request from the General Counsel's Office. Please contact Scott Summers at **402-471-7828**.

Great Plains ADA Center Region VII. Columbia, MO. 1-800-949-4232 [www.adaproject.org](http://www.adaproject.org)

