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# Meeting the Challenge at the Mines: The Americans with Disabilities Act

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## MEETING THE CHALLENGE AT THE MINES: THE AMERICANS WITH DISABILITIES ACT

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## I. INTRODUCTION

The Americans with Disabilities Act of 1990,<sup>1</sup> (the ADA or the Act), was signed into law on July 26, 1990. Title I of the Act, which prohibits employment discrimination based on disability, became effective on July 26, 1992, for employers with 25 or more employees.<sup>2</sup> Since that time, the Equal Employment Opportunity Commission (the EEOC), the agency charged with administering the initial claims process under Title I,<sup>3</sup> has received ADA complaints at the explosive rate of over 1,000 per month. If claims continue to be filed at that rate, the

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1. 42 U.S.C. §§ 12101-12113 (1991).

2. Title II prohibits (1) state and local governments or agencies from discriminating on the basis of disability in all programs, services and activities; and (2) public entities from discriminating on the basis of disability in the provision of transportation services. 42 U.S.C. §§ 12131-12165 (1993). Title III guarantees disabled persons access to public accommodations such as hotels, stores, restaurants, recreational facilities, and virtually any other kind of facility to which the public has access. 42 U.S.C. §§ 12181-12189 (1993). This article does not cover Titles II and III.

3. The administrative and procedural requirements applicable to claims brought under Title I of the ADA are the same as those that apply to claims for race, sex, and other forms of discrimination under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (1993).

ADA heralds a new era of active civil rights litigation for employers in the coal industry and beyond.

Because ADA claims under Title I must first be filed, investigated, and in meritorious cases, subjected to conciliation attempts before the EEOC, few court decisions dealing with such claims have yet been reported. Nevertheless, extensive regulations and policy guidance issued by the EEOC, as well as a substantial body of law under the federal Rehabilitation Act of 1973 (on which much of the ADA is based)<sup>4</sup> and comparable state disability discrimination laws, provide useful guidance for ADA compliance. This article provides a brief overview of Title I of the Act and then relies on the EEOC's issuances and existing case law to discuss areas of particular concern in the coal industry: qualification standards and selection criteria, the hiring process, reasonable accommodations, and workers compensation issues.

It will be apparent from the discussion that follows that the ADA is unique among civil rights statutes in both the degree of difficulty it presents for identifying who is entitled to the Act's protections and the degree to which it imposes affirmative obligations on employers. Unlike Title VII and the Age Discrimination in Employment Act,<sup>5</sup> which impose on employers a general prohibition of discrimination against easily identifiable classes of employees, the ADA requires careful fact-specific analysis of layers of definitions just to make the threshold determination of whether the Act applies in a given situation. If it is determined that there is coverage, the employer must undertake additional fact-specific analysis to determine the extent of its affirmative obligations to a disabled individual. These unique aspects of the ADA will require careful planning and decision-making by operational and human resources personnel, as well as lawyers, throughout the coal industry.

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4. See 42 U.S.C. § 12117(b) (1993); 29 C.F.R. app. § 1630 (1993); *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp 1300, 1306-07 (E.D. Va. 1993).

5. 29 U.S.C. § 621-34 (1993).

## II. OVERVIEW OF THE ADA

### A. Purpose

As explained in the appendix to the regulations, “[t]he ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.”<sup>6</sup> The ADA requirements apply to all aspects of employment, including hiring and promotion decisions, employee discharges, compensation and job training, and other terms and conditions of employment.

### B. Covered Entities

Private employers, state and local governments, employment agencies, labor unions, and joint labor-management committees must comply with Title I of the ADA.<sup>7</sup> Employers with 25 or more employees became subject to the law on July 26, 1992; employers with 15 or more employees must comply by July 26, 1994 (part-time employees are included in the definition of “employee.”)<sup>8</sup> Employers with fewer than 15 employees are not subject to Title I.<sup>9</sup>

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6. 56 Fed. Reg. 35,726-01 (1991).

7. 29 C.F.R. §§ 1630.2(b), (e) (1993).

8. A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT I-1 (Jan. 1992) (hereinafter TECHNICAL ASSISTANCE MANUAL). The Technical Assistance Manual is a comprehensive guide that attempts to address questions raised by the ADA and the EEOC’s regulations issued under it. As the EEOC’s interpretation of its regulations and policies, the Manual is a useful text in understanding and implementing ADA requirements. The EEOC also published an interpretive guide as an appendix to its regulations. 56 Fed. Reg. 35,739 (1991); 29 C.F.R. app. § 1630 (1993).

9. 29 C.F.R. § 1630.2(e) (1993).

### C. Protected Persons

#### 1. Individuals With Disabilities

The ADA prohibits discrimination against an employee or job applicant who is a “qualified individual with a disability.” Thus, whether a person is an “individual with a disability” is a threshold issue for determining whether or not the ADA applies to a given situation.<sup>10</sup> A person is an “individual with a disability” if that person (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment but is not actually disabled (e.g., an individual with disfiguring burn scars).<sup>11</sup>

The definition of “individual with a disability” contains several explicitly defined key terms: “physical or mental impairment,” “substantially limits,” and “major life activity.” A “physical or mental impairment” includes (1) any physiological disorder or condition; (2) cosmetic disfigurement or anatomical loss affecting a major body system; or (3) mental or psychological disorder.<sup>12</sup> “Substantially limits” means being unable to perform a major life activity, or being substantially restricted in the condition, manner, or duration of performing a major life activity.<sup>13</sup> A “major life activity” includes caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>14</sup>

Individuals with certain types of disorders and conditions are specifically excluded from the ADA’s coverage. For example, those currently engaged in the illegal use of drugs are not protected, although

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10. The ADA covers more than disabled individuals. It also protects individuals who are associated with an individual who has a known disability. 29 C.F.R. § 1630.8 (1993). For example, an employer could not refuse to hire a qualified individual because he volunteered to work with people who have AIDS or had a dependent with cerebral palsy.

11. 42 U.S.C. § 12102(2) (1993); 29 C.F.R. §§ 1630.2(g), (k), (l) (1993).

12. 29 C.F.R. § 1630.2(h) (1993).

13. 29 C.F.R. § 1630.2(j) (1993).

14. 29 C.F.R. § 1630.2(i) (1993).

persons not currently engaged in illegal drug use who are enrolled in or have successfully completed a drug rehabilitation program are protected. Individuals with a history of drug use who are incorrectly regarded as current illegal drug users are also protected.<sup>15</sup> Sexual behavior disorders (*e.g.*, transvestism and transsexualism), compulsive gambling, kleptomania, and pyromania also are not considered disabilities under the Act.<sup>16</sup> Because homosexuality and bisexuality are not impairments, they likewise do not meet the Act's definition of disabilities.<sup>17</sup>

#### D. *Qualified Individuals With Disability*

To be protected by the ADA, a person must not only have a disability, but also must be *qualified* for the job, that is, meet the job prerequisites. Whether or not an individual with a disability is qualified depends upon a two-step analysis: determining if the individual with a disability is otherwise qualified and, if so, whether that person can perform the essential functions of the job with or without a reasonable accommodation.<sup>18</sup>

The ADA does not require an employer to hire or promote an individual who is not qualified for a particular job. However, if an individual cannot meet job prerequisites because of a disability and alleges that he is otherwise qualified for the job, the employer must show that the prerequisite which screened out the individual is job-related and consistent with business necessity.<sup>19</sup>

Assuming that job-related and necessary requirements are otherwise met, the next inquiry (typically one of the most important and controversial in ADA cases) is whether the individual can perform the essential job functions with or without reasonable accommodations. An "essential function" of the job is a primary job duty that is intrinsic to

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15. *Id.*

16. *Id.*

17. 29 C.F.R. § 1630.3 (1993).

18. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at II-11 to II-12.

19. The job-related/consistent with business necessity requirement is discussed in more detail *infra* part III.A.

the position. A function can be considered essential if, for example, (1) the position exists to perform that function; (2) there are a limited number of employees available among whom the job function can be distributed; or (3) it is a highly specialized function that requires a particular expertise or ability.<sup>20</sup> The kind of evidence that can be used to determine whether a job function is essential includes (1) written job descriptions prepared before advertising a job or interviewing applicants; (2) the employer's judgment as to which functions are essential; (3) past and current work experience of those in the job; (4) the amount of time spent on the job performing that function; and (5) the consequences of not requiring that the function be done.<sup>21</sup>

A "reasonable accommodation" is essentially a modification or adjustment to the job application process or work environment to enable a qualified individual with a disability to perform the essential functions of a job.<sup>22</sup> Although the question of whether an accommodation is reasonable is a fact specific inquiry, the ADA provides some examples of accommodations that an employer may be required to make. These examples include: (1) making facilities readily accessible; (2) job restructuring; (3) part-time or modified work schedules; (4) reassignment of a current employee to a vacant position; (5) acquisition or modification of equipment, such as braille devices, magnifiers, telephone headsets, mechanical page turners, and raised or lowered furniture; and (6) qualified readers or interpreters.<sup>23</sup>

If the individual is otherwise disabled and qualified, however, reasonable accommodations need not be *necessary* for an individual to be entitled to the Act's protections. For example, the West Virginia Supreme Court of Appeals has held that comparable provisions of the West Virginia Human Rights Act extended protection to an underground coal miner with degenerative joint disease in his knees, where the condition substantially limited the miner's ability to walk and

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20. 29 C.F.R. § 1630.2(n) (1993).

21. *Id.*

22. 29 C.F.R. § 1630.2(o) (1993).

23. 29 C.F.R. § 1630.2(o)(2) (1993).



caused substantial pain, but the miner was nevertheless able to work without any accommodations.<sup>24</sup>

### III. QUALIFICATION STANDARDS AND SELECTION CRITERIA

The ADA does not interfere with an employer's ability to establish job qualifications. However, as noted above, job requirements that would disqualify a disabled person must be job-related and consistent with business necessity. An employer may also require that an individual not pose a direct threat to his own or another person's health and safety.

#### A. *Job-Related And Consistent With Business Necessity*

##### 1. General

The ADA does not prohibit an employer from instituting job-related selection criteria for all functions of a job and requiring that all candidates for that job be able to perform all functions. However, "when an individual's disability prevents or impedes performance of *marginal* job functions . . . the ADA requires the employer to evaluate [the] individual's qualifications solely on his/her ability to perform the *essential* functions of the job, with or without an accommodation."<sup>25</sup> Thus, where selection criteria relate to marginal functions and tend to screen out individuals with disabilities, they will generally be deemed not to be consistent with business necessity.<sup>26</sup> The EEOC has recognized that the meaning of "business necessity" will ultimately be defined by the courts based on the facts of each particular case. The Technical Assistance Manual indicates that "business necessity" under

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24. *Casteel v. Consolidation Coal Co.*, 383 S.E.2d 305, 308 (W. Va. 1989).

25. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IV-2 (emphasis added).

26. 56 Fed. Reg. 35,748 (1991) (preamble to 29 C.F.R. § 1630.10). *See, e.g.*, *Davis v. Frank*, 711 F. Supp. 447 (N.D. Ill. 1989) (failure to award deaf postal clerk time and attendance clerk position is violation of the Rehabilitation Act of 1973 because ability to hear conversational voice is not job-related where answering the telephone is not an essential job function).

the ADA will be subject to the same interpretation in litigation as it has under the Rehabilitation Act.<sup>27</sup> One reported decision applying the ADA illustrates the fact-specific nature of the “business necessity” inquiry by recognizing that “attendance is necessary to any job, but the degree of such [attendance requirement], especially in an upper management position . . . , where a number of tasks are effectively delegated to other employees, requires close scrutiny.”<sup>28</sup> Perhaps recognizing the inevitability of disputes over selection criteria, the EEOC’s interpretive guide to the ADA regulations further notes that challenges to selection criteria have frequently been resolved under the Rehabilitation Act through reasonable accommodation.<sup>29</sup>

## 2. Physical And Mental Requirements

Prior to the enactment of the ADA, many employers routinely required applicants for employment to meet certain physical requirements, such as passing a routine physical examination, prior to receiving an offer of employment. The ADA has greatly changed the landscape with respect to such requirements.

Blanket standards that tend to exclude an entire class of individuals are outlawed by the ADA. The Technical Assistance Manual warns employers that most blanket exclusions (e.g., considering people with heart or back conditions as ineligible) will not conform to ADA requirements.<sup>30</sup> The ADA requires an employer to assess an *individual’s* ability to perform a job, and blanket exclusions prevent that kind of

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27. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IV-3. Compare *Bentivegna v. United States Dep’t of Labor*, 694 F.2d 619 (9th Cir. 1982) (requirement that building repairer demonstrate that his diabetes was under “control” was not job-related and consistent with business necessity where the employer’s reason for excluding the applicant was increased risk of future injury and more likely long term health problems); *with Simon v. St. Louis County*, 735 F.2d 1082, 1084 (8th Cir. 1984) (where paraplegic police officer could not meet the physical requirements of either being able to make a forcible arrest or transferring to any other job in the department, district court findings that these physical requirements were reasonable and “necessary to guarantee effective police work” were not clearly erroneous).

28. *EEOC v. AIC Sec. Investigation, Ltd.*, 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

29. 56 Fed. Reg. 35,748 (1993); 29 C.F.R. app. § 1630.10 (1993).

30. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IV-6.

individualized analysis.<sup>31</sup> The ADA recognizes, however, that employers may need to establish job standards that measure physical or mental ability to perform a job. For example, such standards would specify that an employee be able to lift a certain amount of weight with a certain frequency during a day, as required by the job. The Technical Assistance Manual provides that where physical or mental standards tend to screen out an otherwise qualified individual with a disability, an employer must show that the standards are “job related,” justified by “business necessity,” and relate only to the “essential functions” of the job.<sup>32</sup> In addition, even where the job-related/business necessity showing is made, the employer must still consider whether the individual could meet the standard with a reasonable accommodation.

Given the nature of the work in underground coal mines, having certain physical requirements in place will be unavoidable. For example, miners responsible for belt maintenance will have to be able to lift 50 pounds on a regular basis to rock dust belt entries, and everyone in low coal mines will have to be able to walk in a bent over or duck walk position for an extended period of time. The prudent course for coal operators would be to have *all* physical requirements be job-related and consistent with business necessity.

### B. *Direct Threat To Health And Safety*

An employer also may impose qualification standards requiring that an individual’s hiring or performance in a particular job not pose a “direct threat” to his own safety or health or that of someone else.<sup>33</sup> To show that a person poses such a direct threat, the following is required: (1) there must be significant risk of substantial harm;<sup>34</sup>

31. *Id.*

32. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IV-7 to IV-8.

33. 29 C.F.R. § 1630.15(b)(2) (1993). *See* U.S. E.E.O.C. v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060 (N.D. Ill. 1993) (company executive suffering from brain cancer did not pose direct threat to employer, other employees, or public at large by refusing to discontinue driving, where there was no showing that driving was an essential function of his job and reasonable accommodation would have obviated need for him to drive on the job).

34. *See, e.g.,* Altman v. New York City Health and Hospitals Corp., 2 A.D. Cases

(2) the specific risk must be identified; (3) the risk must be immediately present, not speculative or remote;<sup>35</sup> and (4) the assessment of risk must be based on objective medical or other factual evidence regarding a particular individual.<sup>36</sup> Even if a genuine significant risk of substantial harm exists, the employer must consider whether reasonable accommodations will eliminate or reduce the risk below the level of a “direct threat.”<sup>37</sup>

Given the rigors of the coal mining environment, it is likely that coal operators will often be faced with the question of whether or not an individual poses a direct threat to himself or others.<sup>38</sup> Direct threat

(BNA) 940, 943 (S.D.N.Y. 1993), *aff'd*, 999 F.2d 537 (2d Cir. 1993) (physician’s history of alcoholism and drunkenness on duty “presented the hospital with a grave problem” and justified hospital’s limitation that physician return to work on a trial basis under closer supervision); *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985) (where epileptic applied to the postal service for job using a letter sorting machine, denying her the job based merely on elevated risk of injury violated the Rehabilitation Act because there must be a showing of “reasonable probability of substantial harm”).

35. *Bentivegna v. United States Dep’t of Labor*, 694 F.2d 619 (9th Cir. 1982); *cf.* *Serrapica v. City of New York*, 708 F. Supp. 64 (S.D.N.Y. 1989) (where insulin-dependent diabetic subject to hypoglycemic and hyperglycemic reactions applied for job as sanitation worker, he was not qualified since it was determined that he could not safely operate heavy machinery, an essential function of the job), *aff'd*, 888 F.2d 126 (2d Cir. 1989).

36. *Mantolete*, 767 F.2d at 1422 (determination of reasonable probability of substantial harm cannot be based “except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of an individual’s work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.”).

37. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IV-9. *See, e.g., Breece v. Alliance Tractor-Trailer*, 824 F. Supp. 576 (E.D. Va. 1993) (truck driving school subject to ADA Title II “made a reasonable judgment based on the best available objective evidence” that suggested accommodations of a sign language interpreter and/or a special speaker next to plaintiff’s ear during road driving segment of training would still pose a direct threat to driver, instructor, and public at large); *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991) (where medical evidence showed that construction inspector with Parkinson’s disease would injure himself while inspecting construction sites and reasonable accommodation of giving someone else his field duties was not practical, discharging him did not violate the Rehabilitation Act); *DiPompo v. West Point Military Academy*, 770 F. Supp. 887 (S.D.N.Y. 1991) (where dyslexic fire fighter would have posed a significant danger to himself and others during emergencies and failed to provide any evidence that his disability could be reasonably accommodated, denying him employment was not discriminatory), *aff'd*, 960 F.2d 326 (2d Cir. 1992).

38. *See Ranger Fuel Corp. v. West Virginia Human Rights Comm’n*, 376 S.E.2d 154 (W. Va. 1988) (coal operator’s refusal to hire applicant with psoriatic lesions was not discriminatory under state law since medical evidence demonstrated a reasonable probability

cases probably will often arise when an employee who becomes disabled due to a work injury seeks to return to work, with the inquiry focusing on whether the employee is likely to be reinjured.<sup>39</sup>

### C. Job Descriptions

Job descriptions are not required under the ADA, but they will be considered along with other factors as evidence in determining whether certain job functions are essential.<sup>40</sup> To carry evidentiary weight, job descriptions must be prepared before the job is advertised or before applicants are interviewed;<sup>41</sup> where an existing employee requests an accommodation, job descriptions must be in place before the alleged discriminatory event occurs.<sup>42</sup> As a practical matter, employers in the coal industry who have accurate job descriptions describing essential job functions, in place before employment-related decisions are made, will be better able to defend against claims arising from those actions.

## IV. HIRING PROCESS

With the advent of the ADA, employers have had to change their hiring practices. Gone are the days of using job applications, job interviews, and physical examinations to inquire about an applicant's physical and mental condition and history before a job offer is made.

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that secondary infections would result when lesions were aggravated by crawling around in low coal).

39. See *infra* part V.

40. 29 C.F.R. § 1630.2(n) (1993); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at II-15.

41. 29 C.F.R. § 1630.2(n) (1993).

42. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at II-16.

### A. *Application Forms*

Application forms cannot ask any questions related to disability.<sup>43</sup> However, application forms can ask questions about an applicant's ability to perform the essential functions of the job with or without an accommodation.

### B. *Job Interviews*

The first aspect of the job interview that must be evaluated is the place where it will be conducted because the employer must accommodate applicants through all stages of the application process. Thus, the place of the interview must be accessible. In addition, as in the case of the job application, the employer cannot use the interview to ask the applicant any questions about disability. However, after describing the job tasks, the employer can ask the applicant whether that applicant could perform those tasks with or without a reasonable accommodation. If the applicant indicates a reasonable accommodation will be necessary, an employer can ask how the individual would perform the tasks and with what accommodation.<sup>44</sup>

Similarly, if the applicant has a known disability that would appear to interfere with job performance, the employer can ask him to demonstrate how he would perform certain tasks.<sup>45</sup> If the known disability would *not* interfere with the performance of a job-related function, then the applicant can be asked to demonstrate how he would perform the function, but only if *all* applicants are asked to do so.<sup>46</sup>

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43. Government contractors subject to mandatory affirmative action requirements under the Rehabilitation Act may invite applicants to identify themselves as having a disability, provided the section 503 requirements of maintaining a separate confidential record are observed. For a useful discussion of the kinds of inquiries about disability that are impermissible in the analogous context of Title II of the ADA, see *Medical Soc. of New Jersey v. Jacobs*, 2 A.D. Cases (BNA) 1318 (D.N.J. 1993) (emphasizing that inquiries should be focused on *behavior*, not status).

44. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at V-14.

45. *Id.*

46. *Id.*

### C. *Medical Examinations*

#### 1. Pre-Employment/Pre-Offer

Medical examinations conducted before a job offer is made are prohibited under the ADA.<sup>47</sup> As in the case of job applications and job interviews, an employer cannot ask an applicant about medical history, current medical condition, or history of worker's compensation claims prior to making an offer of employment.<sup>48</sup>

#### 2. Pre-Employment/Post-Offer

Medical examinations can be conducted once a conditional offer of employment has been made. That is, a job offer can be conditioned on the satisfactory completion of a post-offer medical examination, provided such examinations are required of all applicants, not just individuals with a disability. In addition, once a conditional job offer is made, an employer can ask about previous injuries or worker's compensation claims.<sup>49</sup>

Any post-offer examination or inquiry should be job-related and consistent with business necessity, because that demonstration will have to be made if an individual is not hired based on the findings of the examination or inquiry. If an individual is not hired where a post-offer medical examination or inquiry reveals a disability, the employer must be able to show that (1) the reasons for withdrawing the offer are job-related and consistent with business necessity;<sup>50</sup> or (2) the individual posed a direct threat to health or safety.<sup>51</sup> In addition, an employer cannot rely on a post-offer medical examination or inquiry to disquali-

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47. The regulations dealing with medical examinations can be found at 29 C.F.R. §§ 1630.13, 1630.14 (1993).

48. 29 C.F.R. § 1630.13 (1993).

49. 29 C.F.R. § 1630.14 (1993).

50. An employer also must be able to show that no reasonable accommodation that would enable this individual to perform the essential job functions was available, or that accommodation would impose an undue hardship.

51. 29 C.F.R. § 1630.15 (1993).

fy an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.<sup>52</sup>

## V. REASONABLE ACCOMMODATIONS

The ADA requires employers to make a *reasonable accommodation* for disabled individuals "as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities."<sup>53</sup> Failure to provide such a reasonable accommodation constitutes an independent violation of the Act.<sup>54</sup>

### A. Rules Of Accommodation

#### 1. General

The reasonableness of an accommodation is a fact-specific inquiry. In considering whether an accommodation is reasonable, the employer must always examine the individual's abilities and functional limitations in light of the specific functional requirements of the job.<sup>55</sup>

The first step in the accommodation process hinges on whether a disabled person requests an accommodation.<sup>56</sup> An employer is required to accommodate only *known* limitations of a qualified person, and it is the disabled individual's responsibility to notify the employer of the need for an accommodation.<sup>57</sup> In addition, where no request

52. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IV-11.

53. *Id.* at III-2.

54. *See* 42 U.S.C. § 12112(b)(5)(A) (1993).

55. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-6.

56. An individual with a disability is not required to accept an accommodation if the individual has not requested one and does not believe that one is needed. 29 C.F.R. § 1630.9(d); *see also* Castell v. Consolidation Coal Co. 383 S.E.2d 305 (W. Va. 1989) (coal miner protected by disability discrimination statute even though he worked without any accommodations). But if the individual refuses an accommodation necessary to perform essential job functions, and as a result cannot perform those functions, the individual would not be considered qualified. 29 C.F.R. § 1630.9(d) (1993).

57. 29 C.F.R. § 1630.9(a) (1993); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at



for an accommodation is made, but it is readily apparent that a reasonable accommodation would facilitate the individual's performance, the prudent employer should initiate the accommodation process.

Examining an individual's abilities and limitations in fashioning a reasonable accommodation will, in most cases, require *consultation* with the disabled individual.<sup>58</sup> The individual may want to provide his own accommodation, for example, and the ADA permits that.<sup>59</sup> However, just because a disabled individual requests a certain type of accommodation, the employer does not have to institute that accommodation. A reasonable accommodation does not have to be the best accommodation as long as it is effective.<sup>60</sup> In addition, an employer is not required to provide an accommodation that is primarily for personal use (such as eyeglasses or a wheelchair).<sup>61</sup>

Regulations under the Federal Mine Safety and Health Act of 1977<sup>62</sup> may limit a mine operator's ability to implement certain types of accommodations. Most equipment used in underground coal mines must be approved and certified by the Mine Safety and Health Administration (MSHA).<sup>63</sup> Any change in an approved feature or certified component of a piece of equipment, which could include equipment

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### III-7.

58. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-9. 56 Fed. Reg. 35,748 (1993); 29 C.F.R. § 1630.9 (1993). Compare 29 C.F.R. § 1630.2(o)(3) ("it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.") (emphasis added) and TECHNICAL ASSISTANCE MANUAL *supra* note 8, at III-10 ("Consult with the individual with a disability to find out his or her specific physical or mental abilities and limitations . . .").

59. 56 Fed. Reg. 35,744, 29 C.F.R. § 1630.2(o) (1993); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-6.

60. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-4; see *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300, 1306-07 (E.D. Va. 1993) (disabled employee who suffered respiratory problems was not entitled to the totally smoke-free environment he requested, where evidence showed that the other smoking limitations and arrangements imposed by the employer enabled the employee to satisfactorily perform his essential job functions).

61. 56 Fed. Reg. at 35,731 (preamble to 29 C.F.R. § 1630.9); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-5.

62. 30 U.S.C. § 801-962 (1993).

63. See, e.g., 30 C.F.R. Part 18 (1993).

retrofits, must be approved by MSHA.<sup>64</sup> Thus, coordination with MSHA undoubtedly will be required where a coal industry employer wishes to modify certain equipment as a means of fulfilling its reasonable accommodation obligations.

## 2. Vacant Positions

The EEOC's regulations suggest that reassignment to a vacant position is an accommodation possibility and *require* that reassignment to a vacant position be considered as a possible accommodation in the case of an existing employee with a disability.<sup>65</sup> There are, however, some limitations on the reassignment of an existing disabled employee. First, there must be an existing vacant position; the employer has no obligation to create one. Second, there is no requirement to maintain the employee's pay rate if the vacant position pays less than the one the employee can no longer perform.

Many employers in the coal industry have long used this mode of accommodation—reassigning employees to vacant positions or even creating new ones—prior to the advent of the ADA. Requests for such accommodation arise most frequently in two situations where an employee becomes disabled through a job-related injury, but wants to return to work.

First, employees whose physicians have limited their activities may request a light-duty job. While reassignment to a vacant light-duty job could constitute a reasonable accommodation, the ADA does not require an employer to establish a light duty program. If the employer has a light duty program that consists of only temporary positions, the ADA does not require that those positions be made permanent.<sup>66</sup> Nonetheless, an employer may be obligated to create a light duty position for an injured worker who cannot perform “heavy duty” aspects

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64. *See, e.g.*, 30 C.F.R. § 18.15 (1993).

65. 29 C.F.R. § 1630.2(o)(2)(ii) (1993). The specific details are provided in the Interpretive Guide and the Technical Assistance Manual. 56 Fed. Reg. 35,744 (1991); 29 C.F.R. § 1630.2(o) (1993); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-24 to III-25.

66. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at IX-5.

of the job which are *marginal* and which can be reallocated to other employees through job restructuring.<sup>67</sup>

Second, coal industry employees whose functional abilities are permanently limited as a result of injury may request a surface position rather than returning to work underground. Employers are not required to accede to these requests unless they have a vacant surface position available or expect one to become available within a reasonable period of time.<sup>68</sup>

In addition to the ADA, regulations promulgated under the Federal Mine Safety and Health Act of 1977<sup>69</sup> require coal operators to reassign miners who have evidence of the development of pneumoconiosis (black lung).<sup>70</sup> Once the Secretary of Labor has determined, based on chest x-rays that a miner manifests evidence of black lung, he will be classified as a Part 90 miner with the right to be transferred to a less dusty environment, which may or may not entail transfer to a different job.<sup>71</sup> Unlike disabled employees under the ADA, Part 90 miners essentially have an absolute right to transfer to an existing position (assuming the employer cannot maintain lower respirable dust concentrations in the employee's existing work area) with maintenance of pay.<sup>72</sup>

67. *Id.*

68. 56 Fed. Reg. at 35,744 (1991); 29 C.F.R. § 1630.2(o) (1993).

69. 30 U.S.C. § 801 (1993).

70. *See* 30 C.F.R. Part 90 (1993).

71. The regulations provide in pertinent part:

Whenever a Part 90 miner is transferred in order to meet the respirable dust standard in [section] 90.100 . . . or [section] 90.101 . . . , the operator shall transfer the miner to an existing position at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer. The operator may transfer a Part 90 miner to a different coal mine, a newly-created position or a position on a different shift or shift rotation if the miner agrees in writing to the transfer.

30 C.F.R. § 90.102(a) (1993).

72. The rights afforded to miners under Part 90 appear broader than those under the ADA, at least with respect to reassignments. In the case of a conflict, the employer might be able to defend against an ADA action by demonstrating that its actions were required by another Federal law. *See* 29 C.F.R. § 1630.15(e) (1993).

### 3. Undue Hardship

An employer is not required to provide an accommodation that amounts to an undue hardship for the business. An accommodation will present an undue hardship if it will result in "significant difficulty or expense."<sup>73</sup>

The regulations set forth a number of factors to be considered in determining whether a proposed accommodation would amount to an undue hardship: (1) the nature and net cost of the accommodation; (2) the overall financial resources of the facility involved; (3) the overall financial resources of the covered entity; (4) the type of operation of the covered entity;<sup>74</sup> and (5) the impact of the accommodation on the operation.<sup>75</sup> Whether a particular proposed accommodation would create an undue hardship depends upon the particular circumstances of the case.<sup>76</sup> Terms of a collective bargaining agreement, for example,

73. 29 C.F.R. § 1630.2(1) (1993); *see* 56 Fed. Reg. 35,744 (1991); 29 C.F.R. app. § 1630.2 (1993) (undue hardship means any accommodation that would be "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business"); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-12.

74. One recent case under Title II of the ADA held that it would have been an undue hardship for a truck driving school to accommodate a hearing-impaired individual by substituting classroom and simulator training for the over-the-road training for which the school was known. *Breece v. Alliance Tractor-Trailer Training II, Inc.*, 824 F. Supp. 576 (E.D. Va. 1993).

75. 29 C.F.R. § 1630.2(2) (1993). One of few cases yet reported under Title I of the ADA held that a disabled executive's frequent absences associated with his brain cancer did not pose an undue hardship, where the executive could perform his duties from home, over the telephone, via client visits, etc. *U.S. E.E.O.C. v. AIC Sec. Investigation, Ltd.*, 820 F. Supp. 1060 (N.D. Ill. 1993).

76. *See, e.g., Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985) (holding that it would have been an undue hardship to require Army Corps of Engineers to provide full-time physician and blood testing facilities for manic depressive engineer who applied for reassignment to remote location in Saudi Arabia); *Walders v. Garrett*, 765 F. Supp. 303, 306, 314 (E.D. Va. 1991) (where civilian Navy employee suffered from Chronic Fatigue Immune Dysfunction Syndrome that caused her to be frequently absent from work, the employee could not meet the qualification standard of regular attendance; accommodation she suggested—liberal and extra leave—constituted an undue hardship because, *inter alia*, her branch was subject to deadlines and budget constraints such that each employee had "to pull his or her full weight"), *aff'd*, 956 F.2d 1163 (4th Cir. 1992). *Compare DiPompo v. West Point Military Academy*, 770 F. Supp. 887, 894 (S.D.N.Y. 1991) (effect on morale

could be relevant in determining whether an undue hardship exists. The Technical Assistance Manual points out that it may be an undue hardship to reassign a qualified individual with a disability to a vacant position where eligibility for that position is to be determined on the basis of seniority as set forth in the collective bargaining agreement, and the disabled individual is not the most senior.<sup>77</sup> However, the Manual also notes that since unions are also subject to the ADA, "the employer should consult with the union and try to work out an acceptable accommodation."<sup>78</sup>

### B. *The Accommodation Process*

When a qualified individual requests an accommodation, an employer must make a reasonable effort to provide that accommodation. In many cases, a reasonable accommodation will be obvious, such as elevating a desk with blocks to accommodate a wheelchair. Where a reasonable accommodation is less obvious, the interpretive guide to the regulations and the Technical Assistance Manual recommend following the procedures set forth below to determine whether a reasonable accommodation can be made, and if so, what accommodation is appropriate: (1) Analyze the Job Functions (this may have been done in

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of other employees considered among other factors in determining that excusing dyslexic fire fighter from performing unpopular task of monitoring hazards computer would constitute undue hardship) *with* *Davis v. Frank*, 711 F. Supp. 447, 455 (N.D. Ill. 1989) (while telephone answering was not essential function of time and attendance clerk position, it would not have been an undue hardship for the postal service to accommodate deaf applicant by excusing her from phone answering assignments where the only justification for undue hardship was that the morale of other employees assigned to answer the telephones would suffer).

77. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-16.

78. *Id.* ADA obligations must be balanced against bargaining obligations under the National Labor Relations Act (NLRA), 29 U.S.C. § 151-153 (1993). On August 7, 1992, the General Counsel of the National Labor Relations Board issued a memorandum addressing potential conflicts between the ADA and the NLRA. That memorandum also suggests that a unionized employer should negotiate with the union before offering a disabled employee an accommodation, where the accommodation would create a material, substantial, or significant change in established working conditions. To do otherwise may be considered direct dealing in violation of section 8(a)(5) of the NLRA. The memorandum declines to address the situation where an employer implements an accommodation after negotiations in spite of the union's refusal to agree.

preparation for posting/advertising the job; however, a reexamination of the job requirements should be made in light of current information); (2) Consult with the disabled individual about that individual's limitations and potential accommodations; and (3) Identify the appropriate accommodation, considering the preference of the individual.<sup>79</sup>

What is considered a "reasonable" accommodation will vary with each situation. The following types of accommodations should be considered: (1) making facilities readily accessible to and usable by an individual with a disability (including holding off-site company meetings at accessible hotels, restaurants, etc.); (2) restructuring a job by reallocating or redistributing marginal job functions; (3) altering when or how an essential job function is performed; (4) part-time or modified work schedules; (5) obtaining or modifying equipment or devices (taking into account MSHA certification requirements); (6) modifying examinations, training materials, or policies; (7) providing qualified readers and interpreters; (8) reassignment to a vacant position; (9) permitting use of accrued paid leave or unpaid leave for necessary treatment; (10) providing reserved parking for a person with a mobility impairment; (11) allowing an employee to provide equipment or devices that an employer is not required to provide; (12) permitting an occasional break for rest or eating (*e.g.*, for a person with diabetes).<sup>80</sup>

## VI. WORKER'S COMPENSATION AND THE ADA

The majority of ADA claims and requests for accommodation in the coal industry will probably occur as a result of employees who have been disabled due to work-related injuries and are seeking to return to work.

### A. *Job Injury As Disability*

Not all employees injured at work will be considered a "qualified individual with a disability" within the meaning of the ADA. As dis-

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79. 56 Fed. Reg. at 35,748 (1991); 29 C.F.R. app. § 1630.9 (1993); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-9 to III-10.

80. See TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at III-6.

cussed above, a disability is not protected by the ADA unless it is an impairment that substantially affects one or more major life activities, and not all job-related injuries rise to that level. For example, a broken leg that heals normally is a temporary condition that does not affect a major life activity long enough to be substantial. However, a broken leg that heals incorrectly and permanently limits a person's ability to walk may result in a protected disability.

In addition, even if employees receive worker's compensation awards as a result of an injury, that does not necessarily mean that they are disabled under the ADA. The ADA focuses on whether the injury ultimately results in a substantial impairment of a major life activity. For example, a shuttle car operator who loses part of a finger due to a workplace accident may be determined to have an impairment entitling him to a worker's compensation award. Nonetheless, none of that employee's major life activities relative to operating a shuttle car would be affected by that injury, and the employee would be fully capable of returning to his previous job. Of course, if the employee's job were different and required the use of the severed finger—a concert pianist, for example—the ADA clearly would apply to the employee.

### *B. Dealing With Injured Employees Returning To Work*

Where an employee has been injured and wishes to return to work, the employer must determine whether the employee: (1) can fulfill the essential functions of the job with or without reasonable accommodations; and (2) would pose a direct threat of substantial harm to himself or others if he returned to work. This will require asking the employee about his *ability* to perform the job, not about his condition.

Answering these questions may require an independent medical examination of the employee before returning to work. However, once again, several limitations apply to the medical examination. Such examinations must be job-related and consistent with business necessi-

ty,<sup>81</sup> and they are permitted only where there is a job performance or safety problem or where it is necessary to determine current "fitness" to perform a particular job.<sup>82</sup>

These requirements should not pose much difficulty for coal operators in that such "fitness for duty" examinations have long been required for injured employees returning to work. The principal new consideration under the ADA is assuring that the requirements of the examination aimed at testing the employee's ability to perform the essential job functions are in fact closely related and necessary to the job in question. To do this, the employer should identify the essential functions of the job for the doctor, including providing the doctor with a copy of a current job description and ideally allowing the doctor to see how the job is performed at the mine.<sup>83</sup>

In determining whether an injured employee poses a direct threat to himself, the employer and physician will undoubtedly evaluate the likelihood of reinjury if the individual returns to his former job. However, [t]he results of a medical examination may not disqualify persons *currently* able to perform essential job functions because of unsubstantiated *speculation* about future risk.<sup>84</sup> Only the employee's current ability to do a job may be considered, not a general fear of re-injury that could increase workers' compensation costs.

If, after reviewing the doctor's reports, the employer determines that the employee either cannot fulfill the essential functions of the job or would pose a direct threat to himself or others, the employer must consider whether any reasonable accommodations would either enable the employee to perform the essential functions or eliminate the direct threat. Alternatively, the employee might request a reasonable accommodation as soon as the employee notifies the employer that he is ready to return to work. In that case, the employer should begin the accommodation process at the time of the employee's notification,

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81. 29 C.F.R. § 1630.14(c) (1993).

82. 56 Fed. Reg. at 35,751 (1991); 29 C.F.R. § 1630.14(c) (1993); TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at VI-12.

83. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at VI-9.

84. *Id.* at VI-8.



requesting and relying upon an independent medical examination as necessary to fully carry out the accommodation process.<sup>85</sup>

### C. *Example Of The Reasonable Accommodation Process*

The reasonable accommodation process is illustrated below in two examples involving the coal industry.

#### 1. Belt Man With An Injured Back

An employee is assigned to maintain several flights of the main belt on day shift and is required to work by himself. He injured his back on the job, has been off work for several months, and now wishes to return to work. Although he is able to lift 50 lbs. on a regular basis to the rock dust belt entry, the employee cannot lift the 100-125 lb. belt rollers and cannot change out a belt roller by himself. The employee requests an accommodation.

Since the employer has already analyzed the functions of the job, the employer knows that one essential function of maintaining belt lines is changing out belt rollers; however, this work does not necessarily have to be accomplished alone. The employer consults with the employee to determine his exact physical abilities and limitations. With medical documentation, it is determined that the employee can lift 50 lbs., but not the 100-125 lbs. necessary to change out belt rollers.

Given the underground mining environment, the only possible accommodation is to provide help for this employee when changing out belt rollers. Providing help could be accomplished either by allowing the disabled individual to call another person to help him when a

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85. The Technical Assistance Manual cautions employers not to put the doctor in the position of making employment decisions or determining what accommodations to provide. It suggests that the doctor's role is to advise employers concerning an individual's abilities, limitations, and ability to comply with the employer's health and safety requirements. In addition, in the case of direct threats, the Manual states that "[t]he employer should not rely only on a doctor's opinion, but on the best available objective evidence," including experience of the individual in other jobs, and opinions of rehabilitation specialists and doctors with expertise concerning the particular disability. TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at VI-9 to VI-10.

change is required or by switching the employee's job to another shift or location where help is readily available.

During day shift, another worker would not always be available to help the disabled individual whenever he needed to change out a belt roller or otherwise lift 100 lbs. Consequently, the employer decides to accommodate the individual by offering to move him to the midnight shift, a regular maintenance shift where he would always be working with other people who could help him in changing out belt rollers and other heavy lifting. The employee accepts the accommodation.

## 2. A Shuttle Car Operator With An Injured Neck

A shuttle car operator who has been off work with a severe neck injury requests an accommodation to eliminate jarring and vibration that occurs when the shuttle car is in operation. The employer has determined that an essential function of the job is operating the shuttle car from the operator's compartment, since shuttle cars cannot be operated by remote control. Prior to the employee's return to work, an independent medical examination determines that moderate to heavy vibrations, such as those encountered in operating a shuttle car, would re-injure the employee's neck and present a direct threat to the employee's health. The employer investigates the possibility of equipment modifications to eliminate vibrations within the shuttle car, but determines they are impossible.

In this case, there is no operational accommodation that can be made since the disabled person cannot perform the most essential function of the job of shuttle car operator. However, since the disabled individual is an existing employee, the employer must consider transferring him to a vacant position (at that position's pay level). The employer must determine whether any vacant positions exist and whether the disabled individual is qualified to perform those jobs with or without an accommodation. If there is an available position for which the individual is qualified, the transfer must be made.

## VII. CONCLUSION

In light of the high rate of employment discrimination claims being filed under the ADA, as well as the prevalence of disabling injuries in the coal mining industry, coal operators are likely to face a broad range of new challenges under the Act. Unlike other civil rights statutes that simply prohibit employers from discriminating against protected classes of individuals, the ADA requires careful analysis by employers to determine who is protected, whether they can perform the job with or without reasonable accommodations, and which accommodations are required. The answers to these questions will depend upon the facts of the particular case, and coal operators should take steps to assure that they carefully investigate and consider *all* of the relevant facts when making these determinations. Such careful decision-making and planning, along with a close watch on the EEOC's regulatory guidance and developments within the courts, should enable coal operators and their employees to successfully meet the challenge that the ADA presents at the mines.