MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

MCAD Guidelines
Employment Discrimination on the Basis of Handicap

I. Introduction

In 1983, the Massachusetts Legislature amended the Fair Employment Practices Law to prohibit discrimination in employment on the basis of handicap.[1] These guidelines are intended to assist employers, labor organizations, employment agencies and persons with handicaps, and their lawyers, in understanding what employment practices are lawful or unlawful and what steps must be taken to accommodate handicapped persons. The standards governing employment practices with regard to handicapped persons are part of the statutory and regulatory framework governing fair employment practices under Mass. Gen. L. ch. 151B and Mass. Regs. Code tit. 804, § 3.00 et. seq. These guidelines are issued pursuant to Mass. Gen. L. ch. 151B, section 2.[2]

II. Definitions

A. Handicapped Person

1. Statutory Definition

Chapter 151B defines a "handicapped person" as any person who "(a) [has] a physical or mental impairment which substantially limits one or more major life activities . . . (b) [has] a record of such impairment; or (c) [is] regarded as having such impairment." Mass. Gen. L. ch. 151B, sections 1(16), (17).

2. Impairment

An impairment is a physiological disorder affecting one or more of a number of body systems, or a mental or psychological disorder. The following conditions, for example, are not impairments: environmental, cultural, and economic disadvantages; homosexuality, bisexuality and other sexual orientation; normal pregnancy; personality traits that are not caused by mental or psychological

---

[1] The Massachusetts Commission Against Discrimination ("MCAD" or "the Commission") understands that the words "disabled" and "disability" are the more common and accepted parlance than the words "handicapped" and "handicap." The word "handicap," however, is utilized in the governing statute and regulations. See Mass. Gen. L. ch. 151B (1996); Mass. Regs. Code tit. 804 S 3.00 et. seq. (1995). These governing authorities are quoted throughout these Guidelines. These Guidelines will utilize the words "handicap," "handicapped," "disability" and "disabled."

[2] These guidelines will not answer every question concerning application of the law against employment discrimination on the basis of handicap. This commission exists to enforce Mass. Gen. L. ch. 151B and is not bound by federal law. However, "the Federal guidelines can be used to guide Massachusetts in interpreting G.L. c. 151B." LaBonte v. Hutchins & Wheeler, 424 Mass. 813, 823 n. 13 (1997). Sources of guidance under analogous federal law include: the Americans with Disabilities Act, 42 U.S.C. S 12101 et. Seq. (1995); the Rehabilitation Act of 1973, 29 U.S.C. SS706, 791-794 (1994); US Equal Employment Opportunity Commission Regulations: Equal Employment Opportunity for Individuals With Disabilities, 29 CFR S 1630 (1997); EEOC Interpretive Guidance on Title I (Equal Employment Provisions) of the Americans with Disabilities Act, 29 CFR app. S 1630; US EQUAL EMPLOYMENT OOPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON ADA TITLE I [hereinafter EEOC TITLE I MANUAL]; EEOC Enforcement Guidance On the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice Number 915.002, 3-25-97; EEOC Enforcement Guidance on Workers' Compensation and the ADA, EEOC Notice Number 915.002, 9-3-96; EEOC Enforcement Guidance on Pre-employment Inquiries Under the Americans with Disabilities Act, EEOC Notice Number 915.002, 10-18-95.

disorders; normal deviations in height, weight, or strength; the current, illegal use of a controlled substance, or the nondependent use of alcohol.

3. Record of Impairment

A person is considered to be "handicapped" if s/he has a past record or medical history of a physical or mental impairment that substantially limited one or more major life activities, even though the impairment may no longer exist. For example, a person who was treated for cancer five years earlier but who has been cancer-free since that time may still be entitled to protection under the law as a "handicapped person."

4. Regarded as Having an Impairment/Perceived Handicaps

An individual is considered to be "handicapped," even if s/he has no physical or mental impairment that substantially limits one or more major life activities, if the individual is regarded as having such an impairment. For example, a person who has high blood pressure or a spinal defect or is morbidly obese might have no functional impairments, but may be "handicapped" if their employer regards such condition as a health risk or believes that hiring him/her will increase employee group insurance rates.

5. Major Life Activities

The term "major life activities" includes, but is not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Mass. Gen. L. ch. 151B, section 1(20). Other examples of major life activities include sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others.

6. Substantially Limits

An impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity. The determination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment. An impairment substantially limits an individual's ability to work if it prevents or significantly restricts the individual from performing a class of jobs or a broad range of jobs in various classes. Chronic or episodic disorders that are substantially limiting may be handicaps; isolated medical problems (such as a broken arm that heals normally) and illnesses of short duration usually are not handicaps.[3]

7. Mitigating Measures

The existence of an impairment is generally determined without regard to whether its effect can be mitigated by measures such as medication, auxiliary aids or prosthetic devices. For example, an employee who is legally blind, but whose vision is correctable with glasses, may be considered "handicapped" because his impairment substantially limits his ability to perform the major life activity of seeing. Similarly, an employee with a serious mental illness that affects her ability to work in a broad range of jobs may be considered "handicapped," even if the symptoms of the mental illness can be mitigated or eliminated by medication.

8. Illnesses

Individuals with illnesses, such as hepatitis, tuberculosis or AIDS, may be considered handicapped. An

[3] But see Mass. Gen. L. ch. 152, S 75B (1988) (workers' compensation statute providing individuals who suffer certain on-the-job injuries are handicapped individuals for purposes of ch. 151B).

employer may not discriminate against a qualified handicapped individual simply because of fears of contracting a particular illness or because of customers' and/or coworkers' bias against individuals with a particular disease. An employer may have a defense if employing an individual with an illness poses a reasonable probability of substantial harm to the individual or to others.

B. Qualified Handicapped Person/Essential Functions

A "qualified handicapped person" is a handicapped person who can perform the essential functions of a job with or without reasonable accommodation. The law protects qualified handicapped persons. The law does not require an employer to hire, promote or retain a handicapped person who cannot perform the essential functions of the job. The "essential functions" of the job are those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job. Put another way, the "essential functions" are those that are not incidental or tangential to the job in question. Several considerations bear on whether particular job functions are or are not essential.

First, functions that are identified as part of a job but which are in fact rarely or never performed will not likely be considered essential. Second, in determining whether a job function is essential, the Commission will ask whether removing a given function from the job would fundamentally change the nature of the job in question. Thus, for example, while a firefighter may only be called upon to withstand the intense heat of flames on very rare occasions, removing this function from his/her job would fundamentally change the nature of the job. Other considerations may also be taken into account in determining whether or not certain functions are essential to the job. Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a timely written job description, this description shall be considered evidence of the essential functions of the job, but will not be binding.

Additional considerations bearing on whether a function is essential include the amount of time spent on the job performing the function, the terms of a collective bargaining agreement, the work experience of past incumbents in the job, and the current work experience of incumbents in similar jobs.

C. Reasonable Accommodation

A "reasonable accommodation" is any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved[4] and to enjoy equal terms, conditions and benefits of employment.

The duty to provide reasonable accommodation applies to all aspects of employment, and is intended to reduce work-related barriers that are related to an individual's handicap. Reasonable accommodations apply to workplace modifications that specifically assist an individual in performing the duties of a particular job, and do not ordinarily apply to accommodations that an individual may request for use outside of the work context.

In determining the type of reasonable accommodation required for an applicant or employee, the employer need not provide the best accommodation available, or the accommodation specifically requested by the individual with the handicap. Rather, the employer must provide an accommodation

[4] Mass. Gen. L. ch. 151B, S 4(16). Failure to reassign an individual to a vacant position for which s/he is qualified may be evidence of discriminatory animus.

(at its own expense) that is effective for its purpose. Types of accommodation that may, depending upon the circumstances, be considered reasonable include, but are not limited to, the following:

1. making job facilities accessible to and equally usable by a handicapped person;
2. modifying work schedules;
3. modifying when and how an essential job function is performed;
4. obtaining or modifying adaptive job equipment or devices;
5. reassigning nonessential job functions;
6. modifying methods of supervision or evaluation;
7. modifying of tests, examinations, selection devices and/or the manner in which the same are administered;
8. permitting performance of job functions at alternative locations;
9. allowing time off for medical reasons; and
10. reassignment or transfer to a vacant position.[5]

An employer is obligated to provide reasonable accommodation only to the known handicaps of an applicant or employee. An employer need not offer or provide reasonable accommodation where it has no knowledge or reason to know of the individual's need for an accommodation. Unless a handicap and the need for accommodation are known to the employer, it is the responsibility of the individual to inform the employer that an accommodation is needed. If a person with a handicap requests but cannot suggest an appropriate accommodation, the employer and the individual should work together to identify one. The employer may direct the employee to provide reasonable documentation from a health care provider of the existence of a handicap and the need for reasonable accommodation.

D. Undue Hardship

The law provides that an employer is obligated to provide reasonable accommodation to an individual's handicap, unless the employer can demonstrate that the accommodation required would pose an "undue hardship" to its business. Mass. Gen. L. ch. 151B, section 4(16). Factors to be considered in determining whether a particular accommodation poses an undue hardship include:

1. the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;
2. the type of the employer's operation, including the composition and structure of the employer's workforce; and
3. the nature and costs of the accommodation needed.

III. DISCRIMINATION IN EMPLOYMENT CRITERIA

A. Functional Relation

To comply with the Fair Employment Practices Law, Mass. Gen. L. ch. 151B, employment criteria must be designed to measure only those abilities necessary to perform the essential functions of a job. An employer should examine its employment criteria to determine whether they actually measure abilities which are essential to the performance of the particular job for which applicants are being screened. Criteria which are not essential should be dropped.

B. Job Descriptions

Job descriptions should include only those functions that the employee may reasonably be expected to

[5] Reassignment or transfer to a vacant position is usually only a reasonable accommodation where it involves a change in work site or location within the same job category.

perform during his/her employment. The job description may indicate whether particular physical or mental abilities are required, such as lifting or carrying heavy objects. Employers should periodically review job descriptions, as the nature of the job may change over time.

C. Uniformity

An employer must apply the same set of criteria to all applicants for a particular position.

D. Test Selection and Adaptation

Like other employment criteria, tests must measure only those abilities which are necessary to perform essential job functions. An employer should determine whether the tests it uses actually predict an individual's ability to perform the essential functions of the job and modify or discard those tests which test nonessential abilities. If the tests used screen out or tend to screen out persons with handicaps, the employer must prove that the tests are job-related and consistent with business necessity. An employer should consider that manual or speech impairments may affect the individual's performance on a particular type of test. For example, a person with a speech impediment may be qualified to perform the essential functions of a job which does not require clear speech. An oral test would not accurately predict the applicant's ability to perform the job.

Employers must make reasonable accommodations when necessary to ensure that tests actually measure the abilities they are intended to measure. Such reasonable accommodations may include but are not limited to the following:

1. providing of extra time;
2. providing of a reader or interpreter;
3. providing a tape recorded test; and
4. allowing test answers to be recorded in alternative ways

IV. PREEMPLOYMENT INQUIRIES

A. In General

Employers may not ask applicants about handicaps or disabilities until after the applicant has been given a conditional job offer. The purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of his/her medical or disability-related condition. Employers may tell applicants what is involved in the hiring process and ask whether they will need a reasonable accommodation to take any tests, fill out application forms, or do anything else typically required of applicants.

B. Prohibited Inquiries

A disability-related question is any question that is likely to elicit information about a handicap or disability of the job applicant. Employers may not ask disability questions during the pre-employment process, whether on a job application form, in a job interview, or in the employer's background or reference checks. An employer may not ask third parties, such as former supervisors or references, anything which it is not permitted to ask the applicant.

It is illegal for an employer to ask an applicant whether s/he has a disability or needs a reasonable accommodation to perform the job. In addition, questions about any of the following subjects are off limits during the pre-employment part of the hiring process because they are likely to elicit information related to a handicap or disability:

1. treatment for medical conditions or diseases;
2. hospitalizations;
3. treatment by a psychologist or a psychiatrist for a mental condition;
4. major illnesses;
5. absences from work due to illness; and
6. physical conditions.

In addition, questions about whether or not someone is impaired in a major life activity are likely to elicit information about a disability.[6] Therefore, such questions are prohibited unless they are specifically targeted to specific job functions and fall within the parameters described in Section C below.

Questions about an applicant's workers' compensation or health insurance history are also prohibited because they are often related to an individual's impairment and are likely to elicit information about a disability. It is discriminatory for an employer to reject an applicant because of a fear that he/she may increase workers' compensation or health insurance costs.

C. Permissible Inquiries

An employer may always ask a job applicant about his/her ability to perform specific job functions. For example, asking "Can you perform any or all of these job functions?" is permissible. An employer can also ask about the applicant's non-medical qualifications and skills, such as education, work history or required licenses. In general, all pre-employment questions should focus on an applicant's ability to do the job, not on a disability or handicap.

An employer can also ask applicants to describe or demonstrate how they would perform specific tasks, with or without an accommodation, provided that all applicants in the same job category are asked to do this. For example, if the job requires heavy lifting, the employer can ask all applicants to demonstrate or describe how they would lift the weight. If the applicant needs a reasonable accommodation to do the demonstration, the employer can either provide the accommodation or ask the applicant to describe how s/he would perform the task.

It is permissible for employers to ask whether an applicant can meet the attendance requirements for the job and to inquire about the applicant's attendance record at a former job. However, an employer cannot ask how often an applicant was absent from a former job due to illness, as that question is likely to elicit disability-related information.

D. Questions About Drug Use

Questions about the use of legal and illegal drugs are complicated. With regard to the current use of legal drugs, such questions are likely to elicit information about a disability and are prohibited. For example, asking an applicant to list all currently prescribed drugs may reveal that s/he is using AZT or insulin, indicating that the applicant may be disabled. An exception would exist if the employer has administered a test for the current use of illegal drugs and an applicant tests positive. In that case, the employer may ask about the use of legal drugs in order to seek an explanation for the positive test result.

An employer may inquire about the current illegal use of drugs, provided that the questions are not likely to elicit information about past drug addiction which is a covered disability. For example, it is

[6] See supra Section II (A)(5) (defining a "major life activity").

permissible to ask whether the applicant has ever engaged in the use of illegal drugs and when was the last time. However, it is prohibited to ask if the applicant has ever been addicted to illegal drugs or treated for drug abuse. Additional and broader questions may be permitted depending on the circumstances and occupation.

E. Chart

EMPLOYER MAY ASK	EMPLOYER MAY NOT ASK
Can you perform any or all of these specific job functions? Please describe or demonstrate how you would perform a specific task. (This request should be asked of all applicants unless there is an obvious handicap or disability related to a job function. The employer may need to provide reasonable accommodation for the demonstration.) Can you meet the attendance requirements? What was your attendance record at your prior place of employment? Do you currently engage in the illegal use of drugs? An employer may invite applicants to voluntarily disclose their handicap or disability for purposes of assisting the employer in its affirmative action efforts. An employer should make it clear that the information will be used solely in connection with its affirmative action efforts, will be kept confidential, and that nondisclosure will not subject the applicant to adverse treatment.	Do you have a handicap/disability? Do you have any job-related handicaps/ limitations that would prevent you from doing the job? Have you ever received Workers' Compensation? Have you ever been hospitalized/treated for medical or mental conditions? Have you ever been addicted to illegal drugs or treated for drug abuse/alcoholism? Have you ever been absent from work due to illness? Do you have AIDS? An employer may not inquire as to the nature, severity, treatment or prognosis of an obvious handicap or disability or of a hidden disability or handicap voluntarily disclosed by the applicant.

V. MEDICAL EXAMINATIONS AND/OR INQUIRIES

A. General

An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information. Once a conditional job offer is made, the employer may conduct a medical examination (and/or inquiry) and may condition a job offer on the satisfactory result of a post-offer medical examination (and/or inquiry).

A medical examination is a procedure or test that seeks information about an individual's physical or

mental impairments or health.[7] The following questions are helpful in determining whether a procedure or test is "medical":

1. Is it administered by a health care professional or someone trained by a health care professional?
2. Are the results interpreted by a health care professional or someone trained by a health care professional?
3. Is it designed to reveal an impairment or physical or mental health?
4. Is the employer trying to determine the prospective employee's physical or mental health or impairment?
5. Is it invasive?
6. Does it measure a prospective employee's performance of a task (hence, not a medical exam) or does it measure the applicant's physiological responses to performing the task (like blood pressure or heart rate - hence a medical exam)?
7. Is it normally given in a medical setting?
8. Is medical equipment used?[8]

B. Post-Offer Medical Examinations

Under Mass. Gen. L. ch. 151B, an employer may require a medical examination (and/or inquiry) after making a job offer and may condition an offer of employment to a job applicant on the results of such examination (and/or inquiry). Such an examination should be conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job. An employer may only conduct such an examination (and/or inquiry) if all entering employees in the same job category are subjected to such an examination (and/or inquiry), not merely those with known disabilities or those whom the employer believes may have a disability.[9]

Under Mass. Gen. L. ch. 151B, if an individual is not hired because a post-offer medical examination (and/or inquiry) reveals a disability, the exclusionary criteria used must be job-related, consistent with business necessity[10] and necessary for the performance of the essential functions of the job sought.[11] A post-offer medical examination (and/or inquiry) may, for example, disqualify an applicant who would pose a "direct threat" to health or safety.[12] However, an employer may not disqualify a handicapped individual who is currently able to perform the essential functions of the job sought, with or without reasonable accommodations, because of a speculation that the handicap may cause a risk of injury in the future.[13] A medical examination (and/or inquiry) may also disqualify an applicant who is unable to

---

[7] EEOC Guidance on Pre-employment Inquiries Under the Americans with Disabilities Act, 5 Empl. Discrim. Rep. (BNA) 439, 443 (Oct. 18, 1995).

[8] See id. (listing factors).

[9] See 29 C.F.R. S 1630.14(b).

[10] Mass. Gen. L. ch.151B, S 4(16) provides, in pertinent part: "Physical or mental job qualification requirement with respect to hiring... shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job." See also 29 C.F.R. S 1630.14(b)(3); EEOC Title I Manual S 6.1.

[11] Id. Mass. Gen. L. ch.151B, S 4(16) states, in pertinent part: An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

[12] See EEOC Title I Manual S 6.1; see also Mass. Gen. L. ch.151B, S 4(16).

[13] EEOC Title I Manual S 6.1.

perform the essential functions of the job sought, with or without reasonable accommodations.[14] The employer must further show that no reasonable accommodation was available that would enable this individual to perform the essential job functions, or that accommodation would impose an undue hardship.

C. The Doctor's Role

A doctor or health care provider who conducts a medical examination (and/or inquiry) for an employer should not be responsible for making employment decisions or deciding whether or not a reasonable accommodation can or should be made.[15] The employer is responsible for such decisions. The doctor or other health care provider's role in this process is an advisory one, limited to advising the employer about the job applicant's functional abilities and limitations in relation to specific job functions, and about whether or not the job applicant meets the employer's health and safety requirements.[16]

Employers should provide such doctors or other health care providers with specific information about the physical and mental requirements for the job and about the employer's health and safety requirements.[17] Employers should further inform such doctors or health care providers that any recommendations or conclusions made by such doctors or health care providers relating to the job applicant should focus on the following two issues: (1) whether the applicant is able to perform the job, with or without reasonable accommodation; and (2) whether the applicant can perform the job without posing a direct threat to the health or safety of the applicant or others.[18]

D. Tests Or Examinations Permitted Before Extending A Job Offer To A Prospective Employee

Under Mass. Gen. L. ch. 151B, prospective employees can always be asked to complete "tests" that are non-medical in nature and measure whether the applicant can perform actual job functions. For example, prospective police officers may be asked to participate in a physical agility test, like running an obstacle course. Because this test measures the applicant's ability to perform the job and is not a medical examination, it is permitted at the pre-offer state. An employer can ask prospective employees to have a health care professional state whether they can safely perform agility or other permissible tests before commencing the tests.

E. Confidentiality

Mass. Gen. L. ch. 151B does not contain any specific language requiring confidentiality of information obtained by an employer from medical examinations (and/or inquiries). Under Federal law, however, such information must be kept apart from an employee's personnel files as a separate, confidential medical record, even information which the prospective employee voluntarily tells the employer. In order to comply with Federal law, such confidential information should only be disclosed to supervisors, managers, first aid and safety personnel, state officials and insurance companies in accordance with the provisions set forth in Section VI(D) below. Further, such confidential information should remain confidential even if the prospective employee isn't hired. If a hiring occurs, such confidential information should remain confidential even after the individual is no longer an employee.

---

[14] See Mass. Gen. L. ch.151B, S 4(16).
[15] See EEOC Title I Manual S 6.4.
[16] *Id*
[17] *Id*
[18] *Id*

F. Post-Hire Medical Examinations and Inquiries

Mass. Gen. L. ch. 151B does not contain any specific language distinguishing post-offer medical examinations (and/or inquiries) from post-hire medical examinations (and/or inquiries). Under Federal law, however, clear distinctions exist between what can be required by an employer in a post-offer, pre-employment situation (as discussed above) and medical examinations required by employers when the employee in question is a current employee or is an employee coming back to work after a leave of absence.[19] In order to comply with Federal law, post-hire medical examinations (and/or inquiries) must be job related and consistent with business necessity.[20] For example, employers may conduct medical examinations (and/or make inquiries) concerning the ability of the employee to perform job-related functions, or where there is evidence of a job performance or safety problem.[21] Employers may also conduct such examinations (and/or make inquiries) as required by Federal law,[22] and may conduct voluntary examinations (and/or make inquiries) that are part of an employee health program.[23]

VI. POST-HIRE INQUIRIES

A. Federal and State Law

The Americans with Disabilities Act (ADA) expressly prohibits a covered employer from making inquiries of an employee as to whether such employee is an individual with a disability, or as to the nature and severity of the disability, unless the inquiry is shown to be job-related and consistent with business necessity.[24] The Massachusetts statute and regulations, by contrast, do not expressly prohibit post-hire inquires. Such inquiries, however, may be evidence of discrimination. The EEOC interprets the ADA's requirements concerning inquiries and medical examinations of employees as being more stringent that those affecting applicants.[25]

B. Circumstances Justifying Inquiry (State or Federal)

1. **Job-Related Inquiries Consistent With Business Necessity**

   An employer may inquire of an employee as to whether s/he has a handicap or disability, and may ask the employee about the nature and extent of the handicap or disability, if the inquiry is job-related and consistent with business necessity. An employer may also make inquiries into the ability of an employee to perform any job-related functions. In all instances, the purpose of the inquiry must be one of business necessity, and the scope of the inquiry must be limited to job-related functions.[26] Examples of circumstances justifying such inquiry by the employer may include, but are not limited to, the following:

   a. the employer becomes aware of evidence of a direct threat to health or safety that it reasonably believes may be caused by an employee's handicap or disability;

---

[19] For example, an employer may require an employee coming back to work following a leave of absence to submit to a medical examination without first extending a conditional offer of employment.
[20] See 29 C.F.R. S 1630.14(c).
[21] See EEOC Title I Manual S 6.1.
[22] *Id.*
[23] *Id. See infra* Section VI.
[24] 42 U.S.C. S 12112(d)(4)(A); 29 C.F.R. SS 1630.13, 14.
[25] US Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions of the ADA S 6.6 (Jan. 1992) [hereinafter EEOC Technical Assistance Manual]. *See supra* Section V.
[26] 29 C.F.R. S 1630.14(c).

b. the employer becomes aware of evidence of problems related to job performance (e.g., falling asleep on the job, excessive absenteeism, performance problems); or
c. an employee wishes to return to work after an injury or illness and the employer wants to determine the employee's ability to perform the essential functions of the job without risk of harm to the employee or others.[27]

2. Inquiry Necessary for Reasonable Accommodation

Medical information may be needed to determine whether the employee has a handicap or disability and is entitled to an accommodation, and if so, to help identify an effective accommodation. An employer is entitled to conduct appropriately focused inquiries in this context.

Medical inquiries related to an employee's handicap or disability and functional limitations may include consultations with knowledgeable professional sources, such as occupational and physical therapists, rehabilitation specialists, and organizations with expertise in adaptations for specific handicaps or disabilities.[28]

3. Inquiries Required By Law

Employers may make inquiries in connection with periodic examinations and other medical screening and monitoring required by federal, state or local laws, as long as the inquiry is job-related and consistent with business necessity. If the federal, state or local law does not impose this standard for inquiry, the inquiry may not be permissible.

Examples of permissible inquiries include those made in connection with medical examinations and monitoring required by:

a. the US Department of Transportation for interstate bus and truck drivers, railroad engineers, airline pilots and air controllers;
b. the Occupational Safety and Health Act;
c. the Federal Mine Health and Safety Act;
d. Other statutes that require employees exposed to toxic or hazardous substances to be medically monitored at specific intervals.[29]

4. Voluntary Wellness and Health Screening Programs

As part of an employee health program offered by the Employer, an employer may conduct voluntary inquiries, just as it may conduct voluntary medical examinations.[30] Examples of such programs include medical screening for high blood pressure, weight control and cancer detection.[31]

C. Information May Not Be Used to Discriminate

An employer may not use disability-related information to discriminate against the employee in any employment practice, including but not limited to hiring, compensation, insurance and other benefits, assignment, training, evaluation, advancement opportunity, promotion, discipline and discharge.

---

[27] 29 C.F.R. S 1630.14(c). These examples are discussed in EEOC Technical Assistance Manual S 6.6.
[28] *See id*.
[29] *See id*. (discussing these examples).
[30] 42 U.S.C. S 12112(d)(4)(B); 29 C.F.R. S 1630.14(d).
[31] *See* EEOC Technical Assistance Manual S 6.6.

An employer may not do anything indirectly through contractual relationships (including labor union contracts) or other means which it cannot do directly.

D. Confidentiality

Under Federal law, any written information that employers obtain in the course of permissible inquiries shall be collected and maintained on separate forms and in separate medical files (not the employee's personnel file) and is to be treated as a confidential medical record.[32] All medical-related information must be kept confidential with the following exceptions:

1. supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations;
2. first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in case of fire or other evacuations;
3. government officials investigating compliance with the ADA and other federal and state laws prohibiting discrimination on the basis of disability or handicap should be provided relevant information on request;
4. Relevant information may be provided to state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws; or
5. Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees.[33]

Chapter 151B does not specifically require confidentiality; however, failure to maintain the confidentiality of medical information may be evidence of discriminatory motive or otherwise unlawful.

VII. PROVISION OF REASONABLE ACCOMMODATION[34]

An employer may not refuse to provide a qualified handicapped person with reasonable accommodation unless the employer can demonstrate that the accommodation required to be made would impose an undue hardship to the employer's business.

The Commission encourages an open and ongoing dialogue between employees and employers about the provision of reasonable accommodation. The goal is to accommodate the needs of qualified handicapped individuals, while satisfying the legitimate business interests of employers. For example, in the case of an employee who needs weekly medical treatment, the employer and employee could discuss the convenient scheduling of such treatment, or could work together to arrange for treatment during times other than regular business hours.

A. Notice and Duty

An employer should notify all applicants and employees of its obligation to provide reasonable accommodation. Further, an employer should notify employees that an applicant/employee may request a reasonable accommodation if s/he is handicapped and requires an accommodation.

The employer's duty to provide reasonable accommodation is triggered if an employee identifies him/herself as a qualified handicapped person and requests reasonable accommodation. Where an employee has not requested reasonable accommodation, an employer's duty to offer reasonable

---

[32] 42 U.S.C. S 12112(d)(4)(C); 29 C.F.R. S 1630.14(d).
[33] 29 C.F.R. S 1630.14(d); see EEOC Technical Assistance Manual S 6.5.
[34] *See supra* Section II(C).

accommodation may still be triggered if the employer knows or should know that the employee is handicapped and requires reasonable accommodation. An employer should know that an employee is handicapped and requires reasonable accommodation if a reasonable person in the employer's position would know the employee was handicapped and required reasonable accommodation. If an employee with a disability about which the employee knows or should know is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.

B. Required Accommodation

Generally, reasonable accommodation for an applicant is a modification or adjustment to the application process that enables a qualified handicapped applicant to be considered for the desired position. Generally, reasonable accommodation for a current employee is a modification or adjustment to the work environment, enabling a qualified handicapped person to perform the essential functions of that position, or enabling handicapped employees to enjoy the same privileges and benefits of employment as are enjoyed by non-handicapped employees.

Undue Hardship

An employer must provide reasonable accommodation unless it can demonstrate that the accommodation required would impose an undue hardship to the employer's business. Whether accommodation imposes an undue hardship on a business requires a particularized analysis and balancing of the handicap, the accommodation at issue, and the nature of the employer's business. In determining whether accommodation would pose an undue hardship to the employer's business, the following factors may be considered:

1. the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;
2. the type of the employer's operation, including the composition and structure of the employer's workforce; and
3. the nature and costs of the accommodation needed.

If a handicapped employee/applicant proves that s/he is capable of performing the essential functions of a job with reasonable accommodation, the employer bears the burden of proving that the accommodation at issue would create an undue hardship. If a particular accommodation would pose an undue hardship, the employer should try to identify another accommodation that would not pose such a hardship.

Once an employer is on notice that a qualified handicapped employee requires accommodation to perform the essential functions of his/her job, the employer should initiate an informal interactive process with the qualified individual in need of accommodation. This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations.

VIII. AFFIRMATIVE ACTION PROGRAMS

An employer may make an inquiry concerning an applicant's handicap when s/he "invites applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action

efforts."[35]

In any questionnaire used for this purpose, an employer must state clearly the following:

1. the information is intended for use in its affirmative action efforts only;
2. the information is being requested on a voluntary basis;
3. refusal to provide this information will not subject the applicant to any adverse treatment;
4. the information will be kept confidential; and
5. the information will be kept separate from the applicant's personnel records, if hired.

Information obtained in inquiries made as part of an affirmative action program may be revealed to government officials investigating compliance with the law.

IX. PROVING HANDICAP DISCRIMINATION

A. Burdens of Proof

The Complainant is responsible for proving by a preponderance of the evidence that the Respondent violated a provision of the handicap discrimination law. Proof by a preponderance is defined as establishing as more likely than not the existence or nonexistence of a fact.

There are two common scenarios that arise in handicap claims: (1) where the motive for the adverse employment action is not disputed, and (2) where the motive is disputed. Frameworks for addressing these two types of claims are discussed below. In addition, a third framework is utilized when an issue arises regarding whether or not an employer should have provided a reasonable accommodation.

The framework set forth below in Section IX(A)(1) applies when the motive for an adverse employment action is not at issue, and the parties agree as to why the action occurred. For example, a physical therapist working in the rehabilitation unit of a hospital injured his back, and was unable to perform repeated stooping or heavy lifting. The hospital terminated the physical therapist because it believed he could no longer perform the essential functions of his job, which included assisting and transferring patients. In this case, both the therapist and the hospital agree that the back injury motivated the termination decision, and the analysis focuses upon whether such consideration of the back injury was appropriate and justified under the circumstances. Specifically, the analysis will highlight whether repeated stooping or heavy lifting are essential functions of the job, and whether the hospital could have provided a reasonable accommodation that would have permitted the therapist to perform these functions in light of his handicap or disability.

In contrast, the framework set forth below in Section IX(A)(2) applies when the motive for an adverse employment action is at issue, and the parties do not agree why the action occurred. For example, an engineer was terminated during a reduction in force for the stated reason that she had poorer performance evaluations than her peers. The engineer disagrees that she was terminated for performance reasons, alleging that the real reason was her mental handicap, clinical depression.

Finally, the framework described below in Section IX(A)(3) applies when an employee claims that an employer failed to provide reasonable accommodation. For example, a social worker may bring a claim alleging that an employer refused to provide her with a reasonable accommodation, specifically an extended leave of absence, when s/he was suffering from chronic fatigue syndrome.

---

[35] Mass. Gen. L. ch. 151B, S 4(16).

A common type of handicap discrimination case involves the allegation that an employer terminated an employee because of her handicap. In such cases, the Complainant must prove that s/he was a qualified handicapped individual who was terminated because of her handicap. The following discussion of the burdens of proof will assume allegations of discriminatory termination. However the same burdens of proof may be utilized, with minor adjustments, to address other adverse employment actions, such as demotion, failure to promote, or failure to hire.

1. **Analysis when the motive for an adverse employment action is not at issue.**
   In cases where the employee has been terminated expressly because of the handicap, and the employer's reason for terminating the employee is not in dispute, a burden shifting framework is used to determine whether there has been a violation.[36] First, the Complainant must prove her prima facie case, i.e., that s/he was a qualified handicapped person who was terminated because of her handicap.[37]

   If Complainant establishes her prima facie case, the Respondent is given the burden of producing credible evidence that the Complainant was not a qualified handicapped person or that her rejection was for reasons other than her handicap.[38] If the Respondent presents evidence that Complainant was not a qualified handicapped person, then Complainant's final burden is to rebut Respondent's evidence. The Complainant must prove that the Respondent's reasons for termination are based upon misconceptions or unfounded factual conclusions, and that the reasons articulated for the termination encompass unjustified consideration of the handicap.[39] If the Complainant succeeds in this burden, s/he will have demonstrated a violation of the handicap discrimination law, subject to a number of possible defenses to be described in Section IX(B) below.

2. **Analysis where motive is at issue, and the parties disagree over the real reason for the adverse employment decision**
   In cases in which there is material dispute as to the reasons why the employee was terminated, the Complainant may satisfy her burden of proof by providing direct evidence of a discriminatory termination. One example of direct evidence might include a comment from a supervisor to the effect that handicap was the motivating factor in the decision to terminate the Complainant.

   In the absence of direct evidence, the Complainant may utilize circumstantial evidence, pursuant to a second burden-shifting framework.[40] This framework, patterned on the case of McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973), provides an inferential method of proving that the Complainant would not have been terminated but for the handicap.

   Under the McDonnell Douglas analysis, the Complainant must first establish a prima facie case. The

---

[36] Von Dwornick v. Boston Flower Shoppe, Inc., 15 M.D.L.R. 1209, 1225 (1993); McKinley v. Boston Harbor Hotel, 14 M.D.L.R. 1226, 1234 (1992); Ryan v. Town of Lunenberg, 11 M.D.L.R. 1215, 1238 (1989); see also Jasany v. US Postal Service, 755 F.2d 1244, 1250-51 n.5 (6th Cir. 1985).
[37] George v. Skyway Cleaners, 17 M.D.L.R. 1001, 1010 (1995).
[38] If the respondent attempts to meet its burden by showing that termination was for reasons other than handicap, the case should be analyzed by the mixed motive framework, or the McDonnell Douglas framework discussed below. *See* Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 11 (1998).
[39] Dartt, 427 Mass. at 11-12; Yates v. Mass-C E.O.P.S., 17 M.D.L.R. 1503, 1511 (1995); Ryan, 11 M.D.L.R. At 1239.
[40] Von Dwornick, 15 M.D.L.R. At 1225; McKinley, 14 M.D.L.R. At 1234.

> prima facie case may vary, depending on the circumstances involved. One example of a prima facie case is as follows: [a] plaintiff must present credible evidence that (1) he is handicapped within the meaning of the statute; (2) he is qualified to perform the essential functions of the job with or without reasonable accommodation; (3) he was terminated or otherwise subject to an adverse action by his employer; and (4) the position he had occupied remained open and the employer sought to fill it.[41]

If the Complainant establishes her prima facie case, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the termination, by providing credible evidence that the reason advanced is the real reason.[42] If the Respondent meets this burden of articulation and production, then the burden shifts back to the Complainant to demonstrate that the articulated reason was not the real reason for discharge.[43]

While the McDonnell Douglas framework will lead to a finding of discrimination if Complainant prevails (subject to various affirmative defenses described in Section IX(B) below), it should not be considered an exclusive mechanism for proving discrimination. Complainant should proffer the full range of direct and circumstantial evidence of discrimination available to her, in conjunction with the specific burdens set forth in the McDonnell Douglas framework.

For example, the Complainant could provide evidence of workplace harassment based on handicap, comments indicating that the handicap was perceived by the employer as an unwarranted expense or as a negative attribute, a record on the part of the employer of treating handicapped individuals worse than similarly situated non-handicapped individuals, or a practice on the part of the employer of asking illegal pre-employment inquiries relating to handicap. Likewise, the Respondent is free to present other evidence reflecting the absence of discrimination, including, for example, its practice of treating handicapped individuals fairly, its good record of hiring obviously handicapped individuals, and its good record of accommodating handicapped employees.

Complainant may succeed even if her termination was motivated only in part by unlawful consideration of handicap. Complainant need not prove that consideration of handicap was the sole reason for the discharge, but may recover where a combination of lawful and unlawful reasons motivated the discharge.

3. Failure to Provide Reasonable Accommodation

If an employee alleges that the employer failed to reasonably accommodate the employee's handicap, the following burdens apply. The Complainant must prove that (1) s/he was a qualified handicapped individual; (2) s/he needed a reasonable accommodation due to her handicap to perform her job; (3) the employer was aware of the handicap, and was aware that the employee needed reasonable accommodation to perform her job; (4) the employer was aware of a means to reasonably accommodate the handicap, or the employer breached a duty, if any, to undertake reasonable investigation of a means to reasonably accommodate the handicap; and (5) the employer failed to provide the employee the

---

[41] See Dartt, 427 Mass. At 2; Beal v. Board of Selectman of Hingham, 419 Mass. 535, 541 (1995)
[42] See Dartt, 427 Mass. At 11; Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995).
[43] See Blare, 419 Mass. At 442-443; Mortimer v. Atlas Distributing Co., Inc., 15 M.D.L.R. 1233, 1252 (1993); Von Dwornick, 15 M.D.L.R. At 1226; DeMears v. City of Chicopee, 13 M.D.L.R. 1365, 1379-80 (1991).

reasonable accommodation.[44]

If the Complainant prevails on these elements, the burden then falls upon the Respondent to prove that the reasonable accommodation would pose an undue hardship. Complainant may then rebut the Respondent's evidence that the reasonable accommodation would be an undue hardship.

B. Defenses to Handicap Discrimination Claims

There are a number of defenses to handicap discrimination claims, and in all cases, the employer is responsible for proving by a preponderance of the evidence facts that would support the defense.

1. Undue Hardship

An employer is not required to provide a reasonable accommodation that would impose an undue hardship on the employer's business. Whether a particular accommodation would pose an undue hardship should be determined on a case-by-case basis.[45]

2. Physical or Mental Job Qualification Requirement

A complainant must always prove that s/he is a qualified handicapped individual, capable of performing the essential functions of a job with or without reasonable accommodation. However, where an employer rejects an employee based upon specific physical or mental job qualification requirements (e.g., the ability to lift over forty pounds), the burden is on the employer to prove that the requirement is functionally related to the specific job or jobs for which the individual is being considered, and is consistent with the safe and lawful performance of the job.[46]

3. Direct Threat to Health or Safety

An employer may defend a decision to terminate or not hire a handicapped individual because there is a risk of future injury to the employee or others. In order to establish this defense, an employer must prove that there is a "reasonable probability of substantial harm" to the employee or others.[47]

Whether there is a risk of future injury should be determined on a case-by-case basis. To meet its burden, an employer must make an individualized factual inquiry, gather substantial information regarding the employee's individual work and medical history, and may not make a determination based upon a subjective evaluation or speculation as to risk, or except in cases of a very apparent nature, merely on medical reports. An increased risk of injury, without more, is insufficient to establish this defense.[48]

X. SPECIAL TOPICS

A. AIDS/HIV

An employer may not discriminate against persons with Acquired Immune Deficiency Syndrome (AIDS), who are HIV positive, or who are perceived to have or be at risk of having AIDS. Such persons

---

[44] See Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 25 (1st Cir. 1992); S. Churchill, *Reasonable Accommodation in the Workplace: A Shared Responsibility*, 74 Mass. L. Rev. 73, 75-76, 81 (1995).
[45] Mass. Gen. L. ch. 151B, S 4(16); Yates, 17 M.D.L.R. At 1514. *See supra* Sections II(D) and VII(C) (discussing factors that should be considered).
[46] Mass. Gen. L. ch. 151B, S 4(16).
[47] Ryan, 11 M.D.L.R. At 1241-42, citing Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985).
[48] Martinez v. Resource Recovery Sys., 16 M.D.L.R. 1589, 1603 (1994).

are entitled to all of the protections and practices which apply to handicapped employees described previously in these Guidelines.

An employer may not refuse to hire, to promote or otherwise discriminate against a qualified person who has AIDS/HIV, is perceived to have AIDS/HIV or is perceived to be at risk of having AIDS/HIV. Nor may an employer make pre-employment inquiry as to whether an applicant has AIDS/HIV or is at risk of having AIDS/HIV. An employer may not refuse to provide reasonable accommodation to qualified employees or applicants who have AIDS/HIV.

B. Absenteeism/Leaves of Absence for Handicapped Persons

A reasonable accommodation under Mass. Gen. L. ch. 151B, section 4(16) may include granting a leave of absence or permitting a modified work schedule. It may also include permitting the use of accrued paid leave or providing additional unpaid leave.[49]

A leave of absence is not a reasonable accommodation if it poses an undue hardship on the employer. In addition, frequent or prolonged absences may mean that the employee is not a "qualified individual" as defined in Mass. Gen. L. ch. 151B, section 1(16). Although an employer has a duty to provide reasonable accommodation, an employer is not required to disregard or waive an employee's inability to perform an essential function of the job in question.[50] It may be impossible to perform the essential functions of many jobs without regular attendance.[51] For example, a teacher who is required to give classroom instruction and spend time with students may not be a "qualified individual" if frequent absence prevents effective functioning in those capacities, regardless of his/her performance while actually at work.[52]

The possibility of working at home or elsewhere should be considered in evaluating whether an employer can reasonably accommodate an individual's need to be away from the workplace. If a qualified individual can perform the essential functions of his/her position from an off-site location without posing an undue hardship on the employer, such accommodation may be reasonable. Such a determination depends on the nature of the job, the individual and the handicap. For example, an employee with chronic back and neck pain who could not endure long daily commutes to work may be able to work from home using a computer modem, fax, and other technologies.[53] However, off-site work may not be a reasonable accommodation where, for example, the position requires personal contact and coordination with coworkers or clients.[54] Also, depending on the nature of the position, it may not be reasonable to permit an employee to work without supervision.[55]

C. Substance Abuse

---

[49] *See* 29 C.F.R. app. S 1630.2(O).
[50] Cox v. New England Tel., 414 Mass. 375, 390 (1993).
[51] Leary v. Dalton, 4 A.D. Cases 1163 (1st Cir. 1995); Tydall v. National Educ. Ctrs., 31 F.3d 209 (4th Cir. 1994); Carr v. Reno, 23 F.3d 525 (DC Cir. 1994). *See* Picot v. New England Tel., Suffolk Sup. CT No 81-969 (J. Flannery 1994).
[52] *See* Tydall, 31 F.3d at 213.
[53] *See*, e.g., Sargent v. Litton Sys. Inc., 841 F. Supp. 956 (N.D. Cal. 1994).
[54] *See*, e.g., Misek-Falkoff v. IBM Corp., 854 F. Supp. 215 (S.D.N.Y. 1994).
[55] *See*, e.g., Vande Zande v. Wisconsin Dep't of Admin., 851 F. Supp. 353 (W.D. Wis. 1994), aff'd, 44 F.3d 538 (7th Cir. 1995).

1. Handicapped Person - Unlawful Drug Use

Current illegal drug use does not fall within the definition of handicap under Mass. Gen. L. ch. 151B, section 1(17). The term handicap does, however, apply to individuals having an addiction to drugs who are not currently using illegal drugs, having a record of an addiction to drugs, or who are regarded as having an addiction to drugs. Unjustified concern regarding a potential relapse into drug use may indicate that the employer regards the employee as addicted (handicapped).

While addiction may be protected, occasional, casual drug use is not protected. The term handicap does not apply to individuals using drugs recreationally, regarded as using drugs recreationally, or with a record of such drug use.

2. Handicapped Person - Alcoholism

Alcoholism is a handicap. Likewise, individuals regarded as alcoholics, and those with a record of alcoholism, may be considered handicapped. Occasional, casual alcohol consumption, however, is not a handicap.

3. Qualified Handicapped Person/Essential Functions

As discussed above in section II(B), a "qualified handicapped person" is a handicapped individual who, in spite of his/her handicap, can perform the essential functions of the job in question with or without reasonable accommodation. This definition applies to individuals who are handicapped as a result of their addiction to alcohol, individuals with a record of addiction to unlawful drugs or alcohol, and individuals regarded as addicted to unlawful drugs or alcohol. An employer may hold individuals who are handicapped as a result of their addiction to the same standards of job conduct and performance as other employees, subject to the duty to reasonably accommodate the employee. The employee may be terminated to the extent that the employee cannot perform the essential functions of his/her job, with or without reasonable accommodation.

An addicted individual engaging in misconduct may be subjected to discipline, including termination, if the employer would subject a non-handicapped individual to similar discipline for similar misconduct. This is true even if the misconduct is related to the handicap. On the other hand, an employer may not treat the misconduct of an addicted employee more harshly than it would the misconduct of a non-handicapped individual. Moreover, where misconduct is related to the handicap, the employer may have a duty to provide reasonable accommodation.[56]

4. Promulgation And Enforcement Of Alcohol Related Work Rules

An employer may establish and enforce drug and alcohol related work rules, including but not limited to (a) prohibiting the bringing of alcohol or unlawful drugs onto, and consumption of alcohol or unlawful drug use at, the workplace; (b) prohibiting employees from being under the influence of alcohol or unlawful drugs at the workplace; and (c) requiring employees to comply with all state and federal drug and alcohol-related laws or regulations to which the employing unit and/or its employees are subject. While violation of drug and alcohol-related work rules may be the basis for disciplining an addicted employee, the duty to reasonably accommodate handicapped employees pertains to these as well as to other work rules.

[56] *See* Section X(D).

5. Reasonable Accommodation

An employer must provide reasonable accommodation to individuals handicapped as a result of their addiction to alcohol where such accommodation permits them to perform the essential functions of the job, unless such accommodation creates an undue hardship.[57] Under Mass. Gen. L. ch. 151B, reasonable accommodation for an individual who is handicapped as a result of addiction to alcohol may include permitting the individual to attend counseling, or providing the individual with leave in order to participate in rehabilitation services or to otherwise control his/her addiction. There is a distinction between an employer's provision of leave to allow an employee to address a handicap, and an employer's relaxation or elimination of its attendance requirements. An employer's granting leave to an employee to attend counseling or other rehabilitative services may be a reasonable accommodation required by Mass. Gen. L. ch. 151B because it may enable the employee to fully perform the essential functions of his/her job. An employer's relaxation or elimination of essential job functions, including attendance requirements, is not a reasonable accommodation required by Mass. Gen. L. ch. 151B because such action does not enable the employee to fully perform the essential functions of his/her job. Addicted employees requiring time off for treatment should be accommodated just as employees with other types of handicaps.[58]

6. Undue Hardship

An employer need not furnish a reasonable accommodation under Mass. Gen. L. ch. 151B where such accommodation would pose an undue hardship to the employer and/or its operation, considering the particular nature of the employer's business.[59]

7. Drug/Alcohol Tests (and/or Inquires) Under certain circumstances, tests (and/or inquires) intended or designed to determine current unlawful drug use may be administered to (or made of) applicants, individuals with conditional offers of employment, and under certain circumstances, employees. An employer's right to administer such tests (or make such inquires) may implicate privacy rights, such as Mass. Gen. L. c. 214, section 1B. In addition, such tests (or inquires) may implicate collective bargaining rights in a unionized workplace.[60] Apart from privacy or collective bargaining issues, under some circumstances an unjustified requirement of submission to drug or alcohol tests or inquiries might be deemed evidence of handicap discrimination.

D. Disability-Related Misconduct

Where misconduct is related to a handicap or disability, there may be a duty to provide reasonable accommodation. Such accommodation may include, for example, a leave of absence or participation in a company employee assistance program. Where the employee's behavior poses a direct threat to himself or others (shown by a reasonable probability of substantial harm), the employee may not be considered a "qualified handicapped person." In determining whether reasonable accommodation is possible, the employer should make an objective evaluation of all available relevant facts about the employee's work history and medical history.

E. Interrelated Laws

Employees with impairments, whether or not they rise to the level of "handicap" as defined by Mass. Gen. L. ch. 151B, may have rights under other state or federal statutes.

---

[57] *See* Sections II(C) and IV.
[58] *See* Section VII.
[59] *See* Sections II(D), VII(C), and IX(B)(1).
[60] *See* Section IV(D).

1. Worker's Compensation

A policy statement relating to the interrelationship between the Massachusetts Workers' Compensation Act and Mass. Gen. L. ch. 151B is under development.

2. FMLA/Maternity Leave

An employee whose health condition requires a leave of absence from work may have rights under the federal Family & Medical Leave Act (FMLA), 26 U.S.C. S 2601 et seq. An employee who requires a leave of absence from work because of a pregnancy-related health condition may also have rights under the state Maternity Leave Act, Mass. Gen. L. ch. 149, section 105D, as well as the Pregnancy Discrimination Act component of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. S 2000e(k).

The FMLA provides eligible employees up to twelve weeks of unpaid leave a year for certain reasons including their own "serious health condition." A serious health condition is an illness or injury that involves either (1) inpatient care in a hospital, hospice or residential medical care facility, or (2) continuing treatment by a health care provider.[61] Some impairments or handicaps may meet the definition of "serious health condition," whereas others may not. Conversely, some individuals having a "serious health condition" may not have a handicap or disability because their impairment does not affect a major life activity. The FMLA provides coverage for many of the short-term injuries or illnesses that do not rise to the level of a "handicap" as that term is defined in 151B. The FMLA is much more limited in its coverage than Chapter 151B, however, because it covers only employers with fifty or more employees. In addition, to be eligible, an employee must have been employed by the employer for a year; must have worked 1,250 hours in the prior twelve months; and must work at a worksite with fifty or more employees within a seventy-five-mile radius.

An example of how the FMLA and 151B intersect occurs when an employee is injured and requires substantial leave to recover from his injury. If applicable, the employee may be allowed up to twelve weeks of leave under the FMLA. However, if he is still not able to perform the essential functions of his job when his FMLA leave expires, he may have rights to additional leave under 151B as a reasonable accommodation.

Pregnancy-related health conditions may or may not rise to the level of "handicap" under 151B. The FMLA specifically defines a pregnancy-related health condition as a serious health condition. In addition, the Massachusetts Maternity Leave Act provides up to eight weeks of unpaid leave to female employees after the birth or adoption of a child. To obtain this leave, the employee does not have to prove that s/he is disabled from work. An employee who uses her twelve weeks of leave under the FMLA for a pregnancy-related disability remains eligible for an eight-week maternity leave under state law. But this does not mean she is entitled to a twenty-week maternity leave where she has a normal pregnancy with no related disability.

An employee may develop a disability as a result of pregnancy or childbirth, which could affect her return to her job, for which s/he might require a reasonable accommodation. In addition, an employer should treat an employee who cannot work because of a disability related to pregnancy or childbirth the same way it treats other disabled or handicapped employees. Thus, an employer who has a short term

[61] 29 U.S.C. S 2611(11).

disability (STD) policy must allow an employee with a disability related to pregnancy or childbirth to use STD in the same way other employees who develop short term disabilities are entitled to use STD.

3. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) applies to employers with fifteen or more employees, whereas 151B applies to employers with six or more employees. Both the ADA and 151B cover employees as well as applicants.[62] Under both Acts an employer may not inquire, on a job application or during an interview, about an applicant's disability status, job-related injuries or workers' compensation history.

The purpose underlying the ADA is to prohibit employers from excluding persons with disabilities from employment opportunities, unless the person is actually unable to perform the essential functions of the job. The ADA prohibits employers, employment agencies and labor organizations from limiting, segregating or classifying disabled applicants or employees, on the basis of disability in a way that adversely affects their employment opportunities or status.

Consideration must be given under both the ADA and 151B to situations where the requested accommodation creates a conflict with a collective bargaining agreement.[63]

F. Collective Bargaining Agreements

1. In General

Employers and unions negotiating collective bargaining agreements must be sensitive to the needs of employees with disabilities for reasonable accommodation and should build necessary flexibility into the contract.[64] Negotiating a contract that may require the union or the employer or both to violate anti-discrimination laws may subject both to liability under the laws.

For example, a collective bargaining agreement that requires that vacant positions be filled internally according to seniority may conflict with the need to reasonably accommodate an employee with less seniority than another applicant who can no longer perform the functions of her former job because of a disability but who could perform the functions of the vacant position.

Where there is a conflict between the union contract and the duty to accommodate a disabled employee that cannot be resolved through negotiation, the Commission will weigh that conflict on a case-by-case basis in evaluating the reasonableness of the requested accommodation.[65]

2. Preemption

In some cases, and especially those in which an existing collective bargaining agreement contains specific provisions for accommodating disabled or handicapped employees, such as transfer options, light duty classifications, position restructuring, or other special arrangements, federal labor law may

---

[62] *See* 29 C.F.R. S 825.114 (defining serious health condition)

[63] See supra Section VI.

[64] See infra Section F.

[65] The EEOC recommends that contracts negotiated after the effective date of the ADA contain a provision permitting the employer to take all actions necessary to comply with the law. EEOC Technical Assistance Manual pt. III-16. For an example of a flexible labor-management policy, see Buckingham v. US, 998 F.2d 735 (9th Cir.1993), in which a memorandum of understanding between the employer and the union allowed valid concerns other than seniority, including EEO factors, to be considered in filling vacancies.

preempt state handicap and disability claims.[66]

Courts generally have held that state law discrimination claims based on other protected categories (such as race, religion and sex) are not preempted.[67] Handicap claims, however, frequently involve the legal concept of "reasonable accommodation" not found in those other discrimination claims. "Reasonable accommodation" may include a wide range of actions by an employer (medical leave, reduced hours or otherwise modified work schedules, and job restructuring) any or all of which might be the subject of labor contract agreements.[68] Most courts who have decided the issue, therefore, engage in a case by case analysis of the particular facts involved in the claim in light of the applicable collective bargaining agreement.[69]

In these cases, courts determine whether a particular state law claim is preempted by deciding whether "the resolution of [the] state-law claim depends upon the meaning of the collective bargaining agreement."[70] Thus, for example, the existence of provision in a collective bargaining agreement that generally prohibited discrimination based on handicap or disability would not require preemption. By contrast, a case involving a claim for failure to accommodate, where the labor contract contains comprehensive procedures for placement of light duty employees or for reinstatement after a period of disqualifying disability, and there is no evidence that the employer regularly deviates from such procedures, might be preempted because the discrimination claim is so intertwined with the operation of the labor contract that it cannot be assessed without consideration of the contract.

---

[66] *See* Emrick v. Libby Owens Ford Co., 875 F. Supp. 393 (E.D. Tex. 1995).

[67] Section 201(a) of the federal Labor Management Relations Act, 29 U.S.C. S 141 et. Seq. (LMRA), establishes federal jurisdiction for "[s]uits for violations of contracts between an employer and a labor organization." Federal law, therefore, preempts any state cause of action for breach of a collective bargaining agreement (CBA), and even suits based on torts rather than on breach of a CBA if the evaluation of the suit is "inextricably intertwined with consideration of the terms of [a] labor contract." Allis-Chalmers Corp. v. Lueck, 471 US 202, 213 (1985). The federal Railway Labor Act, 45 U.S.C. SS 151-188 (RLA), also preempts state law claims.

[68] These decisions follow the 1988 US Supreme Court decision in Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399 (1988). Lingle held that a claim of retaliation for filing a workers' compensation claim was not preempted because the LMRA does not preempt the application of a state law remedy when the "factual inquiry [under the state law] does not turn on the meaning of any provision of a collective bargaining agreement." A recent Supreme Court decision, *Hawaiian Airlines, Inc. v. Norris*, 512 US 246, 114 S. CT 2239 (1994), has held that the preemption standard in RLA cases is "virtually identical to the preemption standard the Court employs in cases involving S 301 of the [LMRA]." Id. at 2247.

[69] Such provisions in a collective bargaining agreement have a direct impact, not only on the complainant in a disability case, but also on the collectively bargained for terms and conditions of employment of the other bargaining unit employees.

[70] Magerer v. John Sexton & Co., 912 F.2d 525, 528 (1st Cir. 1990) (a post-Lingle case holding that a claim of retaliation for filing workers' compensation claim was preempted by LMRA because the statute deferred to an applicable CBA).

At least one court, however, has ruled that there was no LMRA preemption even when the CBA in question included provisions governing accommodation and reinstatement after a disability. See Smolarek v. Chrysler Corp. 879 F.2d 1326 (6th Cir. 1989) (en banc), cert. denied, 493 US 992 (1989).