(2) Effect on State or other laws. This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(1) Health insurance, life insurance, and other benefit plans—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

[56 FR 35734, July 26, 1991, 76 FR 17003, Mar. 25, 2011]

APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

The Americans with Disabilities Act (ADA) is a landmark piece of civil rights legislation signed into law on July 26, 1990, and amended effective January 1, 2009. See 42 U.S.C. 12101 et seq., as amended. In passing the ADA, Congress recognized that “discrimination against individuals with disabilities continues to be a serious and pervasive social problem” and that the “continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.” 42 U.S.C. 12101(a)(2). Discrimination on the basis of disability persists in critical areas such as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, access to public services, and employment. 42 U.S.C. 12101(a)(3). Accordingly, the ADA prohibits discrimination in a wide range of areas, including employment, public services, and public accommodations.

Title I of the ADA prohibits disability-based discrimination in employment. The Equal Employment Opportunity Commission (the Commission or the EEOC) is responsible for enforcement of title I (and parts of title V) of the ADA. Pursuant to the ADA as amended, the EEOC is expressly granted the authority and is expected to amend these regulations. 42 U.S.C. 12205a. Under title I of the ADA, covered entities may not discriminate against qualified individuals on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. 42 U.S.C. 12112(a). For these purposes, “discriminate” includes (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicants or employees to discrimination; (3) utilizing standards, criteria, or other methods of administration that have the effect of discrimination on the basis of disability; (4) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity; (5) denying employment opportunities to a job applicant or employee who is otherwise qualified, if such denial is based on the need to make reasonable accommodation; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criterion is shown to be job related for the position in question and is consistent with business necessity; and (7) subjecting applicants or employees to
prohibited medical inquiries or examinations. See 42 U.S.C. 12112(b), (d).

As with other civil rights laws, individuals seeking protection under these anti-discrimination provisions of the ADA generally must allege and prove that they are members of the “protected class.”\(^1\) Under the ADA, this typically means they have to show that they meet the statutory definition of “disability.” 2008 House Judiciary Committee Report at 5. However, “Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage.” Id.

In the original ADA, Congress defined “disability” as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12202(2). Congress patterned these three parts of the definition of disability—the “actual,” “record of,” and “regarded as” prongs—after the definition of “handicap” found in the Rehabilitation Act of 1973. 2008 House Judiciary Committee Report at 6. By doing so, Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term “disability” as used in the ADA. H.R. Rep. No. 485 part 3, 101st Cong., 2d sess. 117 (1990) (1990 House Judiciary Report or House Judiciary Report); See also S. Rep. No. 116, 101st Cong., 1st sess. 21 (1989) (1979 Senate Report or Senate Report); H.R. Rep. No. 486 part 2, 101st Cong., 2d sess. 50 (1990) (1990 House Labor Report or House Labor Report). Congress expected that the definition of disability and related terms, such as “substantially limits” and “major life activity,” would be interpreted under the ADA “consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act”—i.e., expansively and in favor of broad coverage. 2008 Senate Statement of the Managers to Accompany S. 3406 (2008 Senate Statement of Managers) at 3 (“When Congress passed the ADA in 1990, it adopted the functional definition of disability from section 504 of the Rehabilitation Act of 1973, in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework and its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred.”); 2008 House Judiciary Committee Report at 6 & n.6 (noting that courts had interpreted this Rehabilitation Act definition “broadly to include persons with a wide range of physical and mental impairments”).

That expectation was not fulfilled. ADAAA section 2(a)(3). The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect. Id. For example, in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), the Court held that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In Sutton, the Court also adopted a restrictive reading of the meaning of being “regarded as” disabled under the ADA’s definition of disability. Subsequently, in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), the Court held that the terms “substantially” and “major” in the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled” under the ADA, and that to be substantially limited in performing a major life activity under the ADA, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA. See 2008 Senate Statement of Managers at 3 (“After the Court’s decisions in Sutton that impairments must be considered in their mitigated state and in Toyota that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual’s impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.”). Congress concluded that these rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and coupled with the EEOC’s 1991 ADA regulations...
Equal Employment Opportunity Comm. which had defined the term “substantially limits” as “significantly restricted,” unduly precluded many individuals from being covered under the ADA. Id. (“Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered dis- abilities under the ADA.”) The Supreme Court’s narrower standard and “[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimina- tion under the ADA”).

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. This legis- lation is the product of extensive bipartisan efforts, and the culmination of collabo- ration and coordination between legislators and stakeholders, including representa- tives of the disability, business, and education communities. See Statement of Representative Hoyer and Sensenbrenner, 114 Cong. Rec. H2394–96 (daily ed. Sept. 17, 2008) (Hoyer- Sensenbrenner Congressional Record State- ment); Senate Statement of Managers at 1. The express purposes of the ADAAA are, among other things:

(1) To carry out the ADA’s objectives of providing “a clear and comprehensive na- tional mandate for the elimination of dis- crimination” and “clear, strong, consistent, enforceable standards addressing discrimina- tion” by reinstating a broad scope of protection under the ADA;

(2) To reject the requirement enunciated in Sutton and its companion cases that whether an impairment substantially limits a major life activity is to be determined with ref- erence to the ameliorative effects of miti- gating measures;

(3) To reject the Supreme Court’s rea- soning in Sutton with regard to coverage under the third prong of the definition of dis- ability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 256 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilita- tion Act of 1973;

(4) To reject the standards enunciated by the Supreme Court in Toyota that the terms “substantially” and “major” in the defini- tion of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled.” and that to be substantially limited in per- forming a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the indi- vidual from doing activities that are of central importance to most people’s daily lives”;

(5) To convey congressional intent that the standard created by the Supreme Court in Toyota for “substantially limits,” and ap- plied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA;

(6) To convey that it is the intent of Con- gress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an indi- vidual’s impairment is a disability under the ADA should not demand extensive analysis; and

(7) To express Congress’ expectation that the EEOC will revise that portion of its cur- rent regulations that defines the term “sub- stantially limits” as “significantly re- stricted” to be consistent with the ADA as amended.

ADAAA section 2(b). The findings and pur- poses of the ADAAA “give[ ] clear guidance to the courts and * * * [are] intended to be applied appropriately and consistently.” 2008 Senate Statement of Managers at 5.

The EEOC has amended its regulations to reflect the ADAAA’s findings and purposes. The Commission believes that it is essential also to amend its appendix to the original regulations at the same time, and to reissue this interpretive guidance as amended con-currently with the issuance of the amended regulations. This will help to ensure that indi- viduals with disabilities understand their rights, and to facilitate and encourage com- pliance by covered entities under this part.

Accordingly, this amended appendix ad- dresses the major provisions of this part and explains the major concepts related to dis- ability-based employment discrimination. This appendix represents the Commission’s interpretation of the issues addressed within it, and the Commission will be guided by this appendix when resolving charges of employ- ment discrimination.

NOTE ON CERTAIN TERMINOLOGY USED
The ADA, the EEOC’s ADA regulations, and this appendix use the term “disabilities” rather than the term “handicaps” which was originally used in the Rehabilitation Act of 1973, 29 U.S.C. 791–796. Substantially, these terms are equivalent. As originally noted by the House Committee on the Judiciary, “[t]he use of the term ‘disabilities’ instead of the term ‘handicap’ reflects the desire of the Committee to use the most current termi- nology. It reflects the preference of per- sons with disabilities to use that term rather than ‘handicapped’ as used in previous laws, such as the Rehabilitation Act of 1973 * * * .” 1990 House Judiciary Report at 26–27; See also 1989 Senate Report at 21; 1990 House Labor Report at 50–51.
In addition, consistent with the Amendments Act, revisions have been made to the regulations and this appendix to refer to “individual with a disability” and “qualified individual” as separate terms, and to change the prohibition on discrimination to “on the basis of disability” instead of prohibiting discrimination against a qualified individual “with a disability because of the disability of such individual.” “This ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’” 2008 Senate Statement of Managers at 11.

The use of the term “Americans” in the title of the ADA, in the EEOC’s regulations, or in this appendix as amended is not intended to imply that the ADA only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality, from discrimination by a covered entity. Finally, the terms “employer” and “employer or other covered entity” are used interchangeably throughout this appendix to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The express purposes of the ADA as amended are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing the standards articulated in the ADA on behalf of individuals with disabilities; and to invoke the sweep of congressional authority to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. 12101(b).

The EEOC’s ADA regulations are intended to implement these Congressional purposes in simple and straightforward terms.

Section 1630.1(b) Applicability

The EEOC’s ADA regulations as amended apply to all “covered entities” as defined at §1630.2(b). The ADA defines “covered entities” to mean an employer, employment agency, labor organization, or joint labor-management committee. 42 U.S.C. 12111(2). All covered entities are subject to the ADA’s rules prohibiting discrimination. 42 U.S.C. 12121.

Section 1630.1(c) Construction

The ADA must be construed as amended. The primary purpose of the Amendments Act was to make it easier for people with disabilities to obtain protection under the ADA. See Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 (reviewing provisions of H.R. 3195 as revised following negotiations between representatives of the disability and business communities (Joint Hoyer-Sensenbrenner Statement) at 2. Accordingly, under the ADA as amended and the EEOC’s regulations, the definition of “disability” “shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA].” 42 U.S.C. 12102(4)(A); See also 2008 Senate Statement of Managers at 3 (“The ADA Amendments Act * * * reiterates that Congress intends that the scope of the [ADA] be broad and inclusive.”). This construction is also intended to reinforce the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose.

The ADAAA and the EEOC’s regulations also make clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, not whether the individual meets the definition of disability. ADAAA section 2(b)(5). This means, for example, examining whether an employer has discriminated against an employee, including whether an employee has met his or her responsibilities under the ADA with respect to providing a “reasonable accommodation” to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation “interactive process.” See also 2008 Senate Statement of Managers at 4 (“[Lower court cases] have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory.”); 2008 House Judiciary Committee Report at 6 (“An individual who does not qualify as disabled * * * does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to
attempts to prove his or her claim of discriminatory treatment.

Further, the question of whether an individual has a disability under this part "should not demand extensive analysis." ADAAA section 2(b)(5). See also House Education and Labor Committee Report at 9 ("The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult. * * *").

In addition, unless expressly stated otherwise, the standards applied in the ADA are intended to provide at least as much protection as the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to prepare and maintain an affirmative action program under section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. See 1990 House Labor Report at 138; 1990 House Judiciary Report at 69–70.

This also means that an individual with a disability could choose to pursue claims under a State discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to charges brought under this part. 1990 House Judiciary Report at 69–70.

The ADA does not automatically preempt medical standards on safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part and are designed to protect the public health from individuals who pose a direct threat to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation. However, the ADA does preempt inconsistent requirements established by State or local law for safety or security sensitive positions. See 1989 Senate Report at 27; 1990 House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any State or local law that imposes prohibitions or limitations on the eligibility of individuals with disabilities who are qualified to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with a disability challenges a private school’s refusal to hire him or her on the basis of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA. Paragraph (c)(3) is consistent with language added to section 501 of the ADA by the ADAAA section 2(b)(5). See also House Education and Labor Committee Report at 9 ("The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult. * * *").

In the original ADA, "Congress sought to protect anyone who experiences discrimination because of a current, past, or perceived
disability.’’ 2008 Senate Statement of Managers at 6. Accordingly, the definition of the term “disability” is divided into three prongs: An individual is considered to have a “disability” if that individual (1) has a physical or mental impairment that substantially limits one or more of that person’s major life activities (the “actual disability” prong); (2) has a record of such an impairment (the “record of” prong); or (3) is regarded by the covered entity as an individual with a disability as defined in §1630.2(I) (the “regarded as” prong). The ADAAA retained the basic structure and terms of the original definition of disability. However, the Amendments Act altered the interpretation and application of this critical statutory term in fundamental ways. See 2008 Senate Statement of Managers at 1 ("The bill maintains the ADA’s inherently functional definition of disability” but “clarifies and expands the definition’s meaning and application.").

As noted above, the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. See Joint Hoyer-Sensenbrenner Statement at 2. Accordingly, the ADAAA provides rules of construction regarding the definition of disability. Consistent with the congressional intent to reinstate a broad scope of protection under the ADA, the ADAAA’s rules of construction require that the definition of “disability” “shall be construed in favor of broad coverage of individuals under the ADA,” to the maximum extent permitted by the terms of the ADA." 42 U.S.C. 12102(4)(A). The legislative history of the ADAAA is replete with references emphasizing this principle. See Joint Hoyer-Sensenbrenner Statement at 2 ("[T]he bill establishes that the definition of disability must be interpreted broadly to achieve the remedial purposes of the ADA"); 2008 Senate Statement of Managers at 1 (the ADAAA’s purpose is to “enhance the protections of the ADA” by “expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability”); id. at 4 ("The managers have introduced the ADAAA to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA.”); id. ("It is our expectation that because the bill makes the definition of disability more generous, some people who were not covered before will now be covered."); id. (warning that “the definition of disability should not be unduly used as a tool for excluding individuals from the ADA’s protections”); id. (this principle “sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently”); 2008 House Judiciary Committee Report at 5 ("The purpose of the bill is to restore protection for the broad range of individuals with disabilities as originally envisioned by Congress by responding to the Supreme Court’s narrow interpretation of the definition of disability."). Further, as the purpose of the ADAAA explicitly cautions, the “primary object of attention” in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations. As noted above, this means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a “reasonable accommodation” to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation “interactive process.” ADAAA section 2(b)(5); See also 2008 Senate Statement of Managers at 4 ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory."); 2008 House Judiciary Committee Report criticizing pre-ADAAA court decisions which “prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case"). Accordingly, the threshold coverage question of whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis.” ADAAA section 2(b)(5).

Section 1630.2(g)(2) provides that an individual may establish coverage under any one or more (or all three) of the prongs in the definition of disability. However, to be an individual with a disability, an individual is only required to satisfy one prong. As §1630.2(g)(3) indicates, in many cases it may be unnecessary for an individual to resort to coverage under the “actual disability” or “record of” prongs. Where the need for a reasonable accommodation is not at issue—for example, where there is no question that the individual is “qualified” without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation—it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the “regarded as” prong of the definition. In fact, Congress expected the first and second
prongs of the definition of disability “to be used only by people who are affirmatively seeking reasonable accommodations” and that “[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation—should be bringing a claim under the third prong of the definition which effectively ‘regards’ the other two prongs regardless of whether the individual is challenging a covered entity’s failure to make reasonable accommodation or requires a reasonable accommodation.

To fully understand the meaning of the term “disability,” it is also necessary to understand what is meant by the terms “physical or mental impairment,” “major life activity,” “substantially limits,” “record of,” and “regarded as.” Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms “physical or mental impairment.” However, the legislative history of the Amendments Act notes that Congress “expect[s] that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change.” 2008 Senate Statement of Managers at 6. The definition of “physical or mental impairment” in the EEOC’s regulations remains based on the definition of the term “physical or mental impairment” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC’s regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within “normal” range and are not the result of a physiological disorder.

The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment, or may be covered under the “regarded as” prong if it is the basis for a prohibited employment action and is not “transitory and minor.”

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See 1989 Senate Report at 22-23; 1990 House Labor Report at 51-52; 1990 House Judiciary Report at 28-29.

Section 1630.2(i) Major Life Activities

The ADAAA provided significant new guidance and clarification on the subject of “major life activities.” As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities. See 2008 Senate Statement of Managers at 8 n.17.

For purposes of clarity, the Amendments Act provides an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive, and the regulations include sitting, reaching, and interacting with others as additional examples. Many of these major life activities listed in the ADA Amendments Act and the regulations already had been included in the EEOC’s 1991 now-superseded regulations implementing title I of the ADA and in sub-regulatory documents, and already were recognized by the courts.

The ADA as amended also explicitly defines “major life activities” to include the operation of “major bodily functions.” This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of “major life activities” under the ADA. 2008 House Judiciary Committee Report at 16; See also 2008 Senate Statement of Managers at 8 (“for the first time [in the ADAAA], the category of “major life activities” is defined to include
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the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting”).

The regulations include all of those major bodily functions identified in the ADA Amendments Act’s non-exhaustive list of examples and add a number of others that are consistent with the body systems listed in the regulation of “impairment” (at §1630.2(h)) and with the U.S. Department of Labor’s nondiscrimination and equal employment opportunity regulations implementing section 138 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, et seq. Thus, special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions are major bodily functions not included in the statutory list of examples but included in §1630.2(i)(1)(ii). The Commission has added these examples to further illustrate the non-exhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act. The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs.

The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual’s normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the function of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

In the legislative history of the ADA Amendments Act, Congress expressed its expectation that the statutory expansion of “major life activities” to include major bodily functions (along with other statutory changes) would lead to more expansive coverage. See 2008 Senate Statement of Managers at 8 n.17 (indicating that these changes will make it easier for individuals to show that they are eligible for the ADA’s protections under the first prong of the definition of disability). The House Education and Labor Committee explained that the inclusion of major bodily functions would “affect cases such as U.S. v. Happy Time Day Care Ctr. in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that ‘there is something inherently illogical about inquiring whether a five-year-old’s ability to procreate is substantially limited by his HIV infection; Furnish v. SVI Sys., Inc, in which the court found that an individual with cirrhosis of the liver caused by Hepatitis H is not disabled because liver function—unlike eating, working, or reproducing—is not integral to one’s daily existence; and Pimental v. Dartmouth-Hitchcock Clinic, in which the court concluded that the plaintiff’s stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a [substantial limitation] on major bodily functions that would qualify them for protection under the ADA.” 2008 House Education and Labor Committee Report at 12.

The examples of major life activities (including major bodily functions) in the ADAAA and the EEOC’s regulations are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the examples does not create a negative implication as to whether an omitted activity or function constitutes a major life activity under the statute. See 2008 Senate Statement of Managers at 8; See also 2008 House Committee on Educ. and Labor Report at 11; 2008 House Judiciary Committee Report at 17.

The Commission anticipates that courts will recognize other major life activities, consistent with the ADA Amendments Act’s mandate to construe the definition of disability broadly. As a result of the ADA Amendments Act’s rejection of the holding in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.” See Toyota, 534 U.S. at 197 (defining “major life activities” as activities that are of “central importance to most people’s daily lives”). Indeed, this holding was at odds with the earlier Supreme Court decision of Dragos v. Abbott, 524 U.S. 624 (1998), which held that a major life activity (in that case, reproduction) does not have to have a “public, economic or daily aspect.” Id., at 639.

Accordingly, the regulations provide that in determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Cf. 2008 Senate Statement of Managers at 7 (indicating that a person is considered an individual with a disability for purposes of the first prong when one or more of the individual’s “important life activities” are restricted) (citing 1989 Senate Report at 25). The regulations also reject the notion that to be substantially limited in performing a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing “activities that are of central
importance to most people’s daily lives.” Id.; see also 2008 Senate Statement of Managers at 5 n.12.

Thus, for example, lifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting. Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in Toyota) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people’s daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks.

Section 1630.2(j) Substantially Limits

In any case involving coverage solely under the “regarded as” prong of the definition of “disability” (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is “substantially limited” in any major life activity. See 2008 Senate Statement of Managers at 10; id. at 13 (“The functional limitation imposed by an impairment is irrelevant to the third ‘regarded as’ prong.”). Indeed, Congress anticipated that the first and second prongs of the definition of disability would “be used only by people who are affirmatively seeking reasonable accommodation,” and that “[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.” Joint Hoyer-Sensenbrenner Statement at 4. Of course, an individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity’s failure to make reasonable accommodations or requires a reasonable accommodation. The concept of “substantially limits” is only relevant in cases involving coverage under the “actual disability” or “record of” prong of the definition of disability. Thus, the information below pertains to these cases only.

Section 1630.2(j)(1) Rules of Construction

It is clear in the text and legislative history of the ADA Amendments Act that Congress concluded the courts had incorrectly construed “substantially limits,” and disapproved of the EEOC’s now-superseded 1991 regulation defining the term to mean “significantly restricts.” See 2008 Senate Statement of Managers at 6 (“We do not believe that the courts have correctly instituted the level of coverage we intended to establish with the term ‘substantially limits’ in the ADA’” and “we believe that the level of limitation, and the intensity of focus, applied by the Supreme Court in Toyota goes beyond what we believe is the appropriate standard to create coverage under this law.”). Congress extensively deliberated over whether a new term other than “substantially limits” should be adopted to denote the appropriate functional limitation necessary under the first and second prongs of the definition of disability. See 2008 Senate Statement of Managers at 6–7. Ultimately, Congress affirmatively opted to retain this term in the Amendments Act, rather than replace it. It concluded that “adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act.” Id. Instead, Congress determined “a better way * * * to express [its] disapproval of Sutton and Toyota (along with the current EEOC regulation) is to retain the words ‘substantially limits,’ but clarify that it is not meant to be a demanding standard.” Id. at 7. To achieve that goal, Congress set forth detailed findings and purposes and “rules of construction” to govern the interpretation and application of this concept going forward. See ADAAA Sections 2–4; 42 U.S.C. 12102(4).

The Commission similarly considered whether to provide a new definition of “substantially limits” in the regulation. Following Congress’s lead, however, the Commission ultimately concluded that a new definition would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress. Therefore, the regulations simply provide rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity. These are each discussed in greater detail below.

Section 1630.2(j)(1)(i): Broad Construction; not a Demanding Standard

Section 1630.2(j)(1)(i) states: “The term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.” Congress stated in the ADA Amendments Act that the definition of disability “shall be construed in favor of broad coverage,” and that “the term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.” 42 U.S.C. 12101(4)(A)–(B), as amended. “This is a textual provision that will legally guide the agencies and courts in properly interpreting the term ‘substantially limits’.”
Hoyer-Sensenbrenner Congressional Record Statement at H6295. As Congress noted in the legislative history of the ADAAA, “[t]o be clear, the purposes section conveys our intent to signify that ‘substantially limits’ should be measured by a lower standard than that used in Toyota, but also that the definition of disability should not be unduly complex or a tool for excluding individuals from the ADA’s protections.” 2008 Senate Statement of Managers at 5 (also stating that “[t]his rule of construction, together with the rule of construction providing that the definition of disability shall be construed in favor of broad coverage of individuals sends a clear signal of our intent that the courts may interpret the definition of disability broadly rather than stringently”). Put most succinctly, “substantially limits” “is not meant to be a demanding standard.” 2008 Senate Statement of Managers at 7.

Section 1630.2(j)(1)(ii): Significant or Severe Restriction Not Required; Nonetheless, Not Every Impairment Is Substantially Limiting

Section 1630.2(j)(1)(ii) states: “An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major live activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a ‘disability’ within the meaning of this section.” In keeping with the instruction that the term “substantially limits” is not meant to be a demanding standard, the regulations provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a “disability” within the meaning of this section.

Accordingly, the Amendments Act and the amended regulations make plain that the emphasis in ADA cases now should be squarely on the merits and not on the initial coverage question. The revised regulations therefore provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population and deletes the language to which Congress objected. The Commission
Equal Employment Opportunity Comm. believes that this provides a useful framework in which to analyze whether an impairment satisfies the definition of disability. Further, this framework better reflects Congress’s expressed intent in the ADA Amendments Act that the definition of the term “disability” shall be construed broadly, and is consistent with statements in the Amendments Act’s legislative history. See 2008 Senate Statement of Managers at 7 (stating that “adopting a new, undefined term” and the “resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination,”) and finding that “substantially limits” shall be construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test of determining whether an individual has a disability (stating that “using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in Toyota—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications”). Consequently, this rule of construction makes clear that the question of whether an impairment substantially limits a major life activity should not demand extensive analysis. As the legislative history explains, “[w]e expect that courts interpreting [the ADA] will not demand such an extensive analysis over whether a person’s physical or mental impairment constitutes a disability.” Hoyer-Sensenbrenner Congressional Record Statement at H2925; see id. (“Our goal throughout this process has been to simplify that analysis.”) Section 1630.2(j)(1)(iv): Individualized Assessment Required, But With Lower Standard Than Precisely Applied

Section 1630.2(j)(1)(iv) states: “The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADAAA.” By retaining the essential elements of the definition of disability including the key term “substantially limits,” Congress reaffirmed that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. See 2008 Senate Statement of Managers at 4. To be covered under the first prong of the definition, an individual must establish that an impairment substantially limits a major life activity. That has not changed—but will the necessity of making this determination on an individual basis. Id. However, what the ADAAA changed is the standard required for making this determination. Id. at 4-5.

The Amendments Act and the EEOC’s regulations explicitly reject the standard enunciated by the Supreme Court in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), and applied in the lower courts in numerous cases. See ADAAA section 2(b)(4). That previous standard created “an inappropriately high level of limitation necessary to obtain coverage under the ADA.” Id. at section 2(b)(5). The Amendments Act and the EEOC’s regulations reject the notion that “substantially limits” should be interpreted strictly to create a demanding standard for qualifying as disabled. Id. at section 2(b)(4). Instead, the ADAAA and these regulations establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended. 2008 Senate Statement of Managers at 7. This will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking to prove discrimination under the ADA. Id.

Section 1630.2(j)(1)(v): Scientific, Medical, or Statistical Analysis Not Required, But Permissible When Appropriate

Section 1630.2(j)(1)(v) states: “The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.” The term “average person in the general population,” as the basis of comparison for determining whether an individual’s impairment substantially limits a major life activity, has been changed to “most people in the general population.” This revision is not a substantive change in the concept, but rather is intended to conform the language to the simpler and more straightforward terminology used in the legislative history to the Amendments Act. The comparison between the individual and “most people” need not be exacting, and usually will not require scientific, medical, or statistical analysis. Nothing in this subparagraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other...
amputees. This does not mean that disability cannot be shown where an impairment, such
as a learning disability, is clinically diagnosed based in part on a disparity between an individual’s actual versus expected achievement, taking into account the person’s chronological age, measured intelligence, and age-appropriate educational performance. With dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive modifications, or assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test are disregarded, as required under the ADA Amendments Act.

Section 1630.2(j)(1)(vi): Mitigating Measures

Section 1630.2(j)(1)(vi) states: “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”

The ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity. Thus, “[w]ith the exception of ordinary eyeglasses and contact lenses, impairments must be examined in their unmitigated state.” See 2008 Senate Statement of Managers at 5.

This provision in the ADAAA and the EEOC’s regulations “is intended to eliminate the catch-22 that exist[ed] * * * where individuals who are subjected to discrimination on the basis of their disabilities [were] fre-
quently unable to invoke the ADA’s protec-
tions because they [were] not considered peo-
ple with disabilities when the effects of their
discrimination, medical supplies, behavioral ad-
aptations, or other interventions [were] con-
sidered.” Joint Roery-Sensenbrenner State-
ment at 2; See also 2008 Senate Statement of Managers at 9 (“This provision is intended to eliminate the situation created under [prior] law in which impairments that are mitigated [did] not constitute disabilities but [were] the basis for discrimination.”). To the extent cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. See 2008 House Judicary Committee Report at 9 & nn.25, 26-27 (citing, e.g., McClure v. General Motors Corp., 75 F. App’x 963 (5th Cir. 2003) (court held that individual with muscular dystrophy who, with the mitigating measure of “adapting” how he performed manual tasks, had successfully learned to live and work with his disability was therefore not an individual with a disability); Orr v. Wal-Mart Stores, Inc., 291 F.3d 720 (8th Cir. 2002) (court held that Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), required consideration of the ameliorative effects of plaintiff’s careful regimen of medicine, exercise and diet, and declined to consider impact of uncontrolled diabetes on plaintiff’s ability to see, speak, read, and walk); Gonzales v. National Bd. of Med. Exam-
iners, 225 F.3d 620 (6th Cir. 2000) (where the court found that an individual with a diag-
nosed learning disability was not substantially limited after considering the impact of self-accommodations that allowed him to read and achieve academic success); McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004) (individual fired because of clinical depression not protected because the successful management of the condition with medication for fifteen years); Eckhaus v. Consol. Rail Corp., 2003 WL 2205042 (D.N.J. Dec. 24, 2003) (individual fired because of a hearing impairment was not protected because a hearing aid helped correct that impair-
ment); Todd v. Academy Corp., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (court held that because medication reduced the frequency and intensity of plaintiff’s seizures, he was not disabled).

An individual who, because of the use of a mitigating measure, has experienced no limi-
tations, or only minor limitations, related to the impairment may still be an individual with a disability, where there is evidence that in the absence of an effective mitigating measure the individual’s impairment would be substantially limiting. For example, someone who began taking medication for hypertension before experiencing sub-
stantial limitations related to the impair-
ment would still be an individual with a dis-
ability if, without the medication, he or she would now be substantially limited in func-
tions of the cardiovascular or circulatory system.

Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence con-
cerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types. However, we expect that consistent with the Amendments Act’s command (and the related rules of construction in the regulations) that the definition of disability “should not demand extensive analysis,” covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence.
The Amendments Act provides an “illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered.” See 2008 Senate Statement of Managers at 9. Section 1630.2(j)(b) of the regulations includes all of those mitigating measures listed in the ADA Amendments Act’s illustrative list of mitigating measures, including reasonable accommodations (as applied under title I) or “auxiliary aids or services” (as defined by 22 U.S.C. 12103(1) and applied under titles II and III).

Since it would be impossible to guarantee comprehensiveness in a finite list, the list of examples of mitigating measures provided in the ADA and the regulations is non-exhaustive. See 2008 House Judiciary Committee Report at 20. The absence of any particular mitigating measure from the list in the regulations should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. See 2008 Senate Statement of Managers at 9.

For example, the fact that mitigating measures include “reasonable accommodations” generally makes it unnecessary to mention specific kinds of accommodations. Nevertheless, the use of a service animal, job coach, or personal assistant on the job would certainly be considered types of mitigating measures, as would the use of any device that could be considered assistive technology, and whether individuals who use these measures have disabilities would be determined without reference to their ameliorative effects. See 2008 House Judiciary Committee Report at 20; 2008 House Educ. & Labor Rep. at 15. Similarly, adaptive strategies that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities, are mitigating measures and also would not be considered in determining whether an impairment is substantially limiting. Id.

The determination of whether or not an individual’s impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including for example medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures used determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.

The ADA Amendments Act and the regulations state that “ordinary eyeglasses or contact lenses” shall be considered in determining whether someone has a disability. This is an exception to the rule that the ameliorative effects of mitigating measures are not to be taken into account. “The rationale behind this exclusion is that the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA.” Joint Hoyer-Sensenbrenner Statement at 2. Nevertheless, as discussed in greater detail below at §1630.10(b), if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the plaintiffs in the Sutton case were), and the applicant or employee who is adversely affected by the standard brings a challenge under the ADA, an employer will be required to demonstrate that the qualification standard is job related and consistent with business necessity. 2008 Senate Statement of Managers at 9.

The ADAAA and the EEOC’s regulations both define the term “ordinary eyeglasses or contact lenses” as lenses that are “intended to fully correct visual acuity or eliminate refractive error.” So, if an individual with severe myopia uses eyeglasses or contact lenses that are intended to fully correct visual acuity or eliminate refractive error, they are ordinary eyeglasses or contact lenses, and therefore any inquiry into whether such individual is substantially limited in seeing or reading would be based on how the individual sees or reads with the benefit of the eyeglasses or contact lenses. Likewise, if the only visual loss an individual experiences affects the ability to see well enough to read, and the individual’s ordinary reading glasses are intended to completely correct for this visual loss, the ameliorative effects of using the reading glasses must be considered in determining whether the individual is substantially limited in seeing. Additionally, eyeglasses or contact lenses that are the wrong prescription or an outdated prescription may nevertheless be “ordinary” eyeglasses or contact lenses, if a proper prescription would fully correct visual acuity or eliminate refractive error.

Both the statute and the regulations distinguish “ordinary eyeglasses or contact lenses” from “low vision devices,” which function by magnifying, enhancing, or otherwise augmenting a visual image, and which are not considered when determining whether someone has a disability. The regulations do not establish a specific level of visual acuity (e.g., 20/20) as the basis for determining whether eyeglasses or contact lenses should
be considered “ordinary” eyeglasses or contact lenses. Whether lenses fully correct visual acuity or eliminate refractive error is best determined on a case-by-case basis, in light of current and objective medical evidence. Moreover, someone who uses ordinary eyeglasses or contact lenses is not automatically considered to be outside the ADA’s protection. Such an individual may demonstrate that, even with the use of ordinary eyeglasses or contact lenses, his vision is still substantially limited when compared to most people.

Section 1630.2(j)(vii): Impairments That Are Episodic or in Remission

Section 1630.2(j)(vii) states: “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state. “This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent.” Joint Hoyer-Sensenbrenner Statement at 2-3. The legislative history provides: “This * * * rule of construction thus rejects the reasoning of the courts in cases like Todd v. Academy Corp. [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff’s epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity.” 2008 House Judiciary Committee Report at 19-20.

Other examples of impairments that may be episodic include, but are not limited to, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. See 2008 House Judiciary Committee Report at 19-20.

The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

Section 1630.2(j)(viii): Substantial Limitation in Only One Major Life Activity Required

Section 1630.2(j)(viii) states: “An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.”

The ADAAA explicitly states that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. See ADAAA Section 4(a); 42 U.S.C. 12102(4)(C). “This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity.” 2008 Senate Statement of Managers at 8. In addition, this rule of construction is “intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA.” Id. To the extent cases pre-dating the applicability of the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. Id. (citing Holt v. Grand Lake Mental Health Ctr., Inc., 445 F. 3d 762 (10th Cir. 2006) (holding an individual with cerebral palsy who could not independently perform certain specified manual tasks was not substantially limited in her ability to perform a “broad range” of manual tasks); See also 2008 House Judiciary Committee Report at 19 & n.52 (this legislatively corrects court decisions that, with regard to the major life activity of performing manual tasks, “have offset substantial limitation in the performance of some tasks with the ability to perform others” (citing Holt)).

For example, an individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong. An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function. And an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability with regard to whether his or her HIV infection substantially limits him or her in reproduction.

In addition, an individual whose impairment substantially limits a major life activity need not additionally demonstrate a resulting limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with
a disability under §1630.2(g)(1)(i) or §1630.2(g)(1)(ii), as cases relying on the Supreme Court’s decision in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), had held prior to the ADA Amendments Act.

Thus, for example, someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting. Similarly, someone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing.

Section 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting

Section 1630.2(j)(1)(ix) states: “The six-month ‘transitory’ part of the ‘transitory and minor’ exception to ‘regarded as’ coverage in §1630.2(1) does not apply to the definition of ‘disability’ under §1630.2(g)(1)(i) or §1630.2(g)(1)(ii). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.”

The regulations include a clear statement that the definition of an impairment as transitory, that is, “lasting or expected to last for six months or less,” only applies to the “regarded as” (third) prong of the definition of “disability” as part of the “transitory and minor” defense to “regarded as” coverage. It does not apply to the first or second prong of the definition of disability. See Joint Hoyer-Sensenbrenner Statement at 3 (“[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.”).

Therefore, an impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, as noted above, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, “[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.” Joint Hoyer-Sensenbrenner Statement at 5.

Section 1630.2(j)(3) Predictable Assessments

As the regulations point out, disability is determined based on an individualized assessment. There is no “‘per se’” disability. However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability. The inherent nature of these types of medical conditions will in virtually all cases give rise to a substantial limitation of a major life activity. Cf. Heiko v. Columbo Savings Bank, F.S.B., 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADAAA, that “certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness”). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

This result is the consequence of the combined effect of the statutory changes to the definition of disability contained in the Amendments Act and flows from application of the rules of construction set forth in §§1630.2(j)(1)(i)–(ix) (including the lower standard for “substantially limits”: the rule that major life activities include major bodily functions; the principle that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active; and the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability).

The regulations at §1630.2(j)(3)(iii) provide examples of the types of impairments that should easily be found to substantially limit a major life activity. The legislative history states that Congress modeled the ADA definition of disability on the definition contained in the Rehabilitation Act, and said it wished to return courts to the way they had construed that definition. See 2008 House Judiciary Committee Report at 6. Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition “broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental disabilities * * * even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual.” Id.; See also id. at 9 (referring to individuals with disabilities that had been covered under the Rehabilitation Act and

that Congress intended to include under the ADA—"people with serious health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities"; id. at 3.6 (citing cases also finding that cerebral palsy, hearing impairments, mental retardation, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); id. at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that "we could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability"); 2008 Senate Statement of Managers at 3 (explaining that "we were faced with a situation in which physical or mental impairments that would previously [under the Rehabilitation Act] have been found to constitute disabilities [we]re not considered disabilities" and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Of course, the impairments listed in subparagraph 1630.2(j)(3)(iii) may substantially limit a variety of other major life activities in addition to those listed in the regulation. For example, mobility impairments requiring the use of a wheelchair substantially limit the major life activity of walking. Diabetes may substantially limit major life activities such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

By using the term "brain function" to describe the system affected by various mental impairments, the Commission is expressing no view on the debate concerning whether mental illnesses are caused by environmental or biological factors, but rather intends the term to capture functions such as the ability of the brain to regulate thought processes and emotions.

Section 1630.2(j)(4) Condition, Manner, or Duration

The regulations provide that facts such as the condition, manner, or duration of an individual's major life activities may be useful in determining whether an impairment results in a substantial limitation. In the legislative history of the ADAAA, Congress reiterated what it had said at the time of the original ADA: "A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 20). According to Congress: "We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in Toyota—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations * * *. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." 2008 Senate Statement of Managers at 7.

Consistent with the legislative history, an impairment may substantially limit the "condition" or "manner" under which a major life activity can be performed in a number of ways. For example, the condition or manner under which a major life activity can be performed may refer to the way an individual performs a major life activity. Thus, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limiting if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. For example, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment "causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion." See 2008 House Judiciary Committee Report at 17.

"Duration" refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant
pain would be substantially limited in standing, since most people can stand for more than two hours without significant pain. However, a person who can walk for ten miles is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk such a distance without experiencing some discomfort. See 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 25).

The regulations provide that in assessing substantial limitation and considering facts such as condition, manner, or duration, the non-ameliorative effects of mitigating measures may be considered. Such “non-ameliorative effects” could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. Of course, in many instances, it will not be necessary to assess the negative impact of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and it thus is not necessary to consider the burdens that dialysis treatment imposes.

Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.

The Committee believes that the comparison of individuals with specific learning disabilities to ‘most people’ is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual’s impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.” 2008 House Educ. & Labor Rep. at 10-11.

It bears emphasizing that while it may be useful in appropriate cases to consider facts such as condition, manner, or duration, it is always necessary to consider and apply the rules of construction in §1630.2(j)(1)(i)–(ix) that set forth the elements of broad coverage enacted by Congress. 2008 Senate Statement of Managers at 6. Accordingly, while the Commission’s regulations retain the concept of “condition, manner, or duration,” they no longer include the additional list of “substantial limitation” factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment).

Finally, “condition, manner, or duration” are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. “Condition, manner, or duration” are not required “factors” that must be considered as a talismanic test. Rather, in referring to “condition, manner, or duration,” the regulations make clear that these are merely the types of facts that may be considered in appropriate cases. To the extent such aspects of limitation may be useful or relevant to show a substantial limitation in a particular fact pattern, some or
all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage.

At the same time, individuals seeking coverage under the first or second prong of the definition of disability should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. See 2008 Senate Statement of Managers at 7. Of course, covered entities may defeat a showing of “substantial limitation” by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts related to “condition, manner, or duration” that are not pertinent to the substantial limitation the individual has proffered.

Sections 1630.2(j)(5) and (6) Examples of Mitigating Measures; Ordinary Eyeglasses or Contact Lenses

These provisions of the regulations provide numerous examples of mitigating measures and the definition of “ordinary eyeglasses or contact lenses.” These definitions have been more fully discussed in the portions of this interpretative guidance concerning the rules of construction in §1630.2(j)(1).

Substantially Limited in Working

The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.

In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person’s ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act. See, e.g., Corley v. Dep’t of Veterans Affairs ex rel Principi, 218 F. App’x 727, 738 (10th Cir. 2007) (employee with seizure disorder was not substantially limited in working because he was foreclosed from jobs involving driving, operating machinery, childcare, military service, and other jobs; employee would now be substantially limited in neurological function); Nida v. United Parcel Serv., Inc., 127 F. App’x 779, 782 (6th Cir. 2005) (employee with bone marrow cancer was not substantially limited in working due to lifting restrictions caused by his cancer; employee would now be substantially limited in normal cell growth); Williams v. Philadelphia Hous. Auth. Police Dep’t, 380 F.3d 751, 763-64 (3d Cir. 2004) (issue of material fact concerning whether police officer’s major depression substantially limited him in performing a class of jobs due to restrictions on his ability to carry a firearm; officer would now be substantially limited in brain function).2

In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. In keeping with the findings and purposes of the Amendments Act, the determination of coverage under the law should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including the major life activity of working, than they applied prior to the Amendments Act. The Commission believes that the courts, in applying an overly strict standard with regard to “substantially limits” generally, have reached conclusions with regard to what is necessary to demonstrate a substantial limitation in the major life activity of working that would be inconsistent with the changes now made by the Amendments Act. Accordingly, as used in this section the terms “class of jobs” and “broad range of jobs in various classes” will be applied in a more straightforward and simple manner than

2In addition, many cases previously analyzed in terms of whether the plaintiff was “substantially limited in working” will now be analyzed under the “regarded as” prong of the definition of disability as revised by the Amendments Act. See, e.g., Cannon v. Levi Strauss & Co., 29 F. App’x 331 (6th Cir. 2002) (factory worker laid off due to her carpal tunnel syndrome not regarded as substantially limited in working because her job of sewing machine operator was not a “broad class of jobs”; she would now be protected under the third prong because she was fired because of her impairment, carpal tunnel syndrome); Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996) (applicant not hired for firefighting job because of his mild hemophilia not regarded as substantially limited in working; applicant would now be protected under the third prong because he was not hired because of his impairment, hemophilia).
they were applied by the courts prior to the Amendments Act.3

Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.

A class of jobs may be determined by reference to the nature of the work that an individual is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs) or by reference to job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels).

For example, if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.

Section 1630.2(k) Record of a Substantially Limiting Impairment

The second prong of the definition of “disability” provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, the “record of” provision would protect an individual who was treated for cancer years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as having learning disabilities or intellectual disabilities (formerly termed “mental retardation”) are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52–53; House Judiciary Report at 29; 2008 House Judiciary Report at 7–8 & n.14. Similarly, an employee who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder.

This part of the definition is satisfied where evidence establishes that an individual has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual’s major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

Such evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a “record of” a substantially limiting impairment—and thus be protected under the “record of” prong of the statute—even if a covered entity does not specifically know about the relevant record. Of course, for the covered entity to be liable for discrimination under title I of the ADA, the individual with a “record of” a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

The terms “substantially limits” and “major life activity” under the second prong of the definition of “disability” are to be construed in accordance with the same principles applicable under the “actual disability” prong, as set forth in § 1630.2(j).

Individuals who are covered under the “record of” prong will often be covered under the first prong of the definition of disability as well. This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting.
tensively on the reasoning of the Judiciary Committee Report at 17 (same). In 2008 Senate Statement of Managers at 9; 2008 House Statement of Managers at 9–10. In doing so, Congress rejected court decisions that had required an individual to establish that an impairment was substantially limiting in order for the individual to establish that he or she is covered under the “regarded as” prong by showing that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be “regarded as having such an impairment.” In short, to qualify for coverage under the “regarded as” prong, an individual is not subject to any functional test. See 2008 Senate Statement of Managers at 13 (“The functional limitation imposed by an impairment is irrelevant to the third ‘regarded as’ prong.”); 2008 House Judiciary Committee Report at 17 (that is, “the individual is not required to show that the perceived impairment limits performance of a major life activity”). The concepts of “major life activities” and “substantial limitation” simply are not relevant in evaluating whether an individual is “regarded as having such an impairment.” To illustrate how straightforward application of the “regarded as” prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability. A “prohibited action” under the “regarded as” prong refers to an action of the type that would substantially limit normal cell growth when active. See 42 U.S.C. 12102(4)(D); § 1630.2(j)(1)(vii). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the “actual disability” prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the “record of” prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, this section of the EEOC’s regulations makes it clear that an individual with a record of a disability is entitled to a reasonable accommodation currently needed for limitations resulting from or relating to the past substantially limiting impairment. This conclusion, which has been the Commission’s long-standing position, is confirmed by language in the ADA Amendments Act stating that individuals covered only under the “regarded as” prong of the definition of disability are not entitled to reasonable accommodation. See 42 U.S.C. 12201(h). By implication, this means that individuals covered under the first or second prongs are otherwise eligible for reasonable accommodations. See 2008 House Judiciary Committee Report at 22 (“This makes clear that the duty to accommodate ... arises only when an individual establishes coverage under the first or second prong of the definition.”). Thus, as the regulations explain, an employee with an impairment that previously substantially limited but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments from a health care provider.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

Coverage under the “regarded as” prong of the definition of disability should not be difficult to establish. See 2008 House Judiciary Committee Report at 17 (explaining that Congress never expected or intended it would be a difficult standard to meet). Under the third prong of the definition of disability, an individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not “transitory and minor.”

This third prong of the definition of disability was originally intended to express Congress’s understanding that “unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions.” 2008 Senate Statement of Managers at 9; 2008 House Judiciary Committee Report at 17 (same). In passing the original ADA, Congress relied extensively on the reasoning of School Board of Nassau County v. Arline4 “that the negative reactions of others are just as disabling as the actual impact of an impairment.” 2008 Senate Statement of Managers at 9. The ADAAA reiterates Congress’s reliance on the broad views enunciated in that decision, and Congress “believe[a] that courts should continue to rely on this standard.” Id.

Accordingly, the ADA Amendments Act broadened the application of the “regarded as” prong of the definition of disability. 2008 Senate Statement of Managers at 9–10. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress’s intent to allow individuals to establish coverage under the “regarded as” prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity’s beliefs concerning the severity of the impairment. Joint Hoyer-Sensenbrenner Statement at 3.

Thus it is not necessary, as it was prior to the ADA Amendments Act, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the “regarded as” prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be “regarded as having such an impairment.”

4 480 U.S. at 282–83.

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would be unlawful under the ADA (but for any defenses to liability). Such prohibited actions include, but are not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

Where an employer bases a prohibited employment action on an actual or perceived impairment that is not “transitory and minor,” the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer’s decision. Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established only if an individual meets the burden of proving that the covered entity discriminated unlawfully within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability. Thus, for example, an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry.

The fact that the “regarded as” prong requires proof of causation in order to show that a person is covered does not mean that proving a “regarded as” claim is complex. While a person must show, for both coverage and liability, that he or she was subjected to a prohibited action based on a perceived impairment on which the employer’s decision was based is both transitory and minor, the function of the ADA is to ensure that the employer ultimately establishes a defense where reasonable accommodation or modification—short of being granted a reasonable accommodation or modification—should be brought under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.” Joint Hoyer-Sensenbrenner Statement at 6.

As prescribed in the ADA Amendments Act, the regulations provide an exception to coverage under the “regarded as” prong where the impairment on which a prohibited action is based is both transitory (having an actual or expected duration of six months or less) and minor. The regulations make clear (at §1630.2(l)(2) and §1630.15(f)) that this exception is a defense to a claim of discrimination. “Providing this exception responds to concerns raised by employer organizations and is reasonable under the ‘regarded as’ prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition.” 2008 Senate Statement of Managers at 10; See also 2008 House Judiciary Committee Report at 18 (explaining that “absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time”). However, as an exception to the general rule for broad coverage under the “regarded as” prong, this limitation on coverage should be construed narrowly. 2008 House Judiciary Committee Report at 18.

The relevant inquiry is whether the actual or perceived impairment on which the employer’s action was based is objectively “transitory and minor,” not whether the employer claims it subjectively believed the impairment was transitory and minor. For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively “transitory and minor” hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have “regarded” the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not “transitory and minor.”

An individual covered only under the “regarded as” prong is not entitled to reasonable accommodation. 42 U.S.C. 12201(h). Thus, in cases where reasonable accommodation is not at issue, the third prong provides a more straightforward framework for analyzing whether discrimination occurred. As Congress observed in enacting the ADAAA: “[W]e expect [the first] prong of the definition to be used only by people who are affirmatively seeking reasonable accommodations or modifications. Any individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation or modification—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.” Joint Hoyer-Sensenbrenner Statement at 6.
Section 1630.2(m) Qualified Individual

The ADA prohibits discrimination on the basis of disability against a qualified individual. The determination of whether an individual with a disability is "qualified" should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in the Rehabilitation Act caselaw as determining whether the individual is "otherwise qualified" for the position. See Senate Report at 33; House Labor Report at 64–65. (See §1630.9 Not Making Reasonable Accommodation).

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position. House Labor Report at 55.

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs.

Section 1630.2(n) Essential Functions

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.

Although part 1630 does not require employers to develop or maintain job descriptions, written job descriptions prepared before advertising or interviewing applicants for the job, as well as the employer's judgment as to what functions are essential are among the relevant evidence to be considered in determining whether a particular function is essential. The terms of a collective bargaining agreement are also relevant to the determination of whether a particular function is essential. The work experience of past employees in the job or of current employees in similar jobs is likewise relevant to the determination of whether a particular function is essential. See H.R. Conf. Rep. No. 101-596, 104th Cong., 2d Sess. 58 (1996) [hereinafter Conference Report]; House Judiciary Report at 33-34. See also Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988).

The time spent performing the particular function may also be an indicator of whether that function is essential. For example, if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function. The consequences of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. (See §1630.10 Qualification Standards, Tests and Other Selection Criteria). If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

Section 1630.2(o) Reasonable Accommodation

An individual with a disability is considered "qualified" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. A covered entity is required, absent undue hardship, to provide reasonable accommodation to an otherwise qualified individual with a substantially limiting impairment or a "record of" such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

The legislative history of the ADAAA makes clear that Congress included this provision in response to various court decisions that had held (pre-Amendments Act) that individuals who were covered solely under the "regarded as" prong were eligible for reasonable accommodations. In those cases, the plaintiffs had been found not to be covered under the first prong of the definition of disability "because of the overly stringent manner in which the courts had been interpreting that prong." 2008 Senate Statement of Managers at 11. The legislative history goes on to explain that "[n]o reasonable accommodations "is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition of disability, properly applied"). Further, individuals covered only under the third prong still may bring discrimination claims (other than failure-to-accommodate claims) under Title I of the ADA. 2008 Senate Statement of Managers at 9-10.

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal
benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

It may also be a reasonable accommodation to permit an individual with a disability the opportunity to use equipment, aids or services that an employer is not required to provide as a reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.

The accommodations included on the list of reasonable accommodations are generally self explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, training rooms, restrooms etc., may be required as reasonable accommodations.

Another of the potential accommodations listed is "job restructuring." An employer or other covered entity may restructure a job by reallocating or redistributing non-essential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires an individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the individual with a disability can perform are made a part of the position to be filled by the individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position. See Senate Report at 31; House Labor Report at 62.

An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job. See Colemon v. Darden, 595 F.2d 533 (10th Cir. 1979).

An employer or other covered entity may also restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour. Likewise, as a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually.

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.

Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances. As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation. See Senate Report at 31–32; House Labor Report at 63.
The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the employee’s disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in §1630.9 Not Making Reasonable Accommodation.

Section 1630.2(p) Undue Hardship

An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer’s or other covered entity’s business. The term “undue hardship” means significant difficulty or expense in, or resulting from, the provision of the accommodation. The “undue hardship” provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. “Undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. See Senate Report at 35; House Labor Report at 67.

For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. The fact that that particular accommodation poses an undue hardship, however, only means that the employer is not required to provide that accommodation. If there is another accommodation that will not create an undue hardship, the employer would be required to provide the alternative accommodation.

An employer’s claim that the cost of a particular accommodation will impose an undue hardship will be analyzed in light of the factors outlined in part 1630. In part, this analysis requires a determination of whose financial resources should be considered in deciding whether the accommodation is unduly costly. In some cases the financial resources of the employer or other covered entity in its entirety should be considered in determining whether the cost of an accommodation poses an undue hardship. In other cases, consideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will actually be required to provide the accommodation. See House Labor Report at 68–69; House Judiciary Report at 40–41; see also Conference Report at 56–57.

If the employer or other covered entity asserts that only the financial resources of the facility where the individual will be employed should be considered, part 1630 requires a factual determination of the relationship between the employer or other covered entity and the facility that will provide the accommodation. As an example, suppose that an independently owned fast food franchise that receives no money from the franchisor refuses to hire an individual with a hearing impairment because it asserts that it would be an undue hardship to provide an interpreter to enable the individual to participate in monthly staff meetings. Since the financial relationship between the franchisor and the franchise is limited to payment of an annual franchise fee, only the financial resources of the franchise would be considered in determining whether or not providing the accommodation would be an undue hardship. See House Labor Report at 68; House Judiciary Report at 40.

If the employer or other covered entity can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., a State vocational rehabilitation agency, or if Federal, State or local tax deductions or tax credits are available to offset the cost of the accommodation. If the employer or other covered entity receives, or is eligible to receive, monies from an external source that would pay the entire cost of the accommodation, it cannot claim cost as an undue hardship. In the absence of such funding, the individual with a disability requesting the accommodation should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business. To the extent that such monies pay or would pay for only part of the cost of the accommodation, only that portion of the cost of the accommodation that could not be recovered—the final net cost to the entity—may be considered in determining undue hardship. (See §1630.9 Not Making Reasonable Accommodation). See Senate Report at 36; House Labor Report at 69.

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a
result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slight increase in risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual’s mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56; House Labor Report at 73–74; House Judiciary Report at 45. See also Mantele v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir.1982).

Section 1630.3 Exceptions to the Definitions of “Disability” and “Qualified Individual with a Disability”

Part 1630 provides that an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of this part when the employer or other covered entity acts on the basis of such use. Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.

Employers, for example, may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination. The term “currently engaging” is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. See Conference Report at 64.

Individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs are not excluded from the definitions of the terms...
“disability” and “qualified individual with a disability.” Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definitions of those terms. The term “rehabilitation program” refers to both in-patient and out-patient programs, as well as to appropriate employee assistance programs, professionally recognized self-help programs, such as Narcotics Anonymous, or other programs that provide professional (not necessarily medical) assistance and counseling for individuals who illegally use drugs. See Conference Report at 64; see also House Labor Report at 77; House Judiciary Report at 47.

It should be noted that this provision simply provides that certain individuals are not excluded from the definitions of “disability” and “qualified individual with a disability.” Consequently, such individuals are still required to establish that they satisfy the requirements of these definitions in order to be protected by the ADA and this part. An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to demonstrate that he or she meets the definition of “disability” as defined in this part.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continued use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. (See §1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

Section 1630.4 Discrimination Prohibited

Paragraph (a) of this provision prohibits discrimination on the basis of disability against a qualified individual in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 501 of the Rehabilitation Act of 1973.

Paragraph (b) makes it clear that the language “on the basis of disability” is not intended to create a cause of action for an individual without a disability who claims that someone with a disability was treated more favorably (disparate treatment), or was provided a reasonable accommodation that an individual without a disability was not provided. See 2008 House Judiciary Committee Report at 21 (this provision “prohibits reverse discrimination claims by disallowing claims based on the lack of disability”). Additionally, the ADA and this part do not affect laws that may require the affirmative recruitment or hiring of individuals with disabilities, or any voluntary affirmative action employers may undertake on behalf of individuals with disabilities. However, part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use criteria that are job-related and consistent with business necessity to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

The Amendments Act modified title I’s nondiscrimination provision to replace the prohibition on discrimination “against a qualified individual with a disability because of the disability of such individual” with a prohibition on discrimination “against a qualified individual on the basis of disability.” As the legislative history of the ADAAA explains: “[T]he bill modifies the ADA to conform to the structure of Title VII and other civil rights laws by requiring an individual to demonstrate discrimination ‘on the basis of disability’ rather than discrimination ‘against an individual with a disability’ because of the individual’s disability. We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual’s impairment, and more time and energy on the merits of the case—including whether discrimination occurred because of the disability, whether an individual was qualified for a job or eligible for a service, and whether a reasonable accommodation or modification was called for under the law.” Joint Hoyer-Sensenbrenner Statement at 4; See also 2008 House Judiciary Report at 21 (“This change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists.”).

Section 1630.5 Limiting, Segregating and Classifying

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of §1630.4. The capabilities of qualified individuals must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees into
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separate work areas or into separate lines of advancement on the basis of their disabilities.

Thus, for example, it would be a violation of this part to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. It would be a violation of this part for an employer to adopt a separate track of job promotion or progression for employees with disabilities based on a presumption that employees with disabilities are interested in, or incapable of, performing particular jobs. Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer-provided non-work facilities such as segregated break rooms, lunch rooms, or lounges. It would also be a violation of this part to deny employment to an applicant or employee with a disability based on generalized fears about the safety of an individual with such a disability, or based on generalized assumptions about the absenteeism rate of an individual with such a disability.

In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

So, for example, it would be permissible for an employer to offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g., limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28–29; House Labor Report at 58–59; House Judiciary Report at 36.

Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees, or reduces the amount of medical insurance coverage that it will provide to all employees, is not in violation of this part, even if the benefits that are reduced have an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons are in violation of this part. See Alexander v. Chosate, 469 U.S. 287 (1985). See Senate Report at 85; House Labor Report at 137. (See also, the discussion at §1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans).

Section 1630.6 Contractual or Other Arrangements

An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. This provision does not affect the determination of whether or not one is a "covered entity" or "employer" as defined in §1630.2.

This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect.

Part 1630 notes that this provision applies to parties on either side of the contractual or other relationship. This is intended to highlight that an employer whose employees provide services to others, like an employer whose employees receive services, must ensure that those employees are not discriminated against on the basis of disability. For example, a copier company whose service representative is a dwarf could be required to provide a stepstool, as a reasonable accommodation, to enable him to perform the necessary repairs. However, the employer would not be required, as a reasonable accommodation, to make structural changes to its customer's inaccessible premises.

The existence of the contractual relationship adds no new obligations under part 1630. The employer, therefore, is not liable.
through the contractual arrangement for any discrimination by the contractor against the contractors own employees or applicants, although the contractor, as an employer, may be liable for such discrimination.

An employer or other covered entity, on the other hand, cannot evade the obligations imposed by this part by engaging in a contractual or other relationship. For example, an employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement. See Conference Report at 59; House Labor Report at 59–61; House Judiciary Report at 36–37.

To illustrate, assume that an employer is seeking to contract with a company to provide training for its employees. Any responsibilities of reasonable accommodation applicable to the employer in providing the training remain with that employer even if it contracts with another company for this service. Thus, if the training company were planning to conduct the training at an inaccessible location, thereby making it impossible for an employee who uses a wheelchair to attend, the employer would have a duty to make reasonable accommodation unless to do so would impose an undue hardship. Under these circumstances, appropriate accommodations might include (1) having the training company identify accessible training sites and relocate the training program; (2) having the training company make the training site accessible; (3) directly making the training site accessible or providing the training company with the means by which to make the site accessible; (4) identifying and contracting with another training company that uses accessible sites; or (5) any other accommodation that would result in making the training available to the employee.

As another illustration, assume that instead of contracting with a training company, the employer contracts with a hotel to host a conference for its employees. The employer will have a duty to ascertain and ensure the accessibility of the hotel and its conference facilities. To fulfill this obligation the employer could, for example, inspect the hotel first-hand or ask a local disability group to inspect the hotel. Alternatively, the employer could ensure that the contract with the hotel specifies it will provide accessible guest rooms for those who need them and that all rooms to be used for the conference, including exhibit and meeting rooms, are accessible. If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory, for the cost of any accommodation needed to provide access to the hotel and conference, and for any other costs accrued by the employer. (In addition, the hotel may also be independently liable under title III of the ADA). However, this would not relieve the employer of its responsibility under this part nor shield it from charges of discrimination by its own employees. See House Labor Report at 49; House Judiciary Report at 37.

Section 1630.8 Relationship or Association With an Individual With a Disability

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

This provision also applies to other benefits and privileges of employment. For example, an employer that provides health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report at 61–62; House Judiciary Report at 38–39.

Section 1630.9 Not Making Reasonable Accommodation

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual
with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal modification or adaptation. In the latter case, the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

It should be noted, however, that the provision of such items may be required as a reasonable accommodation where such items are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office.

The term “supported employment,” which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional (“job coach”) to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as “supported employment.” For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary “job coach” to assist in the training of an individual with a disability as a reasonable accommodation. However, an employer would not be required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer-sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The term “otherwise qualified” is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is “otherwise qualified,” in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job’s essential functions.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. That individual is not entitled to a reasonable accommodation because the individual is not “otherwise qualified” for the position.

On the other hand, if the individual has graduated from an accredited law school and passed the bar examination, the individual would be “otherwise qualified.” The law firm would thus be required to provide a reasonable accommodation, such as a machine that magnifies print, to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. See Senate Report at 33–34; House Labor Report at 64–65. The reasonable accommodation that is required by this part should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average
similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an expensive, state-of-the-art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. See Senate Report at 35; House Labor Report at 66; see also Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of an individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability 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. See Senate Report at 34; House Labor Report at 65.

Process of Determining the Appropriate Reasonable Accommodation

Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34-35; House Labor Report at 65-67.

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

1. Analyze the particular job involved and determine its purpose and essential functions.

2. Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation.

3. In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

4. Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of “reasonable accommodation process.”

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual’s disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, “individual assessment” means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential
functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual’s performance of the job’s essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from State or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that, as provided in §1630.9(c) of this part, the failure to obtain or receive technical assistance from the Federal agencies that administer the ADA will not excuse the employer from its reasonable accommodation obligation.

Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. It should also be noted that the individual’s willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation required by the individual for any reason be unable or unwilling to continue to provide the accommodation.

Reasonable Accommodation Process Illustrated

The following example illustrates the informal reasonable accommodation process. Suppose a Sack Handler position requires that the employee pick up fifty pound sacks and carry them from the company loading dock to the storage room, and that a sack handler who is disabled by a back impairment requests a reasonable accommodation.

Upon receiving the request, the employer analyzes the Sack Handler job and determines that the essential function and purpose of the job is not the requirement that the job holder physically lift and carry the sacks, but the requirement that the job holder cause the sack to move from the loading dock to the storage room.

The employer then meets with the sack handler to ascertain precisely the barrier posed by the individual’s specific disability to the performance of the job’s essential function of relocating the sacks. At this meeting the employer learns that the individual can, in fact, lift the sacks to waist level, but is prevented by his or her disability from carrying the sacks from the loading dock to the storage room. The employer and the individual agree that any of a number of potential accommodations, such as the provision of a dolly, hand truck, or cart, could enable the individual to transport the sacks that he or she has lifted.

Upon further consideration, however, it is determined that the provision of a cart is not a feasible effective option. No carts are currently available at the company, and those that can be purchased by the company are the wrong shape to hold many of the bulky and irregularly shaped sacks that must be moved. Both the dolly and the hand truck, on the other hand, appear to be effective options. Both are readily available to the company, and either will enable the individual to relocate the sacks that he or she has lifted. The sack handler indicates his or her preference for the dolly. In consideration of this expressed preference, and because the employer feels that the dolly will allow the individual to move more sacks at a time and be more efficient than would a hand truck, the employer ultimately provides the sack handler with a dolly in fulfillment of the obligation to make reasonable accommodation.

Section 1630.9(b)

This provision states that an employer or other covered entity cannot prefer or select a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual’s need for an accommodation cannot enter into the employer’s or other covered entity’s decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d)

The purpose of this provision is to clarify that an employer or other covered entity
may not compel an individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided, and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 65; House Judiciary Report at 71–72.

Section 1630.9(e)

The purpose of this provision is to incorporate the clarification made in the ADA Amendments Act of 2008 that an individual is not entitled to reasonable accommodation under the ADA if the individual is only covered under the “regarded as” prong of the definition of “individual with a disability.” However, if the individual is covered under both the “regarded as” prong and one or both of the other two prongs of the definition of disability, the ordinary rules concerning the provision of reasonable accommodation apply.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

Section 1630.10(a)—In General

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant’s (or employee’s) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that those criteria, as used by the employer, are job related for the position to which they are being applied and are consistent with business necessity. The concept of “business necessity” has the same meaning as the concept of “business necessity” under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, often resolved by reasonable accommodation.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See 1999 Senate Report at 37–38; House Labor Report at 70–72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer’s business judgment with regard to production standards. See §1630.2(n) (Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.10(b)—Qualification Standards and Tests Related to Uncorrected Vision

This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. An individual challenging a covered entity’s application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability. In order to have standing to challenge such a standard, test, or criterion, however, a person must be adversely affected by such standard, test or criterion. The Commission also believes that such individuals will usually be covered under the “regarded as” prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See §1630.2(l); appendix to §1630.2(l).)

In either case, a covered entity may still defend a qualification standard requiring a certain level of uncorrected vision by showing that it is job related and consistent with business necessity. For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department’s qualification standard that requires all officers to have uncorrected vision of no
other effective accommodation unless to do so would impose an undue hardship.

Section 1630.11 Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirements of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual, or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. When the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, an employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (e.g., through an interview, or through education license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer’s obligation to make reasonable accommodation extends to ensuring that the test site is accessible. (See §1630.9 Not Making Reasonable Accommodation) See Senate Report at 37–38; House Labor Report at 70–72; House Judiciary Report at 42; see also Stotts v. Freeman, 694 F.2d 666 (11th Cir. 1983); Crane v. Dole, 817 F. Supp. 156 (D.D.C. 1995).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant’s workers’ compensation history.

Employers may ask questions that relate to the applicant’s ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver’s license, if driving

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is a job function, but may not ask whether
the applicant has a visual disability. Em-
ployers may ask about an applicant’s ability
to perform both essential and marginal job
functions. Employers, though, may not
refuse to hire an applicant with a disability
because the applicant’s disability prevents
him or her from performing marginal func-
tions. See Senate Report at 39; House Labor
Report at 72-73; House Judiciary Report at
42-43.

Section 1630.13(b) Examination or Inquiry
of Employees

The purpose of this provision is to prevent
the administration to employees of medical
tests or inquiries that do not serve a legiti-
mate business purpose. For example, if an
employee suddenly starts to use increased
amounts of sick leave or starts to appear
sickly, an employer could not require that
employee to be tested for AIDS, HIV infec-
tion, or cancer unless the employer can dem-
onstrate that such testing is job-related and
consistent with business necessity. See Sen-
ate Report at 39; House Labor Report at 78;
House Judiciary Report at 44.

Section 1630.14 Medical Examinations and
Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-em-
ployment inquiries into the ability of an
applicant to perform job-related functions.
This inquiry must be narrowly tailored. The
employer may describe or demonstrate the
job function and inquire whether or not the
applicant can perform that function with or
without reasonable accommodation. For ex-
ample, an employer may explain that the job
requires assembling small parts and ask if
the individual will be able to perform that
function, with or without reasonable accom-
modation. See Senate Report at 39; House Labor

An employer may also ask an applicant to
describe or to demonstrate how, with or
without reasonable accommodation, the ap-
plicant will be able to perform job-related
functions. Such a request may be made of all
applicants in the same job category regard-
less of disability. Such a request may also be
made of an applicant whose known disability
may interfere with or prevent the perform-
ance of a job-related function, whether or
not the employer routinely makes such a re-
quest of all applicants in the job category.
For example, an employer may ask an indi-
vidual with one leg who applies for a position
as a home washing machine repairman to
demonstrate or to explain how, with or with-
out reasonable accommodation, he would
be able to transport himself and his tools down
basement stairs. However, the employer may
not inquire as to the nature or severity of
the disability. Therefore, for example, the
employer cannot ask how the individual lost
the leg or whether the loss of the leg is indic-
ative of an underlying impairment.

On the other hand, if the known disability
of an applicant will not interfere with or pre-
vent the performance of a job-related func-
tion, the employer may only request a de-
scription or demonstration by the applicant
if it routinely makes such a request of all ap-
plicants in the same job category. So, for ex-
ample, it would not be permitted for an em-
ployer to request that an applicant with one
leg demonstrate his ability to assemble
small parts while seated at a table, if the
employer does not routinely request that all
applicants provide such a demonstration.

An employer that requires an applicant
with a disability to demonstrate how he or
she will perform a job-related function must
either provide the reasonable accommoda-
tion the applicant needs to perform the func-
tion or permit the applicant to explain how,
with the accommodation, he or she will per-
form the function. If the job-related function
is not an essential function, the employer
may not exclude the applicant with a dis-
ability because of the applicant’s inability to
perform that function. Rather, the employer
must, as a reasonable accommodation, either
provide an accommodation that will enable
the individual to perform the function, trans-
fer the function to another position, or
exchange the function for one the applicant
is able to perform.

An employer may not use an application
form that lists a number of potentially dis-
abling impairments and ask the applicant to
tick any of the impairments he or she may
have. In addition, as noted above, an em-
ployer may not ask how a particular indi-
vidual became disabled or the prognosis of
the individual’s disability. The employer is
also prohibited from asking how often the in-
dividual will require leave for treatment or
use leave as a result of incapacitation be-
cause of the disability. However, the em-
ployer may state the attendance require-
ments of the job and inquire whether the ap-
plicant can meet them.

An employer is permitted to ask, on a test
announcement or application form, that in-
dividuals with disabilities who will require a
reasonable accommodation in order to take
the test so inform the employer within a rea-
sonable established time period prior to the
administration of the test. The employer
may also request that documentation of the
need for the accommodation accompany the
request. Requested accommodations may in-
clude accessible testing sites, modified test-
ing conditions and accessible test formats.

Physical agility tests are not medical ex-
aminations and so may be given at any point
in the application or employment process.
Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. (See §1630.9 Not Making Reasonable Accommodation: Process of Determining the Appropriate Reasonable Accommodation).

As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by this part. (See §1630.1 (b) and (c) Applicability and Construction).

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer’s physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59–66; Senate Report at 39; House Labor Report at 73–74; House Judiciary Report at 45.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating this part.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers’ compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for State administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to State workers’ compensation offices or second injury funds in accordance with State workers’ compensation laws without violating this part.

Consistent with this section and with §1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in §1630.16(f).

Section 1630.14(c) Examination of Employees

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers or other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part. This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by Federal, State, or local law that are consistent with the ADA and this part (or in the case of a Federal standard, with section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include Federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine
Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74-75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 75; House Judiciary Report at 43-44.

Section 1630.15 Defenses

The section on defenses is effective in 1968. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The “traditional” defense to a charge of disparate treatment under title VII, as expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer’s attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals’ qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual’s disability. The fact that the individual’s disability is not covered by the employer’s current insurance plan or would cause the employer’s insurance premiums or workers’ compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability. Senate Report at 65; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15(b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, i.e., that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver’s license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver’s license. This is an example of a uniformly applied criterion, having a driver’s permit, that screens out an individual who has a disability that makes it impossible to obtain a driver’s permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.
With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must determine whether a requirement, as applied to the individual, satisfies the “direct threat” standard in §1630.2(r) in order to show that the requirement is job-related and consistent with business necessity. Consequently, an accommodation will cause it undue hardship, an employer would have to show that the cost is undue as compared to the employer’s budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68–69; House Judiciary Report at 40–41. Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

It should be noted, moreover, that the concept of undue hardship that has evolved under section 504 of the Rehabilitation Act and is embodied in this part is unlike the “undue hardship” defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the “de minimis” title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer’s budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68–69; House Judiciary Report at 40–41. Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

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It should be noted, moreover, that the concept of undue hardship that has evolved under section 504 of the Rehabilitation Act and is embodied in this part is unlike the “undue hardship” defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the “de minimis” title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer’s budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68–69; House Judiciary Report at 40–41. Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

Section 1630.15(e) Defense—Conflicting Federal Laws and Regulations

There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

Section 1630.15(f) Claims Based on Transitory and Minor Impairments Under the “Regarded As” Prong

It may be a defense to a charge of discrimination where coverage would be shown solely under the “regarded as” prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. Section 1630.15(f)(1) explains that an individual cannot be “regarded as having such an impairment” if the impairment is both transitory (defined by the ADAAA as lasting or expected to last less than six months) and minor. Section 1630.15(f)(2) explains that the determination of “transitory and minor” is made objectively. For example, an individual who is denied a promotion because he has a minor back injury would be “regarded as” an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory. Similarly, if an employer discriminates against an employee based on the employee’s bipolar disorder (an impairment that is not transitory and minor), the employee is “regarded as” having a disability even if the employer subjectively believes that the employee’s disorder is transitory and minor.

Section 1630.16 Specific Activities Permitted

Section 1630.16(a) Religious Entities

Religious organizations are not exempt from title I of the ADA or this part. A religious corporation, association, educational institution, or society may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider individuals with disabilities who are qualified and who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria. See Senate Report at 42; House Labor Report at 76–77; House Judiciary Report at 46.

Section 1630.16(b) Regulation of Alcohol and Drugs

This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds all of its other employees. Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part. As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of part 1630 when the employer acts on the basis of such use.

Section 1630.16(c) Drug Testing

This provision reflects title I’s neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual’s medical condition beyond whether the individual is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47.

Section 1630.16(e) Infectious and Communicable Diseases; Food Handling Jobs

This provision addressing food handling jobs applies the “direct threat” analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is no accommodation
that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.

If no such reasonable accommodation is possible, the employer may refuse to assign, or to continue to assign the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual. However, if the individual is a current employee, the employer would be required to consider the accommodation of reassignment to a vacant position not involving food handling for which the individual is qualified. Conference Report at 61–63. (See § 1630.2(r) Direct Threat).

Section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans

This provision is a limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans. It does not apply to those who establish, sponsor, observe or administer plans not involving benefits, such as liability insurance plans.

The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This provision is not intended to disrupt the current regulatory structure for self-insured employers. These employers may establish, sponsor, observe, or administer the terms of a bona fide benefit plan not subject to State laws that regulate insurance. This provision is also not intended to disrupt the current nature of insurance underwriting, or current insurance industry practices in sales, underwriting, pricing, administrative and other services, claims and similar insurance related activities based on classification of risks as regulated by the States.

The activities permitted by this provision do not violate part 1630 even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part. Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted.

However, an employer or other covered entity cannot deny an individual with a disability who is qualified equal access to insurance or subject an individual with a disability who is qualified to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks. Part 1630 requires that decisions not based on risk classification be made in conformity with non-discrimination requirements. See Senate Report at 84–86; House Labor Report at 136–138; House Judiciary Report at 70–71. See the discussion of § 1630.5 Limiting, Segregating and Classifying.


PART 1635—GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

Sec. 1635 Purpose.

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SOURCE: 75 FR 68932, Nov. 9, 2010, unless otherwise noted.

§ 1635.1 Purpose.

(a) The purpose of this part is to implement Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff, et seq. Title II of GINA:

(1) Prohibits use of genetic information in employment decision-making;

(2) Restricts employers and other entities subject to Title II of GINA from requesting, requiring, or purchasing genetic information;

(3) Requires that genetic information be maintained as a confidential medical record, and places strict limits on disclosure of genetic information; and

(4) Provides remedies for individuals whose genetic information is acquired, used, or disclosed in violation of its protections.

(b) This part does not apply to actions of covered entities that do not pertain to an individual’s status as an