THE AMERICANS WITH DISABILITIES ACT:

QUESTIONS AND ANSWERS

May, 1995

THE COMMISSION
ON PEACE OFFICER STANDARDS AND TRAINING

STATE OF CALIFORNIA

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CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

Published May, 1992
Reprinted September, 1994; January, 1995
Revised May, 1995

For information about copies of this publication, contact:

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PREFACE

The first edition of this document was published in May 1992, in response to numerous requests for information and clarification on the impact of the Americans with Disabilities Act of 1990 on the personnel practices of law enforcement agencies. Since that time, POST has received many additional inquiries about the Act, and additional information has emerged in the form of both case law and interpretive guidance provided by the agencies responsible for enforcing the Act. Accordingly, the document has been updated and expanded to address many of the questions that have been directed to POST since 1992.

While the information contained in this document is intended to serve the needs of California law enforcement, it is not intended as legal guidance, nor is it intended as a replacement for consultation with legal counsel. It is also not intended to supplant the opportunity to contact POST directly for purposes of discussing any additional inquiries or issues. Included in the text are the names, locations and phone numbers of POST staff and other resources who can be contacted for further assistance.

Norman C. Boehm

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ACKNOWLEDGEMENTS

Integral to the publication of this manual was the input and involvement of a number of key individuals both within and outside of POST. They include:

Martin J. Mayer, J.D.
Mayer, Coble & Palmer

Michael Roberts, Ph.D.
Law Enforcement Psychological Services

Sharon Rennert
Equal Employment Opportunity Commission

Louie Mauro, J.D.
California Department of Justice

Sergeant Gary Hudson
Mendicino Co. Sheriff's Department

Sergeant Gary Bertelsen
San Jose Police Department

Phillip J. Lyons
North Carolina Department of Justice

Beverly Bair
California Department of Corrections

John Berner, Ph.D.
Commission on POST

Ken Krueger
Commission on POST

Luella Luke
Commission on POST

John Weiner
Commission on POST

Jim Norborg, Ph.D.
Commission on POST

Richard Honey
Commission on POST

Secretarial support was provided by Donna Lively and Jackie McGovern, POST.

The assistance of all of the above individuals is sincerely appreciated.

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I. INTRODUCTION

Since its passage in 1990, the Americans with Disabilities Act (ADA) has required organizations to reevaluate and in many cases revise their personnel practices to ensure that individuals with disabilities are not the target of unfair discrimination.[1] In May 1992, POST published "The Americans with Disabilities Act of 1990: Questions and Answers" to assist California law enforcement agencies in their interpretation and implementation of the new legislation. Since that time, additional information about the ADA has been continually emerging in the form of case law, commentaries, and most importantly, guidance from the agencies responsible for enforcing the Act--the Department of Justice (DOJ) and particularly the Equal Employment Opportunity Commission (EEOC).[2] ADA questions directed to POST have also helped identify areas that require further clarification.

The purpose of this revised edition is to provide POST agencies with the most current information on the ADA and in particular how it affects law enforcement personnel practices such as peace officer selection, testing, and training. Unlike the prior edition, this document presumes a basic degree of familiarity with the ADA; therefore, certain basic concepts and history will not be reiterated in any great detail. Furthermore, this document is not intended as legal advice, nor as a legal interpretation of existing law. It is also not intended as a substitute for careful review of the law itself, or associated EEOC/DOJ documents such as their regulations (1991), Technical Assistance Manuals (1992), and the EEOC's Enforcement Guidance (1994).

The information provided here is general in both scope and detail. It is not intended as legal guidance, nor is it intended as a replacement for consultation with legal counsel--especially in light of the individualized, case-by-case analyses required by the ADA itself. Moreover, while this revision reflects POST's most considered judgment resulting from discussions with EEOC/DOJ representatives and review of available information, it is nevertheless acknowledged that differences do exist even among experts in the way the new law and its associated regulations are interpreted. This is especially true at this relatively early stage of the law, while additional guidance and case law are still forthcoming.

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[1]Other parts of the ADA provide protection in additional areas; however, the focus of this document is on Title I (Employment) and Titles II/III (State and Local Governments/Public Accommodations).

[2]EEOC is responsible for enforcing Title I; DOJ is responsible for enforcing Titles II and III.

II. OVERVIEW OF CASE LAW ACTIVITY

Between July 26, 1990 (the enactment date of the ADA) and June 1994, a total of 29,720 employment discrimination charges were filed with the EEOC. Back problems constituted the single most common medical condition (20%), followed by neurological problems (13%), emotional/psychiatric conditions (11%), problems of the extremities (6%), and heart problems (5%). The remaining 45% were classified as "other."

Most of the charges against employers included multiple allegations, although the primary complaints were for wrongful discharge (50%), failure to offer reasonable accommodation (25%), hiring improprieties (11%), and harassment (10%).

III. EXTENT OF COVERAGE

1. Who is covered by the ADA?

As of July 26, 1994, all employers (public or private) of 15 or more employees are covered by the ADA. Federal government institutions, and institutions receiving federal government funds, are covered by the Rehabilitation Act, which for all practical purposes provides the same protection as the ADA. In addition, educational institutions (e.g., community colleges, training academies) are covered by Titles II/III of the ADA (State and Local Governments/Public Accommodations), regardless of whether their students are sponsored or unsponsored.

Employees[3] and applicants are afforded protection under Title I of the ADA; students and those applying for admission into a basic academy would be protected under Titles II/III. Although certain sections of this document focus on the employment (Title I) provisions of the ADA, the majority of the questions and answers addressed here pertain to both categories of individuals.

2. Who is entitled to protection by the ADA?

The ADA prohibits discrimination against all qualified individuals with disabilities as well as individuals regarded as or having a record of being disabled. Individuals who are discriminated against because of an association or relationship with an individual with a disability are also protected.

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[3]Although volunteers generally are not considered employees by the EEOC, they are if the volunteer work is required for or regularly leads to compensated employment with the organization. Therefore, if reserves are given preference, or if it can be shown that most of its officers first served as reserves, then an agency should treat its reserves as employees with respect to Title I requirements.

3. **What does the ADA consider a "disability?"**

A disability is defined as a *physical or mental impairment* that *substantially limits* one or more *major life activities*. Physical impairments include (but are not limited to) physiological disorders or conditions, cosmetic disfigurements, or anatomical losses that affect one or more body systems (e.g., neurological, musculoskeletal, cardiovascular, respiratory). **Mental or psychological disorders** include mental retardation, organic brain syndrome, emotional or mental illness, and specific *learning disabilities*. Individuals with a history of addiction to illegal drugs, as well as individuals who were or are currently addicted to alcohol, are also protected by the ADA.

Congress did not provide an exhaustive list of conditions to be considered disabling; they instead stipulated that this determination must be made on a case-by-case basis.

Major life activities are defined as basic functions that the average person can perform with little or no difficulty. They include:

- walking
- speaking
- breathing
- performing manual tasks
- interacting with others
- seeing
- hearing
- learning
- thinking or concentrating
- **working**

To be substantially limiting, an impairment must either prevent or restrict the condition, manner, or duration with which an individual can perform a major life activity, as compared to an average person in the general population. To determine whether an impairment is substantially limiting, the EEOC will first evaluate the nature and severity of the impairment, the duration or expected duration of the impairment, and the actual or expected long-term impact of the impairment.

4. **What conditions are NOT protected under the ADA?**

There are several types of impairments that are expressly not protected by the ADA. They include:

(a) Temporary, nonchronic impairments/conditions of short duration, and with little or no permanent impact (e.g., broken limbs, sprained joints, concussions, influenza, and pregnancy);

(b) Physical characteristics, such as eye and hair color, left-handedness, height, or muscle tone that are not within "normal"

range (and not the result of a physiological disorder), predisposition to illness or disease;

(c) Personality traits, such as poor judgment and quick temper (that are unrelated to any mental or psychological disorder);

(d) Homosexuality, bisexuality, and sexual behavior disorders such as transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders;

(e) Compulsive gambling, kleptomania, and pyromania;

(f) Socioeconomic conditions such as poverty, lack of education, or a prison record;

(g) Advanced age (but medical conditions commonly associated with age, such as hearing loss and arthritis, are covered);

(h) Psychoactive substance use disorders resulting from the current illegal use of drugs (drug and alcohol use are addressed under "Substance Abuse").

5. If a peace officer applicant/trainee is disqualified due to a medical or psychological condition, is the individual automatically considered to have a "substantial limitation to a major life activity" and therefore protected by the ADA?

Who is to be considered "disabled" is one of the more complex and debated aspects of the ADA--not surprising, given that it is a threshold issue in every action brought under the Act. The case law that has accrued under the ADA and other disability statutes depicts widely different interpretations of who should be afforded protection under the Act.

The EEOC has stated that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working; rather, an individual must be significantly restricted in the ability to perform either a "class of jobs" or a "broad range of jobs" in various classes (relative to an average person who has comparable training, skills, and abilities). But if an applicant is medically (or psychologically) disqualified from being a patrol officer in one agency, will that be considered an inability to perform in an entire "class of jobs?"

EEOC guidance in this area is of limited help in answering this question. The Interpretive Guidance (1994) and Compliance Manual (1995) identify several factors to consider: (1) the geographical area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified, as well as the number and types of jobs using similar training, knowledge, skills and abilities within that geographical area; and (3) the number and type of other jobs not using similar training, knowledge, skills, and abilities from which the individual is also disqualified.

According to the EEOC, an individual who has a back condition that prevents performance of any heavy labor job would be considered substantially limited in the major life activity of working because the individual cannot perform the class of jobs in heavy labor that use similar training, knowledge, skills or abilities. On the other hand, a commercial airline pilot who has a minor vision impairment, or a baseball pitcher who cannot throw a baseball because of a bad elbow, are not substantially limited in the major life activity of working, because they are only unable to perform a particular specialized job. The pilot's minor vision impairment does not prevent him or her from becoming a commercial airline copilot or a pilot for a courier service; the pitcher's bad elbow does not prevent him from performing a broad range of jobs in various classes that do not rely on the ability to throw a baseball.

Given this ambiguity, agencies and academies would be prudent to consider any individual who fails to meet the agency's minimum medical or psychological hiring standards as being protected by the ADA, regardless of the type or severity of the individual's condition (and regardless of whether or not the individual would ultimately be found to be disabled under the law). There are two primary reasons for this suggestion: (1) if an agency argues that its qualification standards are job-related, the courts may assume that other agencies, using the same qualification standards, would also judge the individual to be unfit, resulting in the individual's being restricted from the entire occupational category; and (2) regardless of an individual's actual degree of impairment, a disqualification resulting from medical or psychological findings could indicate that the organization *regards* the individual as disabled.

NOTE: The EEOC stipulates that an individual's limitation in the area of working is only to be considered if the individual is not found to be substantially limited in one or more of the basic major life functions, such as walking, speaking, etc.

6. **Should all applicants who are disqualified on the basis of their psychological screening results be considered mentally disabled?**

Not necessarily. Individuals who are found unsuitable for law enforcement positions due to the presence (or absence) of particular personality traits (e.g., aggressiveness) or other "normal" characteristics (e.g., poor decision-making ability) are not entitled to protection under the ADA. Generally speaking, protected mental disorders are those that are defined in the

American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

The distinction between psychological traits and mental disorders can sometimes be hazy, however. For example, "stress" and "depression" are conditions that may or may not be considered disabilities, depending on whether these conditions result from a documented physiological or mental disorder. On the one hand, a person suffering from general stress because of job or personal life pressures would not be considered to have an impairment. On the other hand, a person diagnosed by a psychiatrist or psychologist as having an identifiable stress disorder that meets the DSM-IV criteria would have an impairment that may be a disability.

7. Is obesity a physical characteristic or a disability?

Being overweight, in and of itself, is generally not considered to be an impairment. Relevant case law includes Johnson v. City of Tarpon (1991), where it was determined that a police captain who weighed in excess of 300 lbs. was not protected since there was no medical reason why he couldn't lose weight; and Hegwer v. Board of Civil Serv. Commissioners of Los Angeles (1992), where the court upheld body-weight limitations on firefighters and paramedics as a reasonable means of insuring the health and safety of the city's emergency personnel and the public, thereby rejecting a claim that the standard violated state anti-discrimination laws.

However, in their Compliance Manual (section 902), the EEOC states that severe obesity, which has been defined as body weight more than 100% over the norm, is to be considered an impairment. In addition, individuals whose obesity is the result of an underlying physiological disorder (e.g., hypertension or thyroid disorder) are also considered to have a medical disability. In Cook v. State of Rhode Island (1993), tried under the ADA (as opposed to the two previously cited cases), morbid obesity was in fact found to be a physiological disability. As in the Johnson case cited above, the employer claimed that the individual was not disabled because she had control and therefore responsibility for her own obesity; however, in this instance the court rejected this claim, citing that other conditions protected by the ADA, such as alcoholism, AIDS, and diabetes, also implicate voluntary conduct.

The use of weight-related employment standards therefore appears to be lawful, as long as these criteria do not exclusively target morbidly obese individuals. However, if such a standard serves to disqualify an applicant who is found to be disabled due to obesity, the organization must be prepared to show that the standard is job related and consistent with business necessity. Realize that this demonstration will be made considerably more difficult if the agency currently employs obese officers who are found to be adequately performing the job. Therefore, when

possible, it would be helpful to use performance-based selection standards (e.g., physical agility test scores) rather than weight limits or other similar blanket criteria that may be difficult to defend as a bona fide occupational qualification. All standards (performance-based or otherwise) should have demonstrated job-relatedness.

IV. SUBSTANCE ABUSE

8. Does the ADA protect all substance abusers?

No. The ADA does not afford protection to **current** illegal drug users, nor to individuals who are past or current **casual** users of illegal drugs. The ADA does protect individuals who have a history of drug addiction, or who have a past or current addiction to alcohol.

9. What is defined as "current" (versus past) drug use?

The ADA does not specify a particular time frame that can be used to target individuals as current drug users. The legislative history only indicates that ADA coverage should be denied if the illegal use of a drug occurred recently enough to justify a reasonable belief that a person will continue the practice. The decision as to who is a current versus past drug user must therefore be made on a case-by-case basis, factoring in information such as duration of drug use, patterns of recidivism, type and severity of drug use, etc.

10. Is it permissible to disqualify a peace officer applicant who is found to have a history of illegal drug use, even if the individual is not currently engaging in such drug use?

Generally yes. Although individuals with a history of drug addiction are protected by the ADA, all employers have the right to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real, ongoing problem. Moreover, law enforcement agencies can also impose a qualification standard that excludes those with a *history* of illegal use of drugs, *if* it can show that the standard is job-related and consistent with business necessity. For example, a law enforcement agency could argue that such an illegal history would undermine the credibility of the officer as a witness for the prosecution in a criminal case.

Furthermore, it is acceptable for law enforcement agencies to screen out individuals with a record of illegal activities, even if the activity was linked to a history of addiction to illegal drugs. For example, in a recent California case, an applicant for police officer was denied employment due primarily to his dishonest account of his past use of illegal drugs. However, the

court, in ruling against the applicant, also affirmed the right of the department to decline to hire as law enforcement officers individuals who have repeatedly violated the law (Hartman v. City of Petaluma, 1994).

It is important to note that agencies should apply this type of qualification standard consistently, rather than singling out illegal drug users. Note also that only individuals with a history of actual drug *addiction* are protected--prior *recreational use* of drugs which did not rise to the level of an addiction is not considered a disability, and therefore individuals with this type of history are not protected. However, those who are erroneously perceived as having a history of drug addiction or as currently addicted to an illegal drug are entitled to discrimination protection under the ADA.

11. Is alcoholism considered a disability under the ADA?

Yes, and as such an individual cannot be discriminated against in employment on the basis of past or current alcoholism. However, an employer can hold an employee who is an alcoholic to the same standards to which it holds all its other employees. Consequently, an employer can discipline, discharge, or deny employment to an alcoholic whose current use of alcohol impairs job performance or conduct. Furthermore, an employer can restrict the employment rights of an individual if he or she poses a threat to the health and safety of him/herself or others.

V. OTHERWISE QUALIFIED

Regardless of the severity of the disability, an individual is not protected by the ADA unless also found to be otherwise qualified for the position. Determining whether someone is qualified (and therefore protected under the ADA) is a two-step process. First, the employer must determine whether the individual satisfied the prerequisites for the position, such as education, experience, training, skills, licenses, certificates, or other *job-related* requirements.[4] If the prerequisites are met, the second step in determining whether the individual is qualified is to determine whether he or she can perform the *essential functions* of the job (with or without reasonable accommodation).

[4]Prerequisites that are not job-related and consistent with business necessity can themselves be found discriminatory--see "Selection Procedures and Qualification Standards."

VI. ESSENTIAL JOB FUNCTIONS

12. What are "essential job functions?"

Essential job functions are those job duties that are fundamental to the position, as opposed to marginal. To be considered qualified (and protected by ADA), an individual must be able to perform the essential job functions associated with the position, with or without accommodation.

There are a number of factors to consider in determining whether a job function is essential or marginal. The two underlying considerations are:

(1) Are employees in the position actually required to perform the function?

The essentialness of a job function that is listed on paper but rarely if ever performed on the job will be seriously questioned. As an example, in Kuntz v. City of New Haven (1993), a police department argued that a lieutenant with a heart condition was unable to perform the essential functions of the job involving physical exertion or stress, such as engaging in high speed chases and apprehending suspects; however, the court determined that the essential functions of the lieutenant's job were instead primarily supervisory or administrative in nature.

If it is determined that employees do actually perform the job function, the next consideration in determining whether that function is essential is to ask:

(2) Would removing the function fundamentally change the job?

In their guidelines, the EEOC lists several additional reasons why a function would be considered essential for a particular position:

- the position exists to perform the function. For example, "making forcible arrests" would most likely be seen as part of the police officer's mandate of protecting public safety;

- few other employees are available to perform that function. For example, a lieutenant in a small agency may be responsible for performing a variety of patrol duties that would be considered marginal for his/her counterparts at larger agencies where there are many officers available to perform the functions;

- the function requires a specialized skill and the employer hired the employee for his or her special skill, ability or expertise. For example, an agency might determine that it needs one officer who can speak Hmong;

therefore, it could be an essential function for just one of the patrol officer positions.

13. **What types of evidence will be used to determine whether a function is essential?**

a. **The employer's judgment.** The ADA is not intended to infringe upon an employer's right to configure its workforce or define the responsibilities of its own workers. The EEOC has stated that employers will neither be second-guessed with regard to their performance standards, nor required to set lower job standards.

An employer's claim that a particular function is essential could be called into question, however, if it is not supported by evidence that confirms both the existence and importance of the job function for that position. For example, if a police department claims that running in excess of five miles is an essential function for its patrol officers, it should be prepared to show that its officers actually have had occasion to run this distance in the event that a protected individual is disqualified for not being able to meet this standard.

b. **Written job descriptions**, while not required by the ADA, should be considered a mandatory piece of evidence for substantiating essential job functions. These descriptions should be prepared before interviewing or advertising for the job. After-the-fact job descriptions may be looked upon with suspicion. The descriptions should be reflective of what actually happens on the job, and should be reviewed and updated periodically to ensure that they are up-to-date. The descriptions should include any marginal job functions in addition to the essential functions; however, the nonessential functions should be identified as such.

c. **The amount of time spent on the job to perform the function.** If an appreciable amount of time is spent performing a particular task, that will be considered evidence that the task is one of the job's essential function.

d. **The consequences of not requiring the incumbent to perform the function.** Although time spent performing a task will be seen as evidence of its essentialness, it is not necessarily true that all infrequently performed functions will be considered marginal. Since many of the most important peace officer tasks can be those that are rarely performed (for example, dragging an incapacitated person to safety), a job function's relationship to the overall mission of law enforcement is a more critical factor in determining its essentialness than its frequency of performance. For example, in Coski v. Local Government

and County of Denver (1990), the ability to fire a gun was determined to be an essential function of a police officer, even though many officers in the department rarely fired a weapon in the line of duty. The court decided that the ability to take action to uphold their sworn duty to preserve the peace, protect life and property, and prevent crime was an essential function of police officers.

Keep in mind, however, that regardless of its importance, a job function's essential status may be called into question if an employer cannot show that there is any *real likelihood* of its being performed by its employees. For example, if an agency lists as one of the essential functions a task or feat that has never been performed by its officers in recent history (e.g., running in excess of five miles), the validity of this job requirement may be called into question if it serves to discriminate against disabled individuals.

e. **The terms of a collective bargaining agreement.** If a collective bargaining agreement lists duties to be performed in a particular job, the terms of the agreement may provide evidence of essential functions. However, the agreement should be supported by evidence that individuals in that position actually perform these duties.

f. **The work experience of past and current incumbents.** As stated above, demonstrating that employees actually perform a particular job task is significant evidence of its essentialness.

g. **Other relevant factors, such as the nature of the work operation or the organizational structure.** There are several organizational issues relevant to law enforcement that can factor into the determination of a job function's essentialness. For example, if a police department regularly rotates its officers' shifts and assignments such that every officer is required to perform a variety of job functions, this may be seen as evidence that all the functions are essential for the job, rather than the function that any one employee performs at a particular time. Similarly, if an agency typically keeps its officers in one job assignment, but expects all to be able to perform a variety of functions at peak times or in times of crisis, this may also be considered evidence of a task's essentialness.

14. **What techniques should be used to identify the essential job functions?**

There are a variety of job analytic techniques that can be used to identify essential job functions, including supervisory or incumbent checklists, diaries/logs, subject-matter expert panels,

etc. For the most part, these are the same techniques used for other personnel purposes (e.g., selection, training). The employer's human resources staff should be able to assist in selecting or designing an appropriate job analysis methodology.

There are a few issues unique to the development of essential functions that should be heeded when selecting a job analytic process, however. These include:

a. **Focus on results/outcomes rather than procedures.**

The analysis should focus on the purpose of the job function and the result to be accomplished, rather than on the manner in which the function is presently performed. This focus will provide latitude for individuals with disabilities to accomplish those functions in different ways. Police-oriented examples of outcome vs. process oriented tasks include:

Process-Oriented	Outcome-Oriented
• Uses twist-lock to subdue suspects	• subdues subjects using control hold
• writes reports	• produces police reports

There may be particular tasks, however, that need to be performed in a specific manner because there is no other way to perform the function without causing undue hardship or risking public or personal health and safety. If so, it is perfectly acceptable to specify the manner in which the function must be performed. For example, if it is determined that an officer must be able to fire a weapon in a particular position, then it is acceptable to state this as an essential function.

b. **In addition to tasks, employers should describe the required or desirable personal characteristics; however, there should be a clear link between these and one or more job tasks.**

It is very useful to have on record the skills, knowledge, abilities, and other personal characteristics necessary for performing the essential job functions, especially if these characteristics are used as the basis for employee selection or other personnel decisions that could result in an adverse action against an individual with a disability. However, creating a list of general characteristics such as "strength," "endurance," or "intelligence," without linking these characteristics to specific job tasks, is not sufficient.

c. **Include information about the work environment, especially if it may have an impact on the selection of individuals with disabilities.**

Environmental and working conditions should also be identified, especially those aspects of the job that could have an adverse effect on individuals with disabilities. For example, if the

employee will be expected to work in extreme temperatures, humidity, amid dust or other allergens, or toxic substances, this should be included in the analysis. It is also important to document the psychological and emotional demands of the job, such as the types and degree of stress faced by employees, as this may help legitimate the decisions resulting from the psychological screening process.

The appendix of this document includes a section from the POST Medical Screening Manual for California Law Enforcement (1993) dealing with patrol officer job information. The duties, tasks, activities, and job conditions provided there are intended to assist in the identification of agency-specific essential functions.

d. **Substantiate the essentialness of the function with information about its importance, frequency, amount of time spent, and/or consequences if the function is not performed (or performed incorrectly).**

To support its inclusion as an essential function, each task should include some indication of time spent, frequency, or likelihood of performing the function, and the consequences if the task is not performed or performed improperly. This type of information is commonly collected during job analyses.

e. **Include information about attendance requirements, nature of work operation, and other organizational issues in the analysis.**

There is ample case law to indicate that an employee's presence at work will be considered prerequisite to the performance of any job function.[5] Therefore, job descriptions should include the attendance requirements of the job, the amount of leave (sick and annual) allotted, and other related personnel policies. Other organizational conditions, such as shift rotations, irregular/ extended work hours, or the need to be available at random or unpredictable moments, should also be specified.

Bottom line: Although not mandated by the ADA, agencies should seriously consider documenting the existence and importance of all job functions and worker requirements that serve as the basis for selection criteria and performance standards, especially those that may result in an adverse action against individuals due to medical, physical, or psychological disabilities.

15. **Is an employer permitted to change essential job functions, once established?**

Yes. It is the employer's right to establish (and re-establish) what a job is and what functions are required to perform it.

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[5]e.g., Car v. Reno (1994); Jackson v. Veterans Administration (1994)

16. **Can an employer evaluate the ability to perform marginal job functions when evaluating applicants?**

Yes. An employer can use qualification standards related to the performance of nonessential job functions; however, an employer cannot discriminate against disabled individuals based on their inability to meet this type of standard.

VII. REASONABLE ACCOMMODATION

Reasonable accommodation is a central, if not defining concept of the ADA. Whereas other employment-related civil rights legislation requires the uniform treatment of individuals without regard to their membership in a particular affected class, the ADA's reasonable accommodation requirement mandates employers to make special adjustments for disabled individuals as a way of eliminating barriers between an individual's abilities and the requirements for performing the essential job functions.

A reasonable accommodation is defined as any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to engage in any one or more of three aspects of employment:

(1) participation in the job application process;
(2) performance of the essential functions of a job; or
(3) enjoyment of the benefits and privileges of employment.

Many types of accommodation, such as providing readers or interpreters, or making physical changes to the workplace (e.g., building ramps), have limited if any applicability to peace officer positions. However, there are a number of forms of reasonable accommodation that may have direct relevance for law enforcement applicants or employees. Some examples include:

In the Application/Training Phases:

- Allowing an applicant with a learning disability additional time to take a non-speeded reading and writing test;
- Allowing a student with a physical disability to use a different, but equally effective take-down technique during arrest methods training;

On the Job:

- Permitting an officer to take sick leave to attend alcohol-dependency support group meetings;

- Transferring an officer who was injured in the line of duty to a temporary light-duty assignment;

Benefits and Privileges of Employment:

- Allowing an officer with a lower back disability to participate in the agency's physical fitness program by demonstrating cardiovascular conditioning through bicycling rather than by running.

17. How (and when) should the employer determine if an accommodation is needed?

The covered entity (e.g., employer; training academy) is responsible for providing notification of its willingness to provide accommodations for qualified individuals with disabilities. Notification should begin early and should take many forms, including posting EEOC-supplied notices in conspicuous places (e.g., employment offices), on job application forms, job vacancy notices, training information, etc. Multiple opportunities should be provided for the applicant/trainee/ employee to request accommodation.

At the pre-employment stage, the notification should include a description of the selection (or training) procedures, including how the information is presented (e.g., oral interviews, written tests, physical performance tests) along with time limits or other relevant details about the process. Included with this should be a statement such as, "We comply with the Americans with Disabilities Act of 1990. If you have a disability and need an accommodation during the conduct of any of the aforementioned phases of the selection process (or basic academy), please inform us within three days of submission of your application."

Once the employer (or other covered entity) has provided sufficient notification of its willingness to offer reasonable accommodation, it is the responsibility of the individual with the disability to request an accommodation within the time frame stipulated. To ensure that individuals are aware of their responsibility to request accommodation, it may be useful to require a signature acknowledging that they have been informed of this process.

18. How should the type of accommodation needed be determined?

Since the nature and extent of a disabling condition, as well as job (and test) requirements vary, decisions regarding the choice of reasonable accommodation should be made on a case-by-case basis. The EEOC urges engaging in an individualized, one-on-one decision making process involving the employer (or other covered entity), the disabled individual, and if necessary, the individual's treating physician or other health care

professional. These individuals should participate in a process which includes identifying those aspects of the test, training, and/or job found limiting by the individual, together exploring possible ways which would enable the individual to perform in these conditions, and making the ultimate decision based on both the preference of the individual and the overall appropriateness to both employer and employee/applicant.

The Job Accommodation Network (JAN) of the President's Committee on Disabilities is a free information and reference service that provides advice on accommodations. They can be reached at 800-ADA-WORK.

19. **Is the individual required to provide any proof of his/her stated disability, or must the employer (or other covered entity) take the person at his/her word?**

If the disability is not obvious (such as in the case of dyslexia), an employer or other covered entity (e.g., training academy) can require the individual to provide documentation from an appropriate professional (e.g., physician, learning disability expert) stating that the individual has a disability as defined by the ADA and is therefore entitled to reasonable accommodation. The professional should be provided with a description of the test, training, or job demands for which the individual is asking to be accommodated.

In their response, professionals should be asked to: (1) confirm and briefly describe the nature of the individual's disabled status under ADA; (2) delineate what (if any) aspects of the test, training, or job functions the individual will find limiting due to the disability; and (3) identify any method(s) of accommodation that will enable the individual to engage in the affected activity.

20. **If the organization has a concern about the credibility of the documentation provided by the individual, can a second opinion be sought?**

In some cases, yes. If there are legitimate reasons for questioning either the credentials of the professional, or the appropriateness of the diagnosis, the individual can be asked to submit to another assessment. However, the covered entity should most likely pay for this second evaluation; in addition, the qualifications of the professional selected to render the second opinion should be undisputed. Moreover, the overall process should be free of any appearance of harassment or other acts of malfeasance.

21. **If an individual requests an accommodation to be able to take a POST-developed test (for example, POSTRAC tests), does POST have the ultimate responsibility for approving or denying the request?**

No, it is the responsibility of the entity dealing directly with the individual. Although POST staff are available if questions arise, it is the responsibility of the specific institution (e.g., law enforcement agency, community college, basic academy) to ensure that lawful reasonable accommodation procedures are selected and implemented.

22. **Is an organization required to provide alternative testing or training formats to all individuals who can prove they have a disability?**

No. An alternative test format need not be considered if the test is designed to measure the skill itself. For example, it is not necessary to provide a reader to a dyslexic applicant to take a reading and writing test, since the ability to read written communication is the skill that the test is designed to measure. By the same token, a training academy would not be required to accommodate a wheelchair-bound individual by permitting him or her to verbalize the actions necessary in making a physical arrest in lieu of actually demonstrating these behaviors, since this would negate the purpose of this performance test.

This does not mean, however, that other requests for accommodation that are unrelated to the purpose of the test can be denied. For example, a request from a dyslexic individual for additional time to take a reading and writing test should not be denied unless it can be shown that the established time limits for the test are reflective of the actual time constraints surrounding this essential job function; a request by a cadet with a musculoskeletal disability to demonstrate the ability to make a physical arrest using a different method than the one practiced in class should be considered as well, unless it can be shown that the requested method is less effective or safe.

23. **Does this mean it is necessary to grant all requests for accommodation unless the accommodation requested undermines the fundamental nature of the test, course, and/or essential job function?**

No. In order for an accommodation to warrant consideration, it must also be "reasonable." Reasonableness relates to an accommodation's effectiveness at reducing or removing the barrier caused by the disability. For example, it would not be *reasonable* to grant an individual with an auditory processing disability extra time to take a written test (assuming that this disability does not hamper speed of test performance)--the requested accommodation in this case does not relate to the particular disability. This is why it is necessary to consult

with the individual, and if necessary, a relevant professional to learn of the limitations posed by the particular disability and explore the accommodation options that would be appropriate and otherwise reasonable.

While the EEOC encourages consideration of the disabled individual's accommodation preferences, the law does not require an organization to provide the requested accommodation if another method of accommodation is found to be reasonable. For example, if an individual with a learning disability requests the use of a thesaurus and a dictionary during a reading and writing test, yet after reviewing the evaluation of the professional, it is found that providing extra time to complete the test will serve as a reasonable accommodation (and will not subterfuge the purpose of the test), it is within the organization's purview to elect to provide the individual with the latter method of accommodation.

Note that the accommodation selected by the organization does not have to be the *best* accommodation available, it simply has to meet the test of being "reasonable": that is, it must serve the purpose of eliminating the employment obstacle posed by the disability.

24. **Can a training academy or employer note in an individual's records that an accommodation was offered?**

Yes, provided that this information is treated as confidential as defined by the law and stipulated by the EEOC. Like information accrued during the medical examination, the organization must also take steps to guarantee the security of these records, including keeping the information separate from the individual's personnel files or training records, and limiting the individual who has access to these records. Details on maintaining confidential records are provided later in the section on confidentiality.

25. **Does a candidate have to be accommodated in the testing process even if he or she will be unable to perform all of the essential job functions? For example, if a visually disabled student at a training academy requests large-print tests, is it necessary to honor this request since the trainee will never be able to pass the visual acuity test administered as part of all law enforcement selection processes?**

Yes, it is necessary to honor requests for accommodation (assuming the students meet the prerequisites as discussed earlier), unless the purpose of the test is to assess the particular sensory, manual or speaking skills which are affected by the disability. For example, it may be necessary to provide a student who has a perceptual tracking disability with a method of recording answers to test questions other than a Scantron sheet, even though the student's dyslexia may prove to be an unaccommodatable obstacle to job performance.

As discussed above, the individual's confidential records can be flagged with a description of the accommodation provided. In addition, it is not unlawful to *inform* the individual of the requirements of the job; however, the decision to continue in the testing process, or to remain in the academy, is up to the individual.

26. **What if an individual refuses to accept the accommodation offered?**

An individual cannot be required to accept an accommodation. However, if an individual refuses an accommodation and is therefore unable to perform adequately or safely, that individual is no longer protected under the ADA. For example, if an employee with an alcohol addiction has performance problems but refuses to admit the addiction, that individual has abrogated any entitlement rights under the Act.

27. **Who is required to pay for a reasonable accommodation--the individual or the organization?**

In most cases, the organization is responsible for paying for the device or other means of accommodation; however, the organization is not required to provide personal use items for the individual. For example, even if an individual must adhere to his/her medicine regimen in order to remain capable of performing the essential job functions, it is very unlikely that an employer would be required to pay for the medicine, since the medicine's impact on the individual's health status affects all aspects of his/her life.

28. **What if an employer determines that an individual is abusing the accommodation privileges afforded to him or her during the selection or training process; for example, if s/he requested and received an accommodation during training (e.g., basic academy), but once placed on the job, s/he no longer requests an accommodation for comparable tasks involving similar demands?**

If an employer believes that the applicant deliberately misrepresented his/her accommodation needs, it has the lawful right to withdraw the job offer for reasons of dishonesty or integrity, since this decision is not based on disability.

VIII. UNDUE HARDSHIP

29. What is "undue hardship" and how does it factor into the reasonable accommodation decision process?

"Undue hardship" is another limiting factor in terms of what is required in the way of reasonable accommodation. 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 a business.

There is no precise formula for making this determination; however, the following factors should be considered:

(1) the nature and net cost of the accommodation;

(2) the overall financial resources of the facility or operation;

(3) the number of persons employed at the facility or operation;

(4) the effect on expenses and resources;

(5) the type of operation of the entity;

(6) the composition, structure and functions of the work force;

(7) the geographic separateness;

(8) the impact the accommodation would have on the operation of the facility, including the ability of other employees to perform their duties.

There is no set dollar or percentage figure to use in deciding what constitutes "unduly costly." Furthermore, excessive cost is only one of several possible ways that an employer can rightfully claim undue hardship. Another alternative is for the employer to demonstrate that the provision of an accommodation would unduly disrupt its business's functioning. For example, in Guice-Mills v. Derwinshi (1992), the court found that a head nurse's request to begin her shift two hours late would constitute an undue hardship on hospital operations, since this would prevent communication with the night supervisor during shift change.

30. Can an employer consider the salary of the employee in determining whether or not an accommodation constitutes an undue hardship?

No. An accommodation must be analyzed in light of the overall resources of the ***business*** and not on a relative comparable basis to the value of the position. Therefore, an employer must apply

the same analysis for a disabled individual hired to perform a $10,000 job as for an individual hired for a $100,000 position. Congress rejected a proposed amendment to the ADA that would have established as undue hardship those accommodations that exceed 10% of an individual's salary, based on the fact that it would have unjustifiably harmed lower-paid workers.

31. **Can an employee, applicant, or trainee be asked to pay for part of a reasonable accommodation that would otherwise constitute an undue hardship for the employer?**

Yes. In fact, disabled individuals *must be allowed*--but may not be required--to pay the portion of the cost that constitutes an undue hardship. However, prior to making this type of arrangement, the organization should explore the possibility of funding from an outside source, such as a state vocational rehabilitation agency, or through federal, state or local tax deductions or credits.

32. **Is it the organization's responsibility to prove that an accommodation is an undue hardship, or the individual's responsibility to show that it isn't?**

The organization has the burden of proving that the proposed accommodation would cause undue hardship.

33. **If the proposed accommodation would have a negative effect on either the ability of other individuals to do their jobs or participate in training, or on their morale, can this be considered an undue hardship?**

It is permissible to consider the impact an accommodation would have on others under certain circumstances. For example, undue hardship could be created if the requested accommodation would create a heavier workload for other employees, put them at additional risk, or make the working environment significantly more difficult or uncomfortable.

Claiming undue hardship solely because of the negative effect that the accommodation has on the morale of co-workers or other trainees, however, is not legitimate. Similarly, an organization cannot claim undue hardship because of "disruption" due to others' fears about, or prejudices toward, a person's disability. For example, complaints from employees regarding the special treatment afforded the disabled individual would not constitute undue hardship.

IX. REASONABLE ACCOMMODATION OPTIONS

A. JOB RESTRUCTURING

34. If an individual's disability prevents him or her from being able to perform certain job function(s), does an employer have to restructure the job to fit the abilities of the individual?

Not necessarily. "Job restructuring" is one form of reasonable accommodation, but it need only involve the reallocation or redistribution of *marginal* (i.e., nonessential) job functions. **An employer is not required to eliminate, reduce, or otherwise alter a position's essential functions.** For example, if a security guard's primary duty is to inspect ID cards, an employer would not be required to provide a blind guard with a sighted assistant to check the cards, since that assistant would then be performing an essential function. However, if two job positions both require employees to perform the same marginal functions, an employer may then be required to restructure those positions so that the disabled employee performs all of those marginal functions s/he can, while the nondisabled employee performs the remaining marginal functions.

Although an employer is not required to revise essential job functions, job restructuring can involve altering when and how an essential function is to be performed. For example, an essential function that is usually performed in the early morning might be rescheduled to be performed later in the day, if an individual's disability makes it impossible for him/her to perform this function in the morning, and this would not cause an undue hardship to the employer.

35. To what extent must a course be restructured for an individual with a disability?

Courses and examinations must be modified, as necessary, to ensure that they are equally accessible to individuals with and without disabilities. Accommodations could include extending the time permitted for completion of a course or test, providing other formats of instruction or testing, or furnishing other aids or services. However, as discussed earlier, it is not necessary to provide any accommodation that would fundamentally alter the examination or course. So, for example, while it may be necessary to offer a dyslexic student the option of taking an oral rather than a written test of job knowledge, this type of accommodation would be inappropriate for a test designed to measure the ability to read written material.

It is also not necessary to provide any accommodation that would result in an undue burden or risk. For example, in Ethridge v. State of Alabama (1994), the court sided with an instructor's

decision to remove a student who had restricted use of his right hand and arm from taking a firearms test due to a demonstrated inability to control his weapon during loading and unloading.

B. REASSIGNMENT

36. When must reassigning an employee with a disability to another position in the agency be considered as a reasonable accommodation?

Reassignment is considered as an accommodation of last resort--it is only available to employees (not applicants), and only to be considered if: (a) there is an actual vacancy (there is no obligation to create another position or to bump another employee); and (b) the disabled employee is qualified to perform all the essential job functions of the new position. Depending on the retirement system, there may be procedures through which an employee who is eligible for disability retirement can continue to receive his or her old salary for work in a lower paying position. The retirement system may pay the difference between the old and new salaries.

37. If an employee is reassigned to a vacant position at a lower pay grade, must his/her previous salary be maintained?

No. While an effort should be made to identify an accommodation that would enable the employee to remain in the current position, or to locate a vacant equivalent position for which the individual is qualified, an employer is not required to maintain a reassigned employee at a salary of the higher graded position if it does not compensate employees in the reassigned position at that level. Similarly, an employer is not required to promote an individual as an accommodation.

38. If the terms of a collective bargaining agreement require that vacant positions be filled by seniority only, could this be used to defend against claims that reasonable accommodation was not provided?

The EEOC guidance indicates that the terms of a collective bargaining agreement may be relevant in determining whether an accommodation would pose an undue hardship on an employer's business. However, the extent to which collective bargaining agreements should be considered when they conflict with ADA requirements appears to be in good part left open to resolution on a case-by-case basis.

C. LIGHT DUTY ASSIGNMENTS

39. **What impact does the ADA have on the manner in which an agency's light duty policy is administered?**

First, the ADA does not require an employer to create a light duty position unless the "heavy duty" tasks an injured worker can no longer perform are marginal job functions which can be reallocated to co-workers as part of the reasonable accommodation of job-restructuring. Creating a job that involves totally different, essential job tasks is not required by the ADA.

The ADA does not prevent an agency from maintaining light duty positions for injured employees to use during their recuperation period. However, the case law in this area strongly suggests that these positions be labeled and treated as temporary assignments. There is considerable case law to indicate that courts will uphold an agency's right to maintain light duty positions for temporarily-disabled *employees* (rather than permanently disabled applicants);[6] however, maintaining permanent light duty positions weakens the evidence that those duties that were eliminated or reduced are in fact "essential" to all incumbents occupying that position.

D. ATTENDANCE POLICIES (modified schedules, flexible leave, attendance)

40. **Can an organization require all employees, disabled or not, to meet the attendance requirements of the job?**

It depends. Modified work schedules, flexible leave policies, and other allowances in attendance constitute another form of reasonable accommodation. Examples of these kinds of accommodations include allowing an individual to keep regular medical appointments despite shift rotations; providing additional, unpaid sick leave (e.g., to recuperate from cancer surgery); or ensuring that an employee has set breaks and/or mealtimes as required by his/her medical condition (e.g., diabetes).

Although these types of accommodations should be seriously considered (when appropriate), case law indicates that regular, predictable attendance can itself be considered an essential job function--**and therefore irregular, spotty attendance need not be tolerated.** Furthermore, granting an allowance in an attendance policy is not necessary if doing so would constitute an undue hardship for the organization. For example, in Huber v. Howard County, Maryland (1994), it was decided that allowing a

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[6] e.g., see Shoemaker v. Pa. Human Rel. Cmsn. (1993) or Gaither v. Anne Arundel County (1993).

firefighter recruit several days per month of disability leave was an undue hardship since the staffing and hours of other firefighters would be adversely affected. If it can be shown that scheduling flexibility on the part of all employees is necessary to ensure proper organizational function, then reasonable accommodation options such as permanent assignment to one shift would not be appropriate for that position (see Mackie v. Runyon (1993)).

X. SELECTION PROCEDURES AND QUALIFICATION STANDARDS

41. If there are several qualified applicants for a job, does the ADA require that the applicant with a disability be hired?

No. The ADA is not an affirmative action law; it is only intended to make it unlawful to discriminate against a qualified individual with a disability on the basis of the disability per se. After implementation of the reasonable accommodation, the disabled individual can be judged competitively with the other candidates.

42. Are all selection procedures, criteria and qualification standards that have the effect of disqualifying individuals with disabilities unlawful under the ADA?

No. Tests, standards, and other selection criteria that have a disparate impact on disabled individuals (i.e., that screen out or tend to screen out disabled individuals) are lawful if they can be shown to be job-related and consistent with business necessity.

43. What is meant by "job-related" and "consistent with business necessity"?

A job-related qualification standard, test, or other selection criterion is one that is a legitimate measure or qualification for the specific job in question. For example, the ability to fire a rifle is not job-related if the peace officer(s) in that particular job do not actually use that weapon.

To be a "business necessity," a qualification standard must be related to the *essential functions* of the job, and as such must serve the goals and objectives of the organization. Note that a qualification standard could be job-related but not of business necessity if it measures the ability of individuals to perform marginal job functions.

44. So as long as a selection test can be shown to be job-related and consistent with business necessity (i.e., related to an essential function of the job), it is acceptable under the ADA?

Not necessarily. Even a test that is job-related and consistent with business necessity is unlawful if it has a disparate impact *and* there exists a reasonable alternative selection procedure which would not have a disparate impact. Therefore, it may be unlawful to require an applicant who has dyslexia to take a written test of job knowledge, no matter how carefully the test was validated. Instead, an alternative examination mode, such as an oral test, could be administered to that individual.

45. What if a selection test *unintentionally* screens out an individual with a disability - is it still unlawful?

Yes. However, a selection test that screens out disabled individuals for reasons *unrelated* to the disability does not violate the ADA, as long as the test is job-related and consistent with business necessity. For example, if an individual with epilepsy happens to fail a reading and writing test, he could not claim employment discrimination under the ADA (unless, possibly, he argued that he experienced a seizure during the exam itself).

46. Can a disabled individual be required to meet performance standards associated with marginal job functions?

The ADA does not prevent qualification standards and selection criteria related to marginal as well as essential job functions. Employers may evaluate and select people who can perform all job functions. However, the ADA <u>does</u> prohibit discrimination against disabled individuals based on their inability to perform marginal job functions, if their performance problem is due to their disability.

47. Does an organization have to change/lower a validated standard in order to accommodate a disabled individual?

No, at least not in theory. The ADA specifically grants employers, as well as educational/training institutions, the authority to establish their own qualification standards. These standards will not be called into question, unless they are not reflective of actual job performance.

However, if a disabled individual's performance on the test (or other qualification standard) is hindered due to the disability itself, then methods of accommodation <u>must</u> be considered and, if possible, implemented. The only exceptions to this accommodation obligation are if: (a) there is no available accommodation that would work (i.e., is reasonable); (b) the accommodation would

cause an undue hardship; or (c) the purpose of the test is to measure the skill(s) hindered by the disability.

It could be argued that, since a selection test is validated using a certain set of testing conditions, the test scores of an individual who was accommodated may not have the same interpretive value. The challenge to the organization, therefore, is to select an accommodation that will eliminate the obstacle posed by the disability, but at the same time preserve as much of the psychometric integrity of the selection measure as possible.

48. What if the current incumbents cannot meet the qualification standard?

The validity of any qualification standard can be called into question if job incumbents who no longer meet these standards are successfully performing in the job. At times, the courts have agreed with employer claims that experience can partially compensate for diminishment of certain capabilities. For example, in Padilla v. City of Topeka (1985), the Kansas Supreme Court acknowledged that job experience can have some compensating effect for diminished physical capability (in this instance, visual acuity).

Other courts have taken a much dimmer view of double standard policies. For example, in Brown County v. LIRC (1985), the court in finding in favor of a candidate for deputy sheriff who was rejected due to his failure to meet the agency's visual acuity standard, argued that the agency undermined the validity of its standards by failing to require its incumbent officers to continue to meet them.

Inconsistent standards between new hires and incumbents put an employer in a legally vulnerable position. Therefore, whenever possible, programs should be developed and maintained to ensure that officers continue to meet qualification standards throughout their tenure.

49. Is an agency therefore prohibited from upgrading its qualification standard if any of its current officers would be unable to meet the new standard?

Although it would be helpful if incumbents could meet all selection standards currently in place, there is case law to indicate that courts may accept an agency's right to upgrade its standards without penalizing or otherwise adversely affecting the employment status of its employees. For example, in Padilla, the court defended its decision to uphold the police department's new vision standard that they admitted would not be met by a number of officers already on the force by stating: "It would be poor public policy to hold that a police department cannot upgrade its

officers by imposing standards without terminating all existing officers who could not meet the new standards."

50. What, if any, ADA-related restrictions are there regarding the type of qualification standards that can be listed in a job announcement?

The ADA generally does not limit either the use or publication of qualification standards. The only standards that could be called into question are those that specifically target and adversely impact those with disabilities. For example, it is acceptable to include an agency's vision standards on an announcement, because there will be both disabled and nondisabled individuals who will be unable to meet these standards. On the other hand, a qualification standard that eliminates individuals with moderate to severe hypertension would likely serve to target those who are disabled; therefore, this type of qualification standard could be called into question. However, even this standard is lawful if it can be shown that all or virtually all of the individuals affected by the standard (i.e., with moderate to severe hypertension) would not be otherwise qualified to perform the job, or by doing so would constitute a direct threat to themselves or others (with or without reasonable accommodation).

51. Is it lawful for a training academy to use eligibility criteria for entrance into the program, particularly if those criteria could serve to disqualify protected individuals?

Under Title II of the ADA, it is permissible for training/educational institutions to impose eligibility criteria for participation in programs even if they screen out (or tend to screen out) persons with disabilities if those requirements are necessary for either successful participation in the program, or for the safety of the individual or others. Like qualification standards for employment, training program entrance criteria must be linked to one or more fundamental activities/objectives of the course. Similarly, any criteria established to ensure that the individual does not pose a direct threat to self or others must be based on real risks, rather than speculation, stereotypes, or generalizations.

XI. PRE-EMPLOYMENT INQUIRIES

52. What kinds of questions can and cannot be asked at the pre-offer stage?

The ADA explicitly prohibits any inquiry for which the response would result in the identification of a disability prior to making the applicant a conditional offer of employment. The purpose of this prohibition is to prevent the practice of eliminating applicants with disabilities (particularly hidden

disabilities) prior to evaluating their ability to perform the job, and without their being able to determine whether the rejection was due to their disability or something else (e.g., insufficient skills or experience).

The 1994 EEOC Enforcement Guidance on Pre-Employment Inquiries includes detailed advice on the lawful structuring and phrasing of pre-offer inquiries. The following section summarizes many points made in the Enforcement Guidance that are particularly pertinent to law enforcement. However, those directly involved in the employment screening process are strongly urged to study the EEOC document first-hand.

53. **Are all questions about an applicant's medical, physical, or psychological health prohibited at the pre-offer stage?**

Although in-depth questioning about an applicant's medical condition is best deferred to the post-offer stage, inquiries that would not be expected to result in information regarding a disability are not prohibited pre-offer. These topics include:

- Questions about temporary impairments. For example, at the pre-offer stage it is acceptable to ask a candidate "How did you break your leg?" or "Do you have a cold?" However, it is not okay to ask "How long will you be laid up?" "Do you get sick often?" or "Do you have open skins sores?" because these types of questions focus either on the severity of the condition and/or could reveal an applicant's disability.

- Questions about average (or above-average) capabilities. For example, it is acceptable to ask "How well can you handle stress?" or "Do you work well under pressure?" because there are both disabled and nondisabled people who have difficulty handling stress. However, it is not acceptable to ask questions at the pre-offer stage such as "Have you ever been unable to cope with work-related stress?" or "Do you ever get ill from stress?" because the answers could reveal a substantially limiting psychological impairment.

54. **What if an applicant reveals a disability in response to a non-invasive pre-offer question?**

If an applicant reveals a disability in response to a non-disability related inquiry, the employer is not in violation of the law; however, no follow-up inquiries concerning the disability should be made at the pre-offer stage. Furthermore, this information, if recorded, must be maintained in a confidential manner, as described in section XVI-Confidentiality.

55. How does the prohibition on pre-offer inquiries affect the employer's ability to assess an applicant's ability to perform the job?

An employer is permitted, at any stage of the selection process, to ask applicants to describe or demonstrate their ability to perform job-related functions (both essential and marginal) with or without reasonable accommodation. However, these questions and demonstrations would be unlawful pre-offer if directed only at applicants with obvious (or otherwise known) disabilities, unless an employer would have reason to believe that an applicant's disability would affect his/her ability to perform that job function. For example, it would be permissible to ask only an applicant with a missing finger to demonstrate his/her ability to use a firearm; however, it would not be lawful to ask that same individual alone to run a special obstacle course, since the disability bears no logical relationship to that performance requirement.

If, at the pre-offer stage, an applicant volunteers information about his/her non-obvious disability, it is acceptable to ask the individual alone to describe or demonstrate the ability to perform a job function in light of the disability, as long as the function bears a logical relationship to the disability.

56. At the pre-offer stage, can the employer ask the applicant about the type of accommodation(s) that will be needed in order to perform job functions?

No. At the pre-offer stage, questions about the type of accommodation required by the applicant should be avoided, since these discussions can lead to information about the individual's disability. For example, "Would you need reasonable accommodation to perform the job (or a particular job function)?" or "What type of accommodation will you need on the job?" are both prohibited pre-offer inquiries. The only accommodation discussions that can take place at the pre-offer stage are those focused on what is required to enable the applicant to participate in the *selection process* (e.g., accommodations required to take a reading and writing test).

A. PRE-OFFER INQUIRIES REGARDING ATTENDANCE

57. Can an employer inquire about an applicant's attendance record on past jobs, including sick leave?

An employer is permitted to ask about an applicant's prior attendance record per se, since there are many non-disability related reasons why an applicant could have been absent from a job (e.g., involvement in a lawsuit). However, at the pre-offer stage, it is not permissible to make specific inquiries about the amount of sick or medical leave taken, or the amount of time off

that will be needed due to the applicant's disability. For example, it is permissible to ask, "How many days were you absent from work last year?" or "Did you have any unauthorized absences from your job last year?" but it is not acceptable to ask, at the pre-offer stage, "How many days were you sick last year?" or "How many separate episodes of sickness did you have last year?"

An applicant who has had a poor attendance record on a previous job may wish to provide an explanation that includes information related to a disability, but the *employer* should not ask whether a poor attendance record was due to illness, accident, or disability.

58. **Can applicants with obvious disabilities be questioned at the pre-offer stage about their ability to regularly show up for work, if questions about the details of the condition are avoided?**

Applicants cannot be asked if they will need or request leave for medical treatment or for other reasons related to a disability. However, the employer can state the attendance requirements of the job, including regular work hours, leave policies, and any special attendance needs of the job, and ask applicants if they can meet them (provided that the attendance requirements actually are applied to incumbents).

B. PRE-OFFER INQUIRIES REGARDING WORKERS' COMPENSATION

59. **What can be asked at the pre-offer stage about an individual's history of filing workers' compensation claims?**

All pre-offer inquiries about an individual's workers' compensation history are unlawful, with one exception: It is permissible to ask specific questions about an individual's history of filing <u>false</u> claims for the strict purpose of identifying instances of insurance fraud.

C. PRE-OFFER INQUIRIES REGARDING SUBSTANCE ABUSE

60. **Can an individual be questioned or tested for illegal drug use at the pre-offer stage?**

Prior to a conditional job offer, it is not permissible to ask individuals any questions the answers to which would cause them to reveal a *history of drug addiction*. Therefore, it is <u>not</u> permissible to ask pre-offer questions about the extent of past drug use, frequency of past drug use, amounts used, degree to which it interfered with work performance or other life activities, etc.

Individuals who are *currently* using or addicted to illegal drugs are not protected by the ADA. It is permissible, therefore, to ask individuals questions about their current use of illegal drugs, including frequency, amounts, types, etc., at any stage of the selection process.

Testing for illegal use of drugs is allowed at any point in the selection process. However, tests to determine either the presence of alcohol or the lawful use of prescription drugs would be considered a medical examination, and therefore can only be required after a conditional job offer is made.

61. **Since only individuals with a history of drug *addiction* are protected (as opposed to past recreational drug users), can't individuals be asked about their history of recreational drug use at the pre-offer stage?**

Yes, if questions are limited to those that will not distinguish individuals with a history of casual drug use from those with a history of drug addiction. The following are examples of acceptable and unacceptable questions based on the likelihood of revealing past drug addiction (versus casual use):

ACCEPTABLE PRE-OFFER QUESTIONS	UNACCEPTABLE PRE-OFFER QUESTIONS
Have you ever used cocaine?	How often did you engage in illegal drug use?
Which illegal drugs have you used?	Have you ever been treated for drug use problems?
When was the last time you used an illegal drug?	Has illegal drug use ever interfered with your job performance?
Have you ever tested positive on an employment-related drug test?	Have you ever been addicted to drugs?
Which of the following illegal drugs have you used only once?	How many times have you used marijuana? How many times per day/week/month did you use cocaine?
Which have you used more than once?	

62. **How can erroneous decisions based on false-positive drug test results be avoided if it is not permissible, at the pre-offer stage, to ask individuals if they're taking any prescription medication?**

While pre-offer inquiries about an applicant's lawful use of prescription or other medication are prohibited, it is permissible, in response to a positive drug test result, to ask individuals if they were taking any prescription medication or

other lawful substances that could have resulted in a false positive reading.

63. **What pre-offer questions can be asked about an individual's use of alcohol?**

Unlike illegal drug use, individuals with both a past and current addiction to alcohol are protected by the ADA. Therefore, pre-offer questions should not allow the questioner to distinguish a casual (or "social") drinker from someone with a current or past history of alcoholism. For example, it is permissible to ask "Do you drink?" "What do you drink?" or "When was the last time you had a drink?" It is not allowable, on the other hand, to ask pre-offer questions that reveal the extent of an individual's alcohol consumption (and therefore potential alcoholism); for example: "How much do you drink?" "How many times a day do you drink?" "Has drinking ever interfered with your job performance? ... daily life activities? etc."

A blood alcohol test is considered a medical examination, and as such is not permissible prior to a conditional job offer.

64. **Can an individual's drug or alcohol-related arrest/conviction record be examined at the pre-offer stage?**

Yes. The ADA does not prohibit pre-offer inquiries about an individual's arrest/conviction record, if this is necessary to determine whether he/she is otherwise qualified, as would be the case for law enforcement officers. Therefore, it is acceptable to ask these individuals questions such as: "Have you ever been convicted of illegal drug use?" or "Have you ever been arrested for driving while intoxicated?"

D. PRE-OFFER QUESTIONS REGARDING OBESITY

65. **Since it is arguable as to whether or not obesity is a disability under the ADA, is it permissible to ask weight-related questions at the pre-offer stage?**

Yes. Questions related to someone's weight, eating habits, or exercise routines are considered "lifestyle questions" by the EEOC and as such are permissible to ask pre-offer. However, employers should not ask questions that could indirectly identify an individual's disability, such as questioning whether an individual must eat several small snacks throughout the day in order to maintain energy level (which is reflective of a diabetic condition).

E. PRE-OFFER INQUIRY PROHIBITIONS AND PEACE OFFICER SCREENING

Listed below is a brief description of how the pre-offer inquiry prohibition affects common steps in the peace officer selection process:

Minimum Qualifications (age, citizenship, education): No change; these qualification criteria should continue to be assessed **prior** to making a conditional job offer.

Reading/Writing Ability Assessments: Reading/writing tests should be administered **prior** to a making a conditional job offer. Any request for accommodation must be seriously considered; however, it is not necessary to provide an accommodation that undermines the purpose of the test (such as providing a reader). Allowing additional administration time on non-speeded tests should be considered, if reasonable, unless the established time limits have themselves been validated as job-related and consistent with business necessity. It is not necessary, however, to provide a dictionary (or computerized speller) as an accommodation for a spelling test, since it would serve to invalidate the purpose of the test.

It is permissible, even at the pre-offer stage, to ask individuals with disabilities to describe and/or demonstrate any aspect of job performance, with or without accommodation, that could reasonably be expected to be affected by that disability. For example, if an individual has been diagnosed as having a learning disability that could result in unintentional character transpositions, it would be acceptable to administer a special test to that individual to assess his/her ability to correctly transcribe nonsense syllables such as license plate numbers and addresses, if it is demonstrated that the ability is job-related and consistent with business necessity.

Other Written Tests: These tests should be administered **prior** to making a conditional job offer. As with all selection measures, written tests should have demonstrated job-relatedness. In addition, individuals should be informed in advance to request a reasonable accommodation in order to take the test (e.g., alternative test format) if needed.

Choosing the appropriate form of accommodation should be an individualized process based on the needs of the individual and the demands of the exam (see Section VII-Reasonable Accommodation).

Fingerprint and Record Checks: These checks should be conducted **prior** to making a conditional job offer.

Physical Agility Tests: The EEOC has determined that physical agility and physical fitness tests are not medical exams, and so should be administered **prior** to making a conditional job offer. However, the tests must be given to all individuals, regardless

of disability. In addition, if the test screens out individuals with disabilities, it must be demonstrated to be job-related and consistent with business necessity, and shown that satisfactory performance on the test cannot be achieved with reasonable accommodation.

If a physical agility test is conducted pre-offer, it is not permissible to take the candidate's blood pressure, heart rate, or to conduct any other type of medical screening. Instead, the employer can provide a description of the physical demands of the test and ask the candidates, and/or their physician, to verify that it is safe for the individual to undergo testing, as well as to identify what reasonable accommodation will be needed, if any. Applicants can also be asked, prior to testing, to sign a waiver acknowledging awareness of the demands and risks of the test and accepting responsibility for any harm incurred during testing.

Interviews: Oral interviews should be conducted **prior** to making a conditional job offer. However, any prohibited pre-offer inquiries should be avoided.

Drug/Alcohol Testing: Drug testing, as discussed earlier, can be performed at any point in the selection process. However, blood alcohol tests, or inquiries about history of illegal drug (or alcohol) use are prohibited prior to a conditional job offer.

Psychological Screening: EEOC's 1994 Enforcement Guidance lists criteria for determining whether a particular procedure or test is to be considered a medical examination (and therefore delayed until after a conditional job offer). Medical examinations are to be considered those that are:

- administered by a health care professional;
- interpreted by a health care professional;
- designed (or used) to reveal the existence, nature or severity of an impairment;
- invasive and/or uses medical equipment or devices to administer; and/or
- designed to measure physiological or psychological responses (as opposed to performance on a task).

These criteria are intended to serve as guidelines for EEOC investigators; therefore, a test meeting only one of the above criteria will not automatically be considered a medical examination. In general, *the decision as to whether a psychological test constitutes a medical examination should be based largely on the kind of information the test is capable of providing*. If a qualified professional can use the test results to draw conclusions about the presence or absence of a mental disability, then the test should be considered a medical examination.

California law (Government Code 1031[f]) stipulates that all peace officers must be free from any *emotional* or *mental condition* which might adversely affect the exercise of their job duties. Furthermore, POST Regulation 1002(a)(7) requires that peace officer applicants be judged free from job-relevant *psychopathology*, and that a minimum of two psychological tests be used, one normed in such a manner as to identify patterns of *abnormal* behavior, the other oriented toward assessing relevant dimensions of normal behavior for purposes of determining psychological suitability. **Therefore, it can be concluded that one of the assessments used in the peace officer psychological screening process (quite commonly, the MMPI) is, by state mandate, an assessment of mental *disability* and therefore must be delayed until <u>after</u> a conditional job offer is made.**

Some have argued that personality traits rather than psychopathology are what is commonly assessed during peace officer psychological screening; however, the criteria listed above clearly delineate that tests that are traditionally used to measure mental disabilities (such as the MMPI) are to be considered medical examinations. Furthermore, even if the intended purpose is to assess personality traits rather than psychopathology, if a measure includes individual items that constitute prohibited inquiries (e.g. "I have been a heavy drinker"), the instrument must not be administered prior to a conditional job offer.

66. **Should a law enforcement agency administer that part of the psychological screening process designed to measure normal behavior prior to a conditional job offer?**

Any part of the psychological screening process that doesn't include prohibited inquiries should, if at all possible, be administered prior to a conditional job offer in order to substantiate that the offer is bona fide. However, if it would be very cumbersome to bifurcate the peace officer psychological screening in this way, the EEOC allows an agency to delay the entire psychological assessment until the post-offer stage.

Agencies who contemplate conducting the normal behavior part of the psychological examination pre-offer should carefully review the instrument selected to ensure that it is free of any individual items that involve medical issues or other prohibited topics. Pre-offer psychological interviews should only be conducted by those who have been thoroughly instructed as to what constitutes a prohibited pre-offer inquiry.

67. **Could an agency arrange for an outside psychologist to perform the entire psychological assessment pre-offer, but build in assurances that the hiring authorities are not privy to any medically-related results until the post-offer stage?**

No. The ADA restricts an employer from making prohibited inquiries or requiring prohibited examinations at the pre-offer stage, not merely obtaining the information at that stage. In addition, the ADA restricts an employer from arranging for a third party to perform activities which the employer could not do itself.

Polygraph Examinations: Although the polygraph examination involves measurement of physiological responses, it is not considered a medical examination by the EEOC. However, if the examination is conducted at the pre-offer stage, it is not permissible to ask applicants if they have any physical impairments that might be adversely affected by the emotional stress of the polygraph examination, or to inquire as to whether they are taking any prescription medications.

It is permissible, however, to ask questions at the pre-offer stage that would not require the individuals to reveal disabilities. For example, it would be acceptable to ask questions such as: "Are you currently in pain?" "Did you get enough sleep last night?" or "Have you eaten a meal today?" It is also permissible to ask, "Have you taken any medication or other substance for the purpose of affecting these test results?" because this question addresses the individual's personal integrity rather than his/her medical status.

If an individual answers negatively to these types of pre-polygraph questioning, but nevertheless demonstrates a nonresponsive pattern during testing, it may be acceptable to make limited inquiries regarding whether he/she took any prescription medication that could have contributed to this result. This practice would be similar to that condoned by the EEOC in response to a positive drug test result (see question 62). However, any pre-offer questioning about medications should be strictly limited to that which is necessary to determine if the polygraph result was valid.

With the possible exception of these limited inquiries about specific medication use, **polygraphers are not permitted to make any medical inquiries at the pre-offer stage.** This includes questions about the extent of prior illegal drug or alcohol use, worker's compensation history, history of mental health problems, etc. All questioning about these issues must be deferred until the post-offer stage.

Background Investigations: Most topics addressed during the background investigation are permissible at the pre-offer stage, including examination of candidates' past experience, education, financial history, DMV records, etc. However, certain other common areas of investigation--such as history of illegal drug

use, workers' compensation history, past or current alcohol abuse, sick leave history, or history of psychological or medical problems--must be deferred until after a conditional job offer is made.

Although the background investigation can include both protected and unprotected topics, most topics are not medically-related; therefore, delaying the entire investigation until the post-offer stage could jeopardize the perceived meaningfulness of the conditional job offer itself. Consequently, conducting all parts of the background investigation that do not touch on prohibited topics prior to extending a conditional job offer will lend proof that the conditional job offer is bona fide.

The POST Personal History Statement (POST 2-251, Rev. 5/94) has been developed so as to include only those topics that are allowable pre-offer. In addition, the Statement's instructions advise the applicant against divulging any information concerning physical, medical, or other conditions protected by the ADA.

To ensure that their conditional job offers are considered bona fide, agencies should carefully review their background investigation process and, to the extent possible, separate those parts of the investigation that touch on medical information (to be assessed post-offer) from those that deal with other, non-medical qualification issues (to be addressed pre-offer). However, if it can be shown that: (1) a particular part of the process typically involves both medical **and** non-medical inquiries; and (2) separating the medical from the non-medical questions for this part would be unnecessarily burdensome, the EEOC acknowledges that it may be acceptable to defer that entire section of the background investigation until after a conditional job offer is made, even though this means that non-medical issues will also be assessed at that time. For example, if past employers are traditionally asked about the applicant's history of illnesses, or workers' compensation history, along with other, non-prohibited topics, it may be acceptable to delay contact with past employers until after a conditional job offer has been extended, if it can be shown that having to make repeat calls to the same contact person would constitute a severe hardship for the agency.

Medical Screening: This type of examination must be delayed until **after** a conditional offer of employment has been made. The POST Medical Screening Manual for California Law Enforcement - 1993 provides examination and evaluation protocols that were developed to be in compliance with the ADA. Anyone involved in the medical screening of patrol officer candidates is urged to consult this document.

The POST Medical History Statement (POST 2-252, Rev. 3/93) should not be completed by the applicant until after a conditional job offer has been extended.

Specific questions addressing the conduct of the medical examination are found in Section XIV-Medical Examinations.

F. SUMMARY

The table below displays the acceptable ordering of typical peace officer selection components into pre-offer vs. post-offer stages.

SUGGESTED TIMING OF PEACE OFFICER SELECTION COMPONENTS	
PRE-OFFER	POST-OFFER
Reading/Writing Tests Other Written Tests Fingerprint/Record Checks Physical Agility (but no medical pre-screening) Interviews (but no disability-related questions) Drug Testing (but no alcohol tests, and no inquiries regarding lawful drug use or extent of past illegal drug use) Background Investigation (except for areas touching on disability)	Psychological Exams (although part of the process may be able to be conducted pre-offer) Polygraph Medical Exam, including blood alcohol tests Background Investigation sections involving prohibited pre-offer topics, such as inquiries re: past drug and alcohol use, etc.

XII. MEDICAL INQUIRIES PRIOR TO BASIC ACADEMY PLACEMENT

68. What type of medical or psychological pre-screening can a training academy conduct on incoming students?

The answer depends in part on the status of the student. Medical and psychological evaluations of sponsored students who have been made conditional job offers are permissible, per the employment provisions (Title I) of the ADA. As discussed earlier, once a conditional job offer has been extended, the scope and depth of questioning is not limited (as long as it is uniformally applied), although the ultimate decision regarding a candidate's fitness for duty must be based on the ability to perform the

essential job functions, with or without reasonable accommodation.

Non-sponsored students, on the other hand, are protected by Titles II and III of the ADA, which address the obligations of state and local governments and educational institutions. The Department of Justice regulations associated with these titles permit only those medical inquiries that are necessary for ensuring that students can successfully and safely participate in the program (with or without accommodation). Therefore, an academy should refrain from conducting any assessments on, or making any inquiries of non-sponsored students that do not have a manifest relationship to safe, successful performance during training. For example, extensive medical questionnaires asking students to provide full histories across a broad range of physical or psychological conditions would most likely be considered unnecessarily invasive, whereas focused inquiries regarding one's ability to physically withstand the rigors of the physical arrest methods portion of training would be more apt to be deemed acceptable.

XIII. OFFERS OF EMPLOYMENT

69. What is a "conditional offer of employment"?

A conditional offer of employment is a legitimate, bona fide job offer that deems the individual qualified on all assessments conducted to that point. The offer should be in writing, and should detail the remaining steps in the process, as well as provide an estimate of how long it may take to be placed on the job should the candidate meet the remaining eligibility requirements. An example conditional job offer (based on an actual form used by a California police department) is included in Appendix B.

To be considered bona fide, a conditional offer should not be extended until after the candidate has been judged as qualified on all selection steps that do not include medical or other pre-offer inquiries prohibited by the ADA.

70. Must a conditional offer promise an immediate job placement once the candidate completes the remaining steps?

No. Bona fide job offers do not necessarily need to be limited to currently available vacancies; under certain circumstances, they can also be given to fill reasonably anticipated openings. In their 1994 Enforcement Guidance, the EEOC cites a law enforcement oriented example of a situation in which it is permissible to make more job offers than immediate positions:

> "A police department may be able to demonstrate that it needs to make offers to 50 applicants for 25 available

positions because: (1) for public safety reasons, it needs to have police officers who are ready and able to begin work when a vacancy occurs on the force; and (2) it is likely that approximately half of the offers will be revoked based on post-offer medical tests and/or the results of security checks, and because some applicants may voluntarily withdraw from consideration" (Section VI.A.2.a).

71. **When a vacancy arises, can the agency select *any* individual from among those in the qualified pool to fill the slot?**

No. The employer must hire individuals from the pool based on preestablished, objective standards (such as the date of application). If a standard has an adverse impact on an individual with a disability, the employer must be able to justify the standard as job-related and consistent with business necessity.

72. **Is it permissible to change the hiring priority of an individual in the qualified pool based either on the results of the post-offer assessments, or if new, more qualified candidates are later added to the pool?**

Yes. Individuals may be reranked after placement in the pool; however, the following conditions must be met: (1) each individual in the pool must be informed of his/her overall ranking *prior* to any post-offer reranking; and (2) each individual must be informed of any change in his/her overall ranking *after* any post-offer reranking.

To illustrate this concept, the EEOC uses another law enforcement related example in their 1994 Enforcement Guidance. (Note: Although this example involves psychological examinations, it is equally relevant to any screening measure administered at the post-offer stage).

> "A police department gives a post-offer psychological examination, which is designed to analyze an individual's mental stability and is therefore a medical examination. The department reranks the individuals in its pool based on scores on this examination, placing those individuals who score most favorably at the top of the hiring priority list. In this case, the department must inform individuals in the hiring pool of their initially-determined hiring rank order; after the post-offer medical examination, the department must inform the individuals in the hiring pool whether their rank has changed based (in whole or in part) on the post-offer medical examination" (Section VI.A.2.b.)

XIV. MEDICAL EXAMINATIONS

73. Does the ADA put limits on the conduct of medical screening examinations, as long as they are performed post-offer?

Yes. They include:

(a) All candidates for a given job must be subjected to the same examination, regardless of disability.

(b) The medical examiner can ask any questions or perform any exam s/he sees fit; however, disqualifications resulting from the exam must be job-related and consistent with business necessity (and no reasonable accommodation should exist to enable the individual to perform the essential job functions).

(c) Information obtained during the course of the exam must be treated as confidential (see Section XVI-Confidentiality).

74. If all candidates must be subjected to the same medical examination, does this mean that referrals to specialists and other, more in-depth probes into an individual's medical condition are prohibited?

The ADA does not require that the scope of each medical examination be identical. An employer may give follow-up tests or examinations if the follow-up examination or inquiry is warranted based on the previously obtained medical information.

75. How should decisions resulting from the medical examination be made?

As thoroughly described in the POST Medical Screening Manual, decisions regarding a candidate's medical fitness for the job must be based on *individualized assessment* rather than on uniform application of categorical criteria. That is, a physician's evaluation of a candidate should factor in information from the physical examination, record review, personal history information, etc. The physician must also be supplied with an adequate description of the job's essential functions, demands and working conditions. Armed with this information, the physician should then make a determination as to whether the candidate can perform the essential job functions, and can do so in a manner that will not pose a "direct threat" to the individual or others.

Physicians should also identify recommended restrictions or accommodations that would allow a disabled candidate to perform the essential job functions. The responsible agency

administrator should then evaluate the agency's ability to reasonably accommodate the candidate by allowing him/her to work within these restrictions. For example, if the physician indicates that the individual should be restricted from working on either the swing or graveyard shifts, the administrator must determine if permitting this restriction would result in an undue hardship for the agency.

76. **Are medical examinations of incumbents permitted under the ADA?**

Yes, if there is a legitimate need to determine whether an employee is still able to perform the essential functions of the job. A medical examination or inquiry is also permitted when an employee wishes to return to work after an injury or illness, provided that it is job-related and consistent with business necessity. Periodic physicals to determine fitness for duty or other medical monitoring are permitted as long as they too are job-related and consistent with business necessity.

The ADA also permits *voluntary* medical examinations, conducted as part of an employee health program. These programs can include screening for high blood pressure, weight control counseling, and cancer detection. It should be noted that the records that are developed as part of these programs must be maintained in a confidential manner.

XV. DIRECT THREAT

77. **What constitutes a "direct threat"?**

The EEOC regulations define direct threat as a "significant risk of substantial harm" to the health or safety of the individual or others that cannot be reduced by reasonable accommodation. The direct threat standard is a very stringent one, requiring an assessment of risk based on individualized, objective evidence.

An employer must first identify the specific risk(s) posed by the individual. For individuals with mental or emotional disabilities, specific behavior(s) that would pose the threat must be identified. For individuals with physical disabilities, the specific aspect of the disability (e.g., bouts of incapacitation) must be identified.

78. **How much of a safety risk does someone have to pose in order to be considered a direct threat?**

No specific or concrete guidance has been provided regarding what constitutes a "significant risk of substantial harm." However, the following factors should be considered:

(a) The duration of the risk;

(b) The nature and severity of potential harm;

(c) The likelihood the potential harm will occur; and

(d) The imminence of the potential harm (future risk concerns are not allowed).

Consideration of these factors must be based on valid medical analysis and/or other objective evidence, rather than on stereotypic or patronizing assumptions, or generalized fears about the effect of the employment environment on the individual.

Although the EEOC regulations do not provide quantitative risk assessment criteria to use in assessing direct threat, existing case law indicates that the risk severity and likelihood need to be balanced together in making this determination. For example, in Huber v. Howard County (1994), the expert witness for a firefighter with asthma testified that the firefighter would pose a 10% risk of danger to himself or others even with the suggested accommodation of an inhaler. In ruling for the employer, the court decided that 10% was more than enough: "...in the life and death circumstances facing firefighters, the county does not have to assume such a 10% risk." On the other hand, in Doe v. District of Columbia (1992), the court found in favor of a firefighter applicant with HIV, after determining that the risk of transmission of the disease through performing firefighter duties to be so small as to be unmeasurable.

Note: According to the EEOC regulations, direct threat involves risk to others and oneself; however, the ADA itself only cites risk to others as a basis for establishing this affirmative defense. It is therefore prudent to focus on risk to others (versus self) in decisions concerning health and safety threats posed by an individual protected by the ADA.

XVI. CONFIDENTIALITY

79. What is required in terms of the confidentiality of medical records?

All medical information collected during the post-offer evaluations (as well as any other information about an individual's disability collected during post-offer assessments) should only be provided to those involved in the decision-making process who have a need to know. For example, it is allowable for screening physicians to consult with medical specialists, if necessary, about a candidate's medical condition; however, it may not always be necessary for the background investigator to have access to this information.

Once the selection decision is made, the medical information must be kept confidential. These records must be maintained on separate forms and kept in separate files. The only individuals who have access to these records should be:

(a) Supervisors and managers who may be informed regarding necessary restrictions on the employee's work and duties and necessary accommodations;

(b) First aid and safety personnel who may be informed, when appropriate, if the disability might require emergency treatment;

(c) Government officials investigating compliance with the ADA;

(d) State workers' compensation fund employees or those representing "second injury" funds, in accordance with state workers' compensation laws; and

(e) Representatives of insurance companies who require a medical examination to provide health or life insurance for employees.

80. **Is an agency required to segregate the medical information in the personnel files of all past and current applicants and employees?**

No. Medical information obtained before January 26, 1992 is not restricted by the ADA's confidentiality restrictions; however, state law has required the confidential treatment of such information since 1981. Under the California Confidentiality of Medical Information Act, each employer who receives medical information is required to establish appropriate procedures to ensure the confidentiality and protection from unauthorized use in disclosure of that information, which includes:

(a) keeping the information in a secure filing system;

(b) controlling access to the filing system to those who have a need to know and a right to know; and

(c) refraining from disclosing (in any manner, including informal discussion) any protected information about any individual participant unless specifically authorized to do so by the participant.

81. **Given the ADA's confidentiality restrictions, can one agency supply medical or psychological information about a prospective employee to another agency?**

The law is not entirely clear as to whether it is allowable to transmit medical information collected after the ADA effective date from one agency to another. At a minimum, the candidate should give uncoerced written consent to the first agency to release the information.

XVII. APPEALS/GRIEVANCE PROCEDURES

82. **What are an organization's legal obligations to individuals who are disqualified from placement in an agency or training academy?**

First, state law[7] requires that candidates for employment be made aware of the basis for the disqualification decision. In addition, before a final determination is made, the individual must also be allowed to submit independent medical opinions for consideration (although the employer is not required to request that these be submitted). At the federal level, Title II regulations require that all public entities with 50+ employees designate at least one employee as the ADA Coordinator and establish grievance procedures for resolving complaints or violations of this part of the ADA. The designated employee(s) must have the authority to both provide information as well as investigate allegations of ADA violations. Although the intent of this regulation is to resolve complaints at the local level without federal intervention, it does not require the individual to exhaust the public entity's grievance process before filing a complaint under ADA.

XVIII. INSURANCE

83. **Can an employer refuse to employ a disabled individual because the employer's insurance plan does not cover that particular person's disability or because of an anticipated increase in insurance costs?**

No. This would be a specific violation of Section 501(c), Title V, of the ADA.

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[7]Cal. Code Regs. tit. 2,7294(d)(2)

84. **Can insurance companies limit or deny health insurance coverage to an individual based solely on the person's diagnosis or disability?**

Not generally. On June 8, 1993, the EEOC issued Policy Guidance 915.002 "Interim Guidance on ADA and Employer-Provided Health Insurance." It details the two-part test that an insurance plan will be subjected to if it is found to include disability-based distinctions, which include: (1) showing proof that the plan is bona fide, and (2) showing that the disability-based distinction is not being used as a subterfuge to evade the ADA's purposes.

XIX. ENFORCEMENT

85. **What are the penalties for noncompliance with the ADA?**

The penalties for violations of the employment provisions (Title I) of the ADA are derived from the Civil Rights Act of 1991. They include injunctive relief (i.e., ending the discrimination), affirmative relief (i.e., hiring the individual), attorney's and expert witness's fees, and compensatory damages (for emotional pain, suffering, inconvenience, mental anguish, and loss of future earnings). Punitive damages are also available, but not in suits brought against federal, state, or local government agencies.

The compensatory damages that may be awarded to any one complainant are limited by dollar ceilings based upon the number of persons employed by the employer, as follows:

$ 50,000 for employers of 15-100;
$100,000 for employers of 101-200;
$200,000 for employers of 201-500;
$300,000 for employers of 501 or more.

It should be noted, however, that existing California law provides for compensatory damages without any dollar ceiling.

Penalties for violations of Titles II/III also include injunctive relief, remediation, compensatory damages, and attorney's fees. In addition, civil penalties can be assessed up to $50,000 for the first violation, and up to $100,000 for any subsequent violations.

XX. RESOURCE INFORMATION

For copies of regulations, technical assistance manuals, or ADA questions, etc:

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L. Street, N.W.
Washington, D.C. 20507
(800) 669-EEOC (669-3362)

Department of Justice
Office of the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, D.C. 20035-6118
(800) 514-0301

Job Accommodation Network (JAN) - (800) 526-7234

The Department of Justice also maintains an Electronic Bulletin Board system on TELNET which contains EEOC and DOJ documents, information, and other communiques: (202) 514-6193.

The POST resource person for ADA issues is:

Shelley Weiss Spilberg, Ph.D.
1601 Alhambra Blvd.
Sacramento, CA 95816-7083
(916) 227-4824

XXI. ADA REFERENCES

ADA LAW, REGULATIONS AND TECHNICAL ASSISTANCE

The Americans With Disabilities Act. 42 U.S.C. Section 12101.

Equal Employment Opportunity Commission (EEOC). 1991. (Vol. 56). Equal Employment Opportunity for Individuals With Disabilities. Final Rule. 29 CFR Part 1630. Federal Register. (July) 144:35726-35756.

Department of Justice. 1991. (Vol. 56). Nondiscrimination on the Basis of Disability in State and Local Government Services. Final Rule. 28 CFR Part 35. Federal Register. (July) 144:35694-35723.

Equal Employment Opportunity Commission (EEOC). 1992. A Technical Assistance Manual of the Employment Provisions (Title I) of the Americans with Disabilities Act.

Equal Employment Opportunity Commission (EEOC). 1994. EEOC Enforcement Guidance on Pre-employment Inquiries Under Americans with Disabilities Act.

Equal Employment Opportunity Commission (EEOC). 1995. Compliance Manual Section 902: Definition of the Term Disability.

REFERENCES ON ADA PERTINENT TO LAW ENFORCEMENT AGENCIES

Allison, L.K. and Stahlhut, E.H.J. 1994/95. A medical communications policy: The employer's first line of defense under the ADA. Employee Relations Law Journal. 20(3):433-442.

American Psychological Association, Division 5. 1993. Psychometric and assessment issues raised by the Americans with Disabilities Act (ADA). The Score. 25(4).

Arnold D.W., and Thiemann, A.J. 1994. Psychological testing in ADA's wake. Security Management. pp. 43-45.

Benson, K. 1994. The Americans with Disabilities Act - Maybe you don't see it that way. Police. pp. 78-84.

Bruyere, S.M. and O'Keeffe, J. 1994. Implications of the Americans with Disabilities Act for psychology. Washington D.C.: American Psychological Association.

Coil, J.H., and Rice, C.M. 1994. The tip of the iceberg: Early trends in ADA enforcement. Employee Relations Law Journal. 19(4):485-506.

Edwards, M.H. 1992/92. The ADA and the employment of individuals with mental disabilities. Employee Relations Law Journal. 18(3):347-389.

Frierson, J.G. 1992. An analysis of ADA provisions on denying employment because of a risk of future injury. (Vol. 17). Employee Relations Law Journal. (Spring) 4:603-622.

Greenlaw, P.S. and Kohl, J.P. 1992. The ADA: Public personnel management, reasonable accommodation and undue hardship. Public Personnel Management. 21(4):411-427.

Greenlaw, P.S. and Kohl, J.P. 1994. Employer 'business' and 'job' defenses in civil rights actions. Public Personnel Management. 23(4):573-586.

Gutman, A. 1994. Reexamining the status of pre-employment psychological testing under the ADA. Criminal Justice Digest. 13(4):1-6.

Maselek, R.J. 1992. Employee medical screening under the Americans with Disabilities Act of 1990. Suffolk University Law Review. 26(3):653-695.

Ogletree, et al. 1994. Americans with Disabilities Act: Employee Rights & Employer Obligations. New York: Matthew Bender.

Parry, J.W. 1993. Mental disabilities under the ADA: A difficult path to follow. Mental and Physical Disability Law Reporter. 17(1):100-112.

Police Executive Research Forum. 1992. Model policy Americans with Disabilities Act. (Sept.).

POST. 1993. Medical Screening Manual for California Law Enforcement. Sacramento, CA: Commission on POST.

Rubin, P.N. 1994. Questions most frequently asked about the ADA by criminal justice professionals. National Institute of Justice - Research in Action. (Nov.):39-41.

Rubin, P.N. 1994. The Americans with Disabilities Act and criminal justice: Hiring new employees. National Institute of Justice - Research in Action. (Oct.):1-7.

Rubin, P.N. 1994. The Americans with Disabilities Act and criminal justice: An overview. National Institute of Justice - Research in Action. (Sept.):1-8.

Santos, M.R. 1994. The Americans with Disabilities Act - A second look at pre-employment medical inquiries. The Police Chief. (Sept.):14-18.

Shaller, E.H. 1991. Reasonable accommodation under the Americans With Disabilities Act - what does it mean?. (Vol. 16). Employee Relations Law Journal. (Spring) 4:431-451.

Snyder. D.A. 1991. The Americans with Disabilities Act. Portland, OR: Labor Relations Information System.

Zappa, J.M.. 1991. The Americans with Disabilities Act of 1990: Improving judicial determinations of whether an individual is "substantially limited." Minnesota Law Review. 75(4):1303-1337.

CASE LAW

Brown County v LIRC, 124 Wis. 2d 560, 367 N.W. 2d 735 (1985).

Car v Reno, (CA D of C 1994), No. 92-5115.

Cook v State of Rhode Island, Dept. of Mental Health, Retardation and Hospitals, (CA1-1993), 783 F.Supp. 1569.

Coski v City and County of Denver, 795 P.2d 1364. (Colo. Ap. 1990).

Doe v Dist. of Columbia, (DC D of C 1992), 59 EPD pp44,656 796 F.Supp. 559.

Ethridge v State of Alabama, (93-T-754-S, 1994).

Gaither v Anne Arundel County, 94 Md. App. 569 A.2d 244 (1993).

Guice-Mills v Derwinshi, (967 F2d 794 CA2 1992).

Hartman v City of Petaluma, USDC C-93-09840 (ND Cal. 1-4-94).

Hegwer v Board of Civil Service Commissioners, Cal. App. 4th, 7 Cal.Rptr. 2nd 389, 92 Daily Journal D.A.R. 5486 (2d Dist. April 24, 1992).

Huber v Howard County, Maryland, No. K-93-606, (DC D Md. 1994).

Jackson v Veterans Administration, (CA-11, 1994), No. 93-6375.

Johnson v City of Tarpon Springs, 758 F.Supp. 1473, 57 RPD, 41004, (D Fla. 1991).

Kuntz v City of New Haven, et al. (DC D Conn. 1993), No. N-90-480.

Mackie v Runyon, 804 F.Supp. 1508 (MD Fla. 1993).

Padella v City of Topeka, 708 P.2d 543 (Kan. 1985).

Shoemaker v Pa. Human Rel. Cmsn., 2 AD Cases (BNA) 1626 (Pa. Cmwlth. 1993).

APPENDIX A

PATROL OFFICER JOB INFORMATION

This section presents the results of several statewide patrol officer job analysis projects conducted by POST that have relevance for the medical screening of candidates. The impact of job stress on patrol officers is also discussed, based on a literature review in this area.

The job information presented below is provided to: (1) identify the job-analytic assumptions made during the creation of the manual's medical protocols; and (2) assist law enforcement agencies in their delineation of essential patrol officer job functions. **Before adopting these results, each department should verify the relevance and accuracy of this statewide job information for its own organization.**

A. POST 1979 Analysis of Patrol Officer Duties and Task Groups (Table 2)

In 1979, POST conducted a job analysis survey of 1,720 officers and 717 supervisory/command personnel from 219 (53%) of the 416 police and sheriffs' departments in the POST program (Kohls, et al., 1979). This survey yielded a vast amount of information on the patrol officer position; Table 2 presents only that part of the job information that may have relevance for medical screening.

Table 2 includes a broad range of patrol officer duties and tasks, including those related to physical performance, patrol and investigation, traffic/motor vehicles, oral communications and written communications. The average importance ratings assigned to each task group are also included.

B. POST 1985 Analysis of Patrol Officer Physical Job Demands (Table 3)

In 1985, POST studied the physical demands of the patrol officer position (Berner, et al., 1985). A total of 1,625 officers from across the state maintained activity logs for eight weeks, during which time they detailed the nature, severity, and consequences of each job-related physical activity in which they engaged. The most frequently reported physical activities are detailed in Table 3.

A total of 1,641 physical incidents were recorded, which translates into a physical incident rate per officer of 23 per year. By far, the most commonly reported physical activity involved resisting combative subjects. In over 50% of the physical incidents, reported failure to perform (or perform correctly) would have likely resulted in injury to self or others.

c. POST 1992 Analysis of Patrol Officer Physical Activities (Table 4)

In 1992, POST conducted another analysis of the type and frequency of physical activities engaged in by patrol officers (Weiner, 1992). In this study, field training officers recorded and rated the critical physical activities of 377 patrol officer trainees over the course of their field training (an average of 37 shifts per officer). The study was conducted across five police departments: Oakland, San Francisco, Los Angeles, Sacramento, and San Diego. Results are displayed in Table 4.

The physical activities reported in Table 4 are divided into two categories: (1) those of a combative nature; and (2) those pertaining to emergency response. Combative incidents were more frequently reported, with an average per officer incident rate of 97 per year, relative to an average emergency response incident rate of 13 per year. There was a combined critical physical incident rate of 110/year.

TABLE 2: Patrol Officer Duties and Task Groups (1979)

Only task groups from the 1979 POST job analysis that would appear to have relevance for medical screening are included. Also included are the average importance ratings assigned to each task group by job experts (3=critical; 4=very important; 3=important; 2=of some importance; 1=of little importance)

I. PHYSICAL PERFORMANCE DUTIES

RESTRAINING/SUBDUING - involves restraining and/or subduing individuals by means of baton techniques, locks, grips or holds, or restraining devices, such as handcuffs (3.9)

Examples:

- Handcuff suspects or prisoners
- Subdue attacking or resisting persons using locks, grips or holds
- Use baton to subdue attacking or resisting persons
- Use restrining devices other than handcuffs (e.g., leg irons, straps)

PHYSICAL PERFORMANCE - involves physical activity such as lifting, carrying or dragging heavy objects, climbing or jumping over obstacles, running, etc. (3.1)

Examples:

- Pursue fleeing suspects on foot
- Lift/carry heaving objects (e.g., disabled person or equipment)
- Pull oneself up over obstacles
- Climb up to elevated surfaces (e.g., roof)
- Jump or climb over obstacles (e.g., walls)
- Balance oneself on uneven or narrow surfaces
- Use bodily force to gain entrance through barriers (e.g., locked doors)

II. WEAPONS HANDLING (including use of interior body armor) (4.2)

- Draw and fire handgun/rifle/shotgun at persons
- Clean and service weapons
- Fire automatic weapons

III. PATROL AND INVESTIGATION DUTIES

ARREST AND DETAIN - involves arresting persons (with and without warrant) and guarding prisoners (3.5)

- Arrest persons with and without warrants
- Take into custody persons arrested by citizens
- Guard prisoners/inmates detained at facility other than jail

ADMINISTER FIRST AID (4.2)

- Administer CPR and other first aid techniques
- Operate resuscitator
- Control bleeding (e.g., apply direct pressure)

SURVEILLANCE - tasks that require careful observation such as following suspicious vehicles, patrolling physically hazardous locations, operating observation post, etc. (includes use of binoculars, photographic equipment, etc.) (2.9)

- Follow suspicious vehicles
- Operate assigned observation post to apprehend criminal suspect (e.g., stakeout)
- Clock speed/visually estimate speed of vehicles

DECISION MAKING - involves analysis, evaluation inquiry, etc., in order to make proper determinations (e.g., priority of required actions) (3.3)

- Survey and evaluate accident scenes and incidents
- Evaluate crime scenes to determine investigative procedures and assistance necessary
- Analyze and compare cases for similarity of modus operandi

REVIEW AND RECALL OF INFORMATION - involves the review and study of information for later recall such as regarding wanted persons and vehicles (3.3)

- Review information on known criminals and criminal activity
- Identify from memory wanted vehicles or persons
- Review reports and notes to prepare for testimony at trials

CHEMICAL, DRUG, AND ALCOHOL TESTING - involves physically or chemically testing for sobriety and/or presence of controlled substances (3.4)

- Administer physical roadside sobriety and "breathalizer" test
- Use chemical test kits (e.g., Valtox, Narco-Ban) to test for controlled substances
- Arrange for obtaining blood or urine samples for sobriety tests

FINGERPRINTING/IDENTIFICATION (2.9)

- Dust and lift latent fingerprints
- Make fingerprint comparisons
- Fingerprint prisoners and other persons

SECURE AND PROTECT PROPERTY - involves making secure and protecting such things as accident scenes, vehicles, homes and property (includes use of extinguisher (3.5

INSPECTING PROPERTY AND PERSONS - involves examining, searching, checking and inspecting buildings, people, vehicles, objects, etc. - includes use of flashlights, spotlights and strolometers to measure distances (3.1

- Examine dead bodies for wounds and injuries to determine nature and cause of death
- Examine dwellings for signs of illegal entry
- Examine suspicious or potentially dangerous objects (e.g., suspicious packages, downed high tension wires

SEARCHING - involves search of buildings, persons, vehicles etc., and the search for missing, wanted or lost persons, evidence, etc. (3.6)

- Pat search suspects
- Physically search properties and vehicles for contraband, criminal activity, wanted subject, or evidence
- Search, collect, and examine evidence from accident crimes

LINEUPS - organizing and conducting lineups and photo lineups (3.2)

IV. TRAFFIC/MOTOR VEHICLE DUTIES

EMERGENCY DRIVING - involves high speed driving in all types of situations such as on the open road, in congested areas, to transport injured persons, etc. (3.5)

- Engage in high speed pursuit driving on open road or in congested areas
- Respond as back-up unit on crimes-in-progress
- Transport injured persons

TRAFFIC CONTROL - involves directing traffic using hand signals, flashlights, radar units, illuminated batons, flares, traffic cones, or other barriers (2.9)

V. ORAL COMMUNICATION DUTIES

ORAL COMMUNICATIONS - involves conferring, advising, coordinating, interviewing, directing, or conducting other verbal interactions with others (3.2)

MEDIATING - involves mediating family and civil confrontations with hostile or potentially hostile people and mediating interpersonal disputes (3.5)

USING RADIO/TELEPHONE - involves communication devices such as patrol car radio, handpack, base station radio, telephone (3.4)

- Transmit messages over police radio
- Request back-up assistance in potentially hazardous or emergency situations
- Receive incoming calls from the public

VI. WRITTEN COMMUNICATION DUTIES

PAPERWORK - generating, processing, and maintenance of written information (includes use of typewriters, photocopiers, and other office machines) (3.0)

READING - statutes, legal transcripts, reports, interoffice memos, teletype messages and training materials (3.0)

WRITING AND DIAGRAMMING - including forms, citations, reports, and depicting crime/accident scenes in schematic form (3.1)

- Sketch accident and crime scenes
- Estimate vehicle speed using physical evidence and mathematical formulas or graphs
- Write reports consisting of several short descriptive phrases

TABLE 3: Patrol Officer Physical Job Demands (1985)

All frequently reported physical demands are listed. These physical demands were found to be required in the service of both critical and noncritical incidents.

1. *Running*

Distance: median and mode - 161 yards, maximum - 500+ yards;
Speed required in almost all (89%) of cases;
Obstacles encountered 60% of time - most commonly:
- fences and walls
- shrubs
- vehicles

Most often performed in conjunction with encountering resistant subjects and/or jumping, climbing;
Average duration - 4+ minutes.

2. *Resisting Combative Subjects*

Most common physical patrol officer activity (50% of instances);
Weight of resisters: mean - 165 lbs., mode - 180 lbs., max - over 220 lbs. (avg. height - 6 ft.);
Number of resisters: 1 (92%) to 3 (2%);
62% of resisters on drugs/alcohol.

Common resistances offered:
- Pulling away
- Wrestling
- Hitting/Kicking
- Running away
- Passive resistance
- Pushing/shoving

Common actions taken by officer:
- Grasping and moving
- Takedown wrestling
- Wrist, head or arm locks
- Pushing/shoving
- Dragging/pulling
- Handcuffing

One-third performed without assistance;
10% of these activities performed without assistance and after running (avg. - 200 yds., max - over 400 yds.);
Average duration - 3+ minutes.

3. *Balancing*

Widths of surfaces: mode - 6", mean - 14";
Distances traveled: mean - 31', max. - over 140';
Distance from ground: avg. - 5', max. - over 8';
Types of surfaces:
- Block walls
- Mountains/hillsides
- Fence tops
- Roofs
- Ledges
- Garbage cans

80% of balancing performed in conjunction with climbing;
Average duration - 6 minutes;
Speed required in 28% of instances.

4. *Climbing*

Object Climbed	Height Mean	Height Mode	Height Max.	Avg. Distance Run in Conjunction with Climb*
Fences/walls	7'	6'	16'	230 yds.
Ladders	20'	20'	35'	120 yds.
Stairs (flights)	2	1-2	5	120 yds.
Embankments	36'	10'	75'	120 yds.

Speed required in 33% of instances;
Average duration - 4+ minutes.

*Running required in conjunction with climbing in approx. 1/3 of instances.

5. *Moving Nonresistant Persons or Objects* (Includes motions such as dragging, pulling, lifting, carrying and supporting)

A. Moving persons
Weight: mean - 170 lbs., mode - 180 lbs., max. - over 250 lbs.;
Distance: avg. - 40 ft., mode - 10 ft., max. - over 100 ft.;
94% of persons moved were conscious;
68% of persons moved were intoxicated;
Speed required in 40% of instances;
Performed without assistance at least 30% of time;
Persons lying down 85% of instances;
Movement of persons most commonly required lifting under arms, around trunk, or by both arms;
Average duration - 4-1/2 minutes.

B. Dragging/pulling objects
Weight (unassisted) mean - 60 lbs., mode - 20 lbs., max - over 100 lbs.;
Weight (assisted) mean - 780 lbs., mode - 150 - 200 lbs., max - 1000 lbs.;
Distance: mean - 27 ft., mode - 6 ft., max - over 35 ft.;
Performed without assistance 80% of instances;
Speed required in 60% of instances;
Average duration - 3+ minutes.

C. Lifting/carrying objects
Weight: avg. - 40 lbs., max - over 100 lbs.;
Items: boxes, lumber, furniture, sand bags, tire wheels;
Performed without assistance 85% of time;
Lifted from ground (70%), waist height (22%), shoulder (6%) and above head (2%);
Average duration - 6 minutes.

D. Pushing objects
Most common object pushed: vehicles;
Weight: mean - 3000 lbs., mode - 2000 lbs., max - over 5000 lbs.;
Distances: mean - 58 ft., mode - 50 ft., max - over 150 ft.;
Performed with assistance over 60% of time;
Speed required 50% of time;
Average duration - 2 minutes.

6. *Jumping/Hurdling/Vaulting*

Most common object jumped: fences and walls

Direction	Distances Mean	Mode	Max.
Up	39"	36"	72"
Down	51"	72"	96"
Across	35"	36"	60"
Over	36"	24"	72"
Vaulted	56"	72"	72"

Speed required 90% of time;
Performed 66% of time while moving forward, 33% from stationary position;
Performed most commonly in conjunction with running and climbing;
Average duration - 4-1/2 minutes.

TABLE 4
Patrol Officer Rates of Critical Physical Activities by Type of Activity
(1992)
(N = 377)

Type of Activity	Per Year Frequency*
	Mean
Combative Incidents	
1. Handcuffing	79.7
2. Using restrain device	2.4
3. Using baton	2.0
4. Using locks, grips, holds	10.4
5. Self-defense	1.8
6. Using body force	1.3
Emergency Response Incidents	
1. Running	10.6
2. Lifting/carrying	4.9
3. Dragging/pulling	2.4
4. Climbing	6.9
5. Crawling	2.2
6. Jumping	2.9
7. Balancing	2.9
8. Pushing	2.4
9. Other	1.8
Overall Physical Incident Rate	110.7

*Based on an estimated average of 221.3 shifts per year.

D. Environmental Factors and Working Conditions That Can Be Associated with the Patrol Officer Job (Table 5)

Working conditions and environmental factors can also have a direct impact on the ability of a candidate with a disability to perform as a patrol officer. Table 5 provides a list of contextual factors that may have an impact on the medical screening of patrol officer candidates. This list, however, is not based on a job analysis, and therefore no data exists as to either the prevalence or consequence associated with any of these factors. Rather, it is provided to assist employers in identifying their own agency-specific job conditions and environmental considerations.

TABLE 5
Environmental Factors and Working Conditions That Can Be Associated With Patrol Officer Job Duties

1. Exposure to the following atmospheric conditions:

   Direct sunlight
   High temperatures (above 95 degrees)
   Low temperatures (below 30 degrees)
   Sudden temperature changes (more than 30 degrees)
   Humidity (high or low)
   High or low air pressure conditions
   Snow and ice
   High winds

2. Exposure to the following irritants:

   Dust
   Allergenic substances (e.g., bee stings, pollens, animal dander)
   Other toxic/poisonous substances (e.g., pesticides, herbicides, EDB, PCB, carbon monoxide, fingerprint powder, chemical irritants, chemical agents)

3. Adverse physical surroundings:

   Slippery surfaces (e.g., chasing suspect through wet grass, or over rain-slicked roofs)
   Working above floor level (e.g., roofs, fences)
   Extreme vibrations (from exposure to equipment or machines as might occur while directing traffic, or from sudden jerks or jars as might occur while subduing combative suspect)
   Confined areas or work that requires awkward or confined body positions

4. Adverse vision and hearing conditions:

   Poor lighting (e.g., glare, night vision conditions)
   Fog
   Noise (e.g., activated alarms, wailing sirens, gunfire)
   Faint sounds
   Other poor auditory conditions (e.g., distracting background noise)

5. Adverse working conditions:

   Irregular/extended work hours (including frequently fluctuating work hours and rotating shift work)
   Job pressure/tension
   Prolonged sitting

APPENDIX B

EXAMPLE

CONDITIONAL OFFER OF EMPLOYMENT

_____

Name

This offer of employment is conditioned upon your successfully completing the following steps and meeting the established standards for the position of police officer. These standards are contained in applicable federal and state statutes as well as the City's administrative regulations. The steps to be completed are as follows:

- The remaining parts of the background investigation, conducted according to guidelines established by the City for its Police Department employees.
- A psychological screening to determine job suitability conducted and interpreted by a licensed psychologist.
- A comprehensive medical examination conducted by a licensed physician retained by the City for this purpose, to be administered according to guidelines established by the City for its Police Department employees.

Any significant discrepancies in the information you give during any of the steps above can be the basis for your removal from the eligibility list.

If you successfully complete the above requirements, you may receive a final offer of employment and be hired immediately, or you may be placed in a pool of qualified applicants. If you are placed in a pool, you will be informed of your relative standing. You may also be informed of later changes in your standing due to changes in the qualified applicant pool.

THIS IS NOT AN OFFER OF IMMEDIATE EMPLOYMENT. DO NOT GIVE NOTICE, QUIT YOUR PRESENT JOB, OR RELOCATE.

I have read and fully understand the nature of this conditional offer of employment.

_____ _____

Signature Date

_____ _____

Signature Date