Business Law Resource Guide

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Bankruptcy

▶ What These Words Mean

Credit: Financial trustworthiness; a person with good credit will be able to get loans in the future; a person with bad credit will not be able to get loans

Credit Reporting Agency: A company that tells people who are about to loan you money whether you have paid back loans in the past and whether you pay your bills on time

Creditor: The person to whom you owe a debt

Debt: The amount of money you owe to a creditor

Debtor: A person who declares bankruptcy

Discharge: A court order stating that debtors do not have to pay their dischargeable debts; a debt that is discharged in bankruptcy need not be paid

Equity: The amount that your property is worth over the amount you owe on it; for example, if your car is worth $5,000 and you owe the bank $3,000 on it, your equity in the car is $2,000

Exemptions: Property that a person keeps even though they have declared bankruptcy

File: To give a paper to the court

Lien: If a creditor has a lien on a piece of your property and you do not pay the loan off, the creditor can take the property from you

Plan: The payment plan that a debtor files in bankruptcy

Schedules: The debtor's list of property and income

Trustee: The person who handles your bankruptcy; the trustee sells your property in a Chapter 7 or collects payments from you and pays your creditors in a Chapter 13

▶ What is Bankruptcy?

In bankruptcy, a person may restructure or discharge debts. There are two basic types of bankruptcies. In one type, the debtor pays the debts off under a payment plan over time. In another type, some of the debtor's assets are sold, the money is paid to the creditors and the debts are discharged.

As soon as the debtor files bankruptcy, most creditors must stop trying to collect the money owed to them. An automatic stay goes into effect. They will collect their debts through the bankruptcy court.

A person is allowed to keep some property and still go through bankruptcy. A

person is allowed to keep his or her "exemptions." In Missouri, the major exemptions are: $8,000 worth of equity in a house, $1,000 worth of equity per person in a car, $1,000 worth of equity per person in household goods and furnishings, the cash value in life insurance policies up to $150,000 per person, certain pension and retirement benefits, and tools of the trade.

There are four major forms of bankruptcy. Chapter 7 bankruptcy is a "liquidation." Non-exempt assets will be sold and debts will be discharged. Chapter 13 bankruptcy is a "wage earner payment plan." Debts will be paid off over time. Chapter 12 bankruptcy is a payment plan for farmers. Chapter 11 bankruptcy is a payment plan or liquidation for businesses.

It is sometimes possible to avoid bankruptcy through workout arrangements. Usually, both debtors and creditors want to avoid bankruptcy. Debtors and creditors can work together to avoid bankruptcy. Workout arrangements are often handled by groups providing debt counseling or your lawyer.

Bankruptcy will likely have a significant impact on your credit. This means you may not be able to get loans in the future. Credit reporting agencies usually list a Chapter 7 bankruptcy for 10 years and a Chapter 13 bankruptcy for seven years after the payment plan is finished. You have certain rights as to what information is included on your credit report.

▶ What is the Bankruptcy Court System?

The bankruptcy court handles bankruptcy cases. Certain bankruptcy cases also have a trustee. If you have a trustee, the trustee will supervise your case. Your lawyer will help you complete the paperwork and give you valuable advice in dealing with the court.

▶ What is Chapter 7 Bankruptcy?

Chapter 7 bankruptcy is designed to discharge debt. The trustee will collect all of the property that is not exempt and sell it to pay creditors. After this is done, the debtor will no longer owe the creditors any money. There is a fee to declare Chapter 7 bankruptcy.

Debtors usually keep their houses and cars in Chapter 7, but they must continue to pay the loans for this property as if they have not declared bankruptcy. This is called a reaffirmation. Debtors may also return property and not have to pay any more on the debt. Debtors may also pay what the property is now worth and keep the property. This is called redeeming.

Sometimes creditors take liens on furniture or household goods to make sure the debtor pays the debt on some other property. The debtor may have these liens removed in bankruptcy.

Some debts will not be discharged even in bankruptcy. These include debts involving fraud, accidents involving drunken driving, student loans, certain taxes,

alimony and child support. Certain credit card transactions made within six months of bankruptcy may not be discharged. Also, a person who has enough money to pay back all or most of his debts may not declare Chapter 7 bankruptcy.

▶ What is Chapter 13 Bankruptcy?

Corporations or partnerships may not declare Chapter 13 bankruptcy. The debtor must have a job that provides regular income. A person with debts of more than $1 million may not file Chapter 13 bankruptcy. There is a fee to declare Chapter 13 bankruptcy.

In Chapter 13 bankruptcy, the debtor gives a payment plan for upt to 60 months to the court and his or her creditors. The plan must pay the debtor's creditors at least as much as the creditors would receive in a Chapter 7 bankruptcy. The debtor may not have to pay his or her debts in full.

The bankruptcy court must approve the debtor's payment plan. A trustee looks at the debtor's schedules and payment plan. If the court approves the plan, the trustee collects payments from the debtor and pays the creditors. In Chapter 13, the debtor keeps all of his or her property.

The debtor is not discharged from the debts until the payment plan is finished. More types of debt can be discharged in Chapter 13 than in Chapter 7, but debts for crimes, accidents involving drunken driving and student loans may not be discharged in Chapter 13.

▶ What is Chapter 12 Bankruptcy?

Chapter 12 bankruptcy is a special chapter for "family farmers" with regular income. A "family farmer" is a person or business that receives at least half of its income from farming. A family farmer may declare Chapter 12 bankruptcy if at least 80% of its debts are related to the farm and if the debts are not more than $1,500,000.

Under Chapter 12 bankruptcy, the debtor gives a payment plan to the court and its creditors that shows how it will pay its debts over time. The debtor must pay its creditors at least as much as they would receive in a Chapter 7 bankruptcy.

The payment plan must be approved by the bankruptcy court. A trustee reviews the debtor's schedules and payment plan. If the court approves the debtor's plan, the trustee collects payments from the debtor and pays the creditors. The debtor will be discharged from the debts when the plan is finished.

▶ What is Chapter 11 Bankruptcy?

Chapter 11 bankruptcy is available to any individual, husband and wife, partnership or corporation. There is a fee to declare Chapter 11 bankruptcy. The debtor is allowed to continue to operate his or her business while working on a plan to restructure debts or sell assets to pay creditors. A Chapter 11 debtor must pay its

creditors more than they would receive under Chapter 7 bankruptcy.

A Chapter 11 plan must be approved by the Bankruptcy Court. The creditors will have a chance to vote on whether the court should approve the plan.

▶ For Legal Advice, See Your Lawyer

For legal advice see your lawyer. If you need help finding a lawyer, call

Missouri Bar Lawyer Referral Service
573/636-3635

In St. Louis, call
314/621-6681

In Springfield, call
417/831-2738

Business Organizations

▶ Forms of Business Organizations

Missouri presently allows individuals to operate a business under four forms of organizations:

- Sole Proprietorships
- Partnerships
- Corporations
- Limited Liability Companies

▶ Sole Proprietorship

A sole proprietorship is really not an organization but rather ownership and corporation by one individual. Any one person who begins a business without deliberately creating another form automatically begins as a sole proprietorship. No formal creation is necessary.

▶ Partnership

A partnership is a combination of individuals, called partners, who operate a business. Although no formal creation is necessary, individuals who wish to form a partnership should enter into a written agreement, called a Partnership Agreement or Articles of Partnership, which sets out all the terms of the relationship. Generally, the partners collectively make decisions concerning the partnership.

A **limited partnership** is a special type of partnership. In a limited partnership, the limited partners share in the profits, but they generally do not participate in the management of the limited partnership.

Missouri law also allows for the creation of a **limited liability partnership**, which permits one partner to be shielded from individual joint liability for partnership obligations created by another partner's or person's misconduct. A partner's liability is not limited, however, when the misconduct took place under the supervision or control of the partner. Only liability arising from the misconduct of other partners or persons is covered by this law; the partnership is not relieved from liability for other partnership obligations and individual partners are liable for their own misconduct.

▶ Corporation

A corporation is a more complex arrangement allowing for multiple owners but with centralized management. The owners, called stockholders, elect directors, who in turn elect officers to manage the affairs of the corporation. The individuals who wish to form a corporation, called incorporators, must prepare a formal written

document called Articles of Incorporation. This document is then submitted to the Secretary of State for approval. Once approved, the Secretary of State issues a Certificate of Incorporation which authorizes the corporation to act. A corporation is then considered to act as a separate person.

There are two types of special corporations. A **subchapter S corporation** is a regular corporation but is recognized by the Internal Revenue Service as a special corporation afforded a different income tax treatment. The Internal Revenue Service has technical and complex rules concerning subchapter S corporations.

Missouri also recognizes **non-profit corporations**. Missouri treats non-profit corporations somewhat differently and the Internal Revenue Service provides for a different income tax treatment for non-profit corporations.

▶ Limited Liability Company

A limited liability company is a new form of business organization in Missouri. A limited liability company operates much like a partnership but with some of the advantages of a corporation. A formal written document called Articles of Organization must be prepared and submitted to the Secretary of State for approval. The owners, called members, manage the limited liability company unless the members provide in the Articles of Organization for centralized management by a manager.

▶ Selection of a Business Organization

Although the choice of the type of business organization depends upon many factors, in addition to those previously discussed, most selections are made for three reasons:

- Liability
- Income Taxes
- Funding

▶ Liability

Liability concerns the extent to which an owner is responsible for the debts and charges against the organization. If an owner has "personal liability," she is totally responsible, and creditors may reach all personal funds of the owner — even if the funds are not invested in or part of the business. If an owner has "limited liability," his responsibility is limited to only the funds that he has invested in the organization. An evaluation of the risks and possible liabilities to be incurred in the operation of the business leads to the selection of the appropriate form of business organization.

A sole proprietor is personally liable for all debts of the business.

Generally, a partner is also personally liable for all the debts of the partnership. However, the liability of a limited partner in a limited partnership is generally limited solely to that person's investment or contribution to the limited partnership.

Unless special circumstances apply, a stockholder's liability is limited solely by the stockholder's investment in the corporation.

Generally, the liability of a member in a limited liability company is limited solely to the member's investment in the limited liability company.

▶ Income Taxes

All income of a sole proprietorship is taxed on the sole proprietor's own personal income tax return at the appropriate individual tax rates.

A partnership must prepare an income tax return but the partnership pays no income taxes itself. The partnership income tax return acts as a conduit of income to the individual partners. The partnership return apportions the income (or loss) among the partners or limited partners. Each partner or limited partner then includes his or her portion of the income (or loss) on his or her personal income tax return.

Since a corporation is considered a separate person, the corporation prepares its own income tax return and pays income tax on its income. Any distribution of income as dividends to the stockholders is also taxed on a stockholder's individual personal income tax return. The income tax rate for the corporation may be very different from the individual personal rate. A subchapter S corporation is treated similarly to a partnership for income tax purposes. The income taxation of a non-profit corporation is separate and very complicated.

If a limited liability company complies with technical and complex income tax rules, the income earned by the limited liability company is taxed as the income from a partnership.

▶ Funding

When obtaining funds from third parties, a sole proprietorship is generally limited to borrowing money, usually from a bank.

A partnership can seek additional investment from loans or it can solicit additional partners (or limited liability partners) who may contribute additional funds.

A corporation has more opportunities for seeking investment. It can borrow money, seek additional investors to purchase either common or preferred stock or issue other corporate securities such as corporate bonds.

A limited liability company can obtain additional funds similar to a partnership.

▶ For Legal Advice, See Your Lawyer

Because of the very technical and complex rules concerning business organizations, you should always consult a lawyer for advice and assistance concerning business organizations.

If you need help finding a lawyer, call The Missouri Bar Lawyer Referral Service at 573/636-3635.

In St. Louis, call 314/621-6681

In Greene County, call 417/831-2783

Your Rights Under the Missouri Workers' Compensation Law

▶ What is the Workers' Compensation Law?

All states have workers' compensation laws. The Missouri Workers' Compensation Law is contained in Chapter 287 of the Revised Statutes of Missouri. The workers' compensation statute is the law that controls the rights and obligations of employees and employers when employees are injured at work.

▶ Who is Covered by Workers' Compensation

Any employer with five or more employees, and all employers in the construction industry, are required to provide protection for their employees under the Missouri Workers' Compensation Law. Most employers do this by purchasing a workers' compensation insurance policy from an insurance company authorized to do business in Missouri. Some employers satisfy their obligation by applying for and becoming qualified to self-insure their workers' compensation liability. If your employer has five or more employees, or if your employer is in the construction industry and has even one employee, it is required by Missouri law to either obtain insurance coverage or become authorized as a self-insured so you will be protected under the Missouri Workers' Compensation Law.

▶ I Was Injured at Work. What Should I Do?

If you have been injured at work, the first thing you should do is report your injury to your supervisor. Missouri law requires employees to provide prompt notice of any injury or accident to their employer.

▶ How Do I Get Medical Treatment for My Injury?

Under Missouri law, the employer (and not the insurance company) has the right to select the treating doctor in workers' compensation cases. If you need to see a doctor for treatment as the result of an injury on the job, you should tell

your employer you want to see a doctor. If your employer knows that you need treatment because of a compensable accident, your employer should tell you which doctor to see. If your employer does not refer you to any particular doctor, you should ask your employer which doctor your employer wants you to see. Since your employer has the right to select the treating doctor, your employer (and its insurance company) may not have to pay for your bills if you choose to go to your own doctor rather than to your employer's authorized treating doctor.

▶ Will I Be Paid When I Am Off Work?

If the treating doctor certifies that you are unable to work, you should be entitled to "temporary total disability benefits" under the Missouri Workers' Compensation Law when you are off work. You will not be paid benefits for the first three regularly scheduled work days you are off, but you should be paid for each day missed thereafter, and also for the first three days if you are off more than two weeks. The amount of these benefits is two-thirds of your gross average weekly wage, subject to certain maximums which change each year. The law contains a formula for determining your average wage, which usually involves computing the average gross wages you earned over the 13 weeks prior to the accident.

▶ Will I Be Paid Mileage For My Trips to the Doctor?

Under Missouri law, you are entitled to be paid mileage for driving for medical treatment, but only if you are required to be treated "outside of the local or metropolitan area from the place of injury or the place of [your] residence," subject to a 500-mile round trip limit.

▶ Will I Get a Settlement?

If you are able to return to work after your injury, you may be entitled to a settlement or payment for your "permanent partial disability" if you have permanent disability as a result of a covered accident or injury. The amount that you will receive for your permanent injury depends on the extent of your disability. Your disability may be evaluated by doctors or other experts. There are formulas in the workers' compensation statute to determine the amount of permanent partial disability awards. The amount of the settlement will vary depending upon several factors, including the disability ratings from the doctors, your average weekly wage and the date of your accident. Doctors often disagree regarding the percentage of permanent partial disability in any given case. The amount of your permanent partial disability, if any, probably cannot be determined until you have completed your medical treatment.

▶ Are Occupational Diseases Covered?

Under Missouri law, occupational diseases (as well as accidents) are covered. Therefore, if you develop a disease or illness which is directly caused by your employment, you may file a claim for benefits under the law.

▶ Will I Be Paid Anything for Scarring or Disfigurement?

In Missouri you can be paid for scarring or other disfigurement, but only if the disfigurement is to your head, neck, arms or hands. The disfigurement payment is determined by the administrative law judge or legal advisor at the Division of Workers' Compensation and is in addition to all other benefits due. There are limits in the law regarding the amount you can receive for disfigurement.

▶ What If I Am Unable to Return to Work Because of My Injury?

If you are permanently and totally disabled from all types of employment, you may qualify for "permanent total disability benefits" under the Missouri Workers' Compensation Law. However, in order to qualify for these benefits, you must be unable to work in any line of work in the labor market because of your compensable injury or occupational disease. The weekly rate for these benefits is the same as the temporary total rate. If you are totally disabled, you may also qualify for Social Security disability benefits. You should contact the Social Security office to apply for those benefits. In some cases, but not all, Social Security disability benefits are reduced because of the receipt of workers' compensation benefits.

▶ What is the Second Injury Fund?

In Missouri, if you had a physical or mental disability before you were hurt at work, you might qualify for additional benefits from the Missouri Second Injury Fund. The purpose of the Second Injury Fund is to encourage employers to hire and retain employees who have disabilities. In some cases, the Second Injury Fund's liability can be substantial. For example, in permanent total disability cases the Second Injury Fund can be held responsible for an employee's lifetime weekly benefits when the permanent total disability results from a combination of the employee's preexisting conditions and those caused by the current injury. Also, in death cases, when the employer failed to obtain workers' compensation

insurance, the Second Injury Fund can be held responsible for death benefits to the employee's dependents. Claims against the Second Injury Fund must comply with special time limits in the law.

▶ What Is "Vocational Rehabilitation"?

Vocational rehabilitation services are designed to help injured people return to work. The Missouri Workers' Compensation Law does not require the employer or its insurance carrier to provide vocational rehabilitation assistance to injured workers. The Missouri law does provide for voluntary vocational rehabilitation, which may be furnished by an employer or insurance carrier at their option. Also, you may qualify for assistance from the Missouri State Division of Vocational Rehabilitation if, because of your injury, you are unable to return to your former work and you need help finding another line of work. The Division of Vocational Rehabilitation is separate from the Division of Workers' Compensation. Contact the Missouri Division of Vocational Rehabilitation if you need retraining or other help finding suitable work because of an injury or other problem.

▶ When Should I File a Claim?

The Missouri Workers' Compensation Law contains time limits for the filing of claims. Generally, a claim under the Missouri Workers' Compensation Law must be filed with the Division of Workers' Compensation within two years of the last to occur of the following: the date of the accident; the last payment of workers' compensation benefits; or the last medical treatment provided; **or**, within three years of the last of those dates if the employer failed to file the Report of Injury with the Division of Workers' Compensation within the time allowed by law. Remember that simply notifying your employer or its insurance carrier about your injury does not constitute filing a claim. A claim is "filed" by filing the claim form with the Division of Workers' Compensation, not with your employer or its insurance company. A claim against the Second Injury Fund must be filed within two years of the date of the accident or within one year after the claim is filed against the employer, whichever is later.

▶ What If My Employer Failed to Obtain Insurance?

If your employer was required to obtain workers' compensation insurance and failed to either obtain insurance or become authorized to self-insure its liability under the law, and if you have sustained an injury arising out of and in the course of your employment with that employer, you have the right to either sue your employer in civil court for damages (if you can prove your employer was negligent in

causing your injury) or file a workers' compensation claim against your employer with the Missouri Division of Workers' Compensation. Also, when employers fail to obtain insurance coverage or become authorized to self-insure when required, state law allows the Missouri Second Injury Fund to pay for an employee's medical bills if the insured employer fails to do so.

▶ Which State's Laws Apply to My Case?

The state in which your accident occurred will have jurisdiction in your case. Also, the state in which your contract or hire with your employer was entered into may also have jurisdiction. Finally, the state in which your employment was principally located could also have jurisdiction. In some cases, there is jurisdiction in more than one state. In those cases, you have a right to pursue your claim in any state having jurisdiction. Your rights and the benefits payable will vary from state to state.

▶ Do I Need a Lawyer for My Workers' Compensation Case?

Not everyone who suffers an injury or illness at work needs a lawyer. However, a lawyer can answer your questions and represent your interests in your workers' compensation case. If necessary, your lawyer can take your case to trial before an administrative law judge.

▶ What If I Have Further Questions?

If you have further questions, contact the Missouri Division of Workers' Compensation or contact a lawyer to discuss your rights under the workers' compensation law. If you need help finding a lawyer, call the appropriate lawyer referral service listed below.

In St. Louis, call: 314/621-6681
In Springfield, call: 417/831-2783

Elsewhere in the state, call The Missouri Bar
Lawyer Referral Service at 573/636-3635

The ADA: Rules for the Workplace

This is a question and answer summary of the key employment discrimination provisions found in Title I of the Americans with Disabilities Act (ADA). The ADA prohibitions on employment discrimination against individuals with disabilities became effective July 26, 1992, for employers with 25 or more employees (July 26, 1994 for employers with 15 or more employees).

Who is prohibited from discriminating under the employment provisions of the Act?

Generally, public and private employers with 15 or more employees are subject to the prohibitions of the ADA.

Who is protected from employment discrimination under the Act?

Any qualified individual with a disability in regard to job application procedures, hiring or discharging, compensation, advancement, training and any other term or condition of employment.

What is the meaning of "qualified individual with a disability?"

The phrase means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires.

How does an employer determine if an individual with a disability is "qualified?"

The determination of whether an individual with a disability is "qualified" begins with deciding whether the individual satisfies the prerequisites for the position, such as possessing the appropriate education, experience, skills, licenses, etc. The next step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.

What are "essential functions?"

Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desires. They do not include the marginal functions of the position.

A job function may be considered essential for any of several reasons, such as:

the reason the position exists is to perform that function; there are a limited number of employees available among whom the performance of that job function can be distributed; and/or the function is highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

What evidence should be considered in determining whether a function is essential?

Evidence of whether a particular function is essential includes, but is not limited to: the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job actually performing the function; the consequences of not requiring the individual to perform the function; the terms of a collective bargaining agreement; the work experience of past employees in the job; and/or the current work experience of incumbents in similar jobs.

What is a "disability" under the Act?

The definition is very broad. With respect to an individual, "disability" means: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such an impairment.

What is a "physical or mental impairment?"

A physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting most body systems and mental or psychological disorders, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. Impairments do not include physical characteristics such as height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder.

What is a "major life activity?"

Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reproduction and, if no other major life activity is substantially limited, working.

What is the meaning of "substantially limits?"

The term substantially limits means: (1) unable to perform a major life activity that the average person can perform; or (2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the average person. Temporary impairments, such as broken limbs, sprained joints, concussions, appendicitis and influenza are usually not disabilities.

What factors determine whether a major life activity is substantially limited?

The factors include: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact or the expected permanent or long-term impact of or resulting from the impairment. The term "duration" as used in this context refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment.

Example: A broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the impact of the impairment would be the resulting permanent limp.

What is the meaning of a substantial limitation on the major life activity of working?

With respect to the major life activity of working, the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation.

Disability also is defined as having a "record of a physical or mental impairment that substantially limits a life activity." What does this mean?

This provision is intended to ensure that people are not discriminated against because of a history of disability or because they have been misclassified or disabled.

Example: Former cancer patients are protected from discrimination based upon their prior medical history.

Disability also is defined as being "regarded as having a physical or mental impairment." What does this mean?

Being regarded as having a physical or mental impairment means: having a physical or mental impairment that does *not* substantially limit major life activities but that is treated or perceived by an employer as substantially limiting; having a physical or mental impairment that substantially limits major life activities, but only as a result of the attitudes of others; or having no physical or mental impairment, but being treated by an employer as having a substantially limiting impairment.

Example: Suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated myths, fears or stereotypes that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

Does the Act obligate an employer to do anything for an employee with a disability that the employer is not required to do for the other employees?

The Act obligates the employer to make reasonable accommodations that would permit an employee with a known disability to perform the duties of the job unless providing such accommodations would result in an undue hardship.

What is a "reasonable accommodation?"

A "reasonable accommodation" is a modification or adjustment (1) to the job application process that enables a qualified applicant with a disability to be considered for the positions such qualified applicant desires; (2) to the work environment, or to the manner of circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position; or (3) that enables an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

What type of modifications or adjustments may be involved?

Reasonable accommodations may involve, but are not limited to, making existing employee facilities accessible to and usable by employees with disabilities, job restructuring, modification of equipment, modification of work schedules or provision of readers or interpreters. Reassignment to a vacant position is also a possible reasonable accommodation when accommodation within the individual's current position would pose an undue hardship.

What is an "undue hardship?"

Undue hardship is defined as an action requiring significant difficulty or expense. The factors to be considered include: (1) the nature and cost of the accommodation needed under the Act; (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility and the effect on expenses and resources; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees and the number, type and location of its facilities; (4) the type of the operation or operations of the covered entity, including the composition, structure and functions of the work force of such entity and the relationship of the facility or facilities in question to the covered entity; and (5) the impact of the accommodation upon the

operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

What employment criteria and tests can an employer use without violating the Act?

The Act still permits employers to devise physical and other employment tests if they are job-related and consistent with business necessity. Importantly, the Equal Employment Opportunity Commission (EEOC) has stated that an employer's business judgments about production standards will not be second-guessed. When the employer applies employment criteria and tests, it must determine whether reasonable accommodation would enable the person with the disability to perform the essential functions of the job without imposing an undue hardship on the business.

Is reasonable accommodation required in order for an individual with a disability to take a qualification test?

Reasonable accommodation can be required in the administration of a qualification test if: (1) the employer knows that the individual has a disability impairing sensory, manual or speaking skills that will prevent the employee from taking the test or that will negatively influence the results of the test; (2) the impaired sensory, manual or speaking skills are not necessary to perform the essential functions of the job, with or without reasonable accommodation; and (3) the reasonable accommodation in the format of the test or otherwise can be provided without undue hardship.

Example: An employer can require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure for the performance of an essential function of the job. Otherwise, an alternative oral test should be administered.

May the employment of a person with a disability be denied because of an increased risk to the safety of that person or others?

An employer may adopt a qualification standard that an employee not pose a direct threat to the health or safety of the individual or others. Such a standard must apply to all individuals, not just those with disabilities. An individual may be denied employment because the individual poses a direct threat to the health or safety of the individual or others if the threat cannot be eliminated by reasonable accommodation. However, the determination of the threat to safety must be made on a case-by-case basis supported by valid medical analysis or other objective evidence. It cannot be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies. Moreover, the threat must pose a significant risk — a high probability of substantial harm. Speculative or remote risk is insufficient.

What is the effect of the ADA on drug testing of employees?

The ADA attempts to be neutral on drug testing. It provides that drug testing shall not be considered a prohibited medical examination. It further excludes from the definition of "qualified individual with a disability" any employee or applicant who is currently engaging in the illegal use of drugs when an employer acts on the basis of such use.

What remedies would be available to an individual with a disability who is discriminated against by an employer?

The Act provides the remedies that are available under Title VII of the Civil Rights Act of 1964. These include injunctions, back pay and lost benefits, reinstatement, front pay when reinstatement is not appropriate, attorneys' fees and costs, other make-whole relief and limited actual and punitive damages in some cases.

How will the Act be enforced against employers?

The EEOC will be responsible for processing and investigating charges under the Act. Civil actions may be filed against the employer by the EEOC, the Attorney General or an aggrieved individual.

What sort of actions by a health plan sponsor may be viewed as "subterfuge" to evade the purposes of the Act?

It seems likely that an employer who amends a health plan to reduce coverage for a specific disabling condition shortly after learning of an employee who is afflicted with that disability would be vulnerable to a charge of attempting to evade the purposes of the Act.

Example: A law firm may not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness.

May an employer inquire of an applicant concerning the existence, nature or severity of a disability?

Employers generally are not permitted to conduct pre-offer medical examinations or make inquiries to elicit this information. Additionally, employers may not inquire at the pre-offer stage about an applicant's workers' compensation history. However, an employer may make preemployment inquiries into the ability of an applicant to perform job-related functions. This can be accomplished by narrowly and specifically describing what the job entails and asking if the individual can perform the job with or without reasonable accommodation. Employers may also require a medical examination after offering employment and before the applicant begins working. The examination may be made a condition of an offer of employment if all employees are subject to such an examination regardless of disability and information obtained regarding the medical condition or history of

the applicant is collected and maintained on separate forms and in separate medical files that are treated as confidential.

May an employer take any steps to determine whether an individual with a known disability can perform the job in question?

An employer may ask an individual with a known disability that may interfere with or prevent the performance of a job to describe or demonstrate how, with or without reasonable accommodation, the individual will be able to perform job-related functions. If the disability is not one that may interfere with or prevent the performance of the job, the individual can be required to explain or demonstrate performance only if the employer routinely makes such a request of all applicants in the same job category.

Example: An employer may state the attendance requirements of a job and inquire whether an applicant can meet them, but may not ask how an individual became disabled, the prognosis for the disability, how often the individual will use leave for treatment for the disability or how the individual will use leave as a result of incapacitation due to the disability.

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