

CALIFORNIA STATE PERSONNEL BOARD

Date of Issue: May 6, 1992

MEMO TO: ALL STATE AGENCIES AND EMPLOYEE ORGANIZATIONS

SUBJECT: IMPACT OF THE AMERICANS WITH DISABILITIES ACT (ADA) ON STATE EMPLOYMENT

On January 26, 1992 the employment and equal public access provisions of Title II of the ADA went into effect for all State agencies. The employment provisions of Title I will become effective on July 26, 1992. The employment provisions of both Titles I and II are, for the most part, identical and closely parallel those of the Federal Rehabilitation Act of 1973, from which current State laws affecting equal employment opportunity, anti-discrimination and reasonable accommodation for the disabled were modeled. The State Personnel Board (SPB) has compared current State Civil Service laws, regulations and policies with the employment provisions of the ADA and the applicable regulations and guidelines issued by the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice and has concluded that they are essentially consistent.

The purpose of this memorandum is to provide State agencies with information about the employment provision of the ADA and the implementing regulations and guidelines. The State's Guide for Implementing Reasonable Accommodation is currently being updated to include more detailed information about the reasonable accommodation provisions of the Act and will be distributed at a later date.

The basic employment provisions of the Act and the implementing regulations and guidelines and the responsibilities of State agencies are highlighted below. **The following items are those which clarify or modify existing State provisions:**

- The ADA is an equal employment opportunity, anti-discrimination law. It neither advocates for, nor restricts affirmative action efforts.
- The ADA requires all employers to post notices in an accessible format to applicants and employees describing the employment provisions of the Act. Notices must be continuously posted in conspicuous places on the employer's premises where notices to employees and applicants for employment are customarily posted. A violation of this provision is subject to a fine, not to exceed \$100.00. This is the same requirement that agencies have for posting the provisions of the Civil Rights Act of 1964.

To facilitate compliance with this requirement, the EEOC has developed a poster describing the applicable provisions of the Act, which is suitable for posting. The poster is available in accessible formats and may be obtained by writing to the EEOC, 901 Market ST, Suite 390, San Francisco, CA 94103.

- State agencies are now subject to compensatory damages of up to \$300,000.00 for violations of the anti-discrimination provisions of the ADA. Failure to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified person with a disability is considered a discriminatory act under the ADA, unless the agency can demonstrate that it would incur undue hardship.
- Each State agency is required to carefully assess whether its programs, services, policies and practices are in compliance with the equal public access provisions of Title II of the ADA. This includes its employment practices, as well as all other program areas. To accomplish this, Title II regulations require each agency to complete a formal self-evaluation review by January 26, 1993. The review must include opportunities for public comment. Agencies that conducted a similar self-evaluation under Section 504 of the Rehabilitation Act of 1973 may limit their new self-evaluation to programs not addressed in their original review.

The Department of Rehabilitation is coordinating the State's efforts to comply with the requirement to complete a self-evaluation review. For additional information and assistance, State agencies should contact Curtis Richards, Assistant Director, Department of Rehabilitation at (916)445-3973, or TDD (916) 323-4347.

- The ADA adds the following as examples of reasonable accommodation: "reassignment to a vacant position" (i.e., alternate job placement); and "modification of examination and training materials and policies". The EEOC guidelines state that reassignment to a vacant position does not apply to applicants for a position.
- The ADA provides that an employer may use the concept of "direct threat" as a defense for refusing to hire or retain in a position a person with a disability. EEOC regulations state that among the qualifications an agency may require of an employee is that he/she not pose a "direct threat" to his/her own health or safety or the health or safety of others when performing the essential functions of the job. The regulations defines "direct threat" as a significant risk of substantial harm that cannot be eliminated or reduced to an acceptable level by reasonable accommodation.

In assessing whether a person poses a direct threat, the factors to be considered are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

- An employer's examination announcements, job specifications and position duty statements can be used as evidence of the essential functions of the job in cases involving the denial of reasonable accommodation requests. It is very important that these documents be accurate and up-to-date.
- Individuals currently engaging in illegal use of drugs are not protected under the ADA. Testing to determine the illegal use of drugs is not considered a medical examination and is permitted by the Act. State agencies, however, must still comply with State laws and regulations governing medical examinations and drug testing. Recovered substance abusers are protected by the anti-discrimination provisions and cannot be arbitrarily excluded from employment.

Other provisions of the ADA and accompanying regulations, which are consistent with current State laws and policies, include:

- All job qualifications, including physical requirements, must be job related. Agencies are responsible for insuring that the "Minimum Qualifications" for all their classifications are job related. Any physical requirement standards should be validated as job related or eliminated. Agencies that need assistance in validating physical job requirements should contact the Test Validation and Construction Unit at the SPB at (916)653-1264, CALNET 453-1264, or TDD (916)653-1511, CALNET 453-1511.
- All examination and job announcements must contain a TDD telephone number or the number of the California Relay Service in order to provide equal access to employment information for the deaf and hearing impaired. For additional information, see SPB pink memorandum on "Concerns of Deaf and Hearing Impaired State Employees", dated June 18, 1991.
- All examinations in which there is disparate impact against the disabled must either be defended as job related and required by business necessity or eliminated. The best defense of the job-relatedness of an examination is through a validation study. Agencies that need assistance in validating their examinations should contact the Test Validation and Construction Unit at the SPB.
- Pre-employment medical examinations or inquiries about

disabilities or medical condition are prohibited by the ADA. No required health related information may be obtained by an employer prior to an individual's acceptance of an offer of employment. Pre-employment inquiries can be made, however, relating to an individual's ability to perform job-related functions. In addition, job-related physical agility tests are not considered medical examinations and can be given at any point in the selection process.

- Employee medical information must be kept in a separate file, apart from other employment information. Confidentiality must be maintained and access to such information must be limited in accordance with the Confidentiality of Medical Information Act contained in Part 2.6, Chapter 1, commencing with Section 56 of the California Civil Code. For more information on the access and maintenance of medical records, see SPB pink memoranda on "Maintenance of Medical Records", dated October 18, 1982 and July 5, 1984.
- Persons with disabilities can be held to the same performance standards as nondisabled employees when appropriate reasonable accommodation has been made.
- Employees with disabilities are entitled to equal access to programs, services and privileges afforded to nondisabled employees. This includes such things as training programs, retirement luncheons and office Christmas parties.

To assist State agencies in meeting their legal obligations, the SPB has revised its Reasonable Accommodation Training Course to add information on the ADA. The first sessions of the revised course are scheduled for May 21, 1992 and June 25, 1992. The course costs \$85.00 per participant. For more information about the training, please contact Arnelle Thompson, SPB Training Coordinator, at (916)653-0664, CALNET 453-0664, or TDD (916)653-1311, CALNET 453-1511.

We hope this information is helpful to you in avoiding employment discrimination and in providing reasonable accommodation to persons with disabilities. If you have any questions about the ADA or reasonable accommodation, please contact either Ted Edwards, Manager, Special Programs Unit, at (916)653-0014, CALnet 453-0014, or Elizabeth Montoya, SPB Reasonable Accommodation Coordinator, at (916)653-0558, CALNET 453-0558. The TDD number for both is (916)653-1498, CALNET 453-1498.

/s/  
LAURA AGUILERA, Chief

Affirmative Action and Merit Oversight Division