

**PPM #2**

**Policy Name:** *Americans with Disabilities Act (ADA)*

**Effective Date:** *August 16, 1999*

**Revision Date:** *August 1, 2008; December 1, 2011*

**Authorization:**



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## **PHILOSOPHY**

The Americans with Disabilities Act (ADA) is intended to maximize employment opportunities for qualified individuals with disabilities and to assure quality of opportunity, full participation, independent living and economic self-sufficiency for disabled individuals. The Office of the Lieutenant Governor (OLG) and the Department of Culture, Recreation and Tourism (DCRT) are fully supportive of these goals and will ensure that qualified individuals with disabilities are afforded equal opportunity in all conditions of employment.

## **WHO IS PROTECTED?**

The ADA protects qualified individuals with disabilities. A qualified individual with a disability is an individual who satisfies the requisite skill, experience, education and other job-related requirements of the position that he/she holds or desires and who, with or without reasonable accommodations, can perform the essential functions of the position. Under the ADA, a person has a disability if:

- A. **The individual has a physical or mental impairment, which substantially limits a major life activity.** Generally, this includes any person with a physiological disorder, cosmetic disfigurement or anatomical loss affecting the body's neurological system, sense organs, digestive system, cardiovascular system, etc. Also included are individuals with impairments (orthopedic, speech, epilepsy, heart disease, diabetes, etc.) which substantially limit his/her ability to perform activities which an average person can do with little or no difficulty, or significantly restricts the conditions, manner or duration under which he/she can perform major life activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing and lifting, and mental and emotional disorders and processes such as thinking concentrating, and interacting with others.

The determination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, the duration or expected duration of the impairment and the permanent or long-term impact of the impairment. Although short-term, temporary restrictions generally are not

substantially limiting, temporary impediments that take significantly longer than normal to heal, long-term impairments or potentially long-term impairments of indefinite duration may be disabilities if sufficiently severe.

With respect to the major life activity of working, "disability" refers to significant restrictions in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to a person having comparable training, skills and ability. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

- B. **The individual has a record or history of a substantially limiting impairment or has been misclassified as having such impairment.** This provision covers educational, medical, employment and other such records. Under this provision, it is discriminatory to base employment decisions solely upon an individual's record or known history of disability. For instance, an employer cannot refuse employment based upon knowledge that the applicant has a history of back ailments.
- C. **The individual is regarded as having such an impairment because he or she: (1) has a physical or mental impairment that does not substantially limit a major life activity, but is regarded as suffering from such limitation; (2) has a physical or mental impairment that substantially limits a major life activity only due to the attitudes of others towards the impairment; or (3) does not have a disability, but is treated as having a substantially limiting impairment.** For example, an employer cannot refuse employment to an applicant with high blood pressure because the employer believes that such an individual will be unable to handle stress or will require time off from work for medical appointments.

To be protected, a person must have a disability and be qualified to perform the essential functions of the job, with or without reasonable accommodations. Stated succinctly, the employee or applicant must be able to:

- A. Satisfy the job requirements – i.e., educational background, employment experience, skills, licensure and other job related requirements; and
- B. Perform the essential functions of the position, with or without reasonable accommodations:
1. **Essential functions** of a position are the basic job duties that an employee must be able to perform. Considerations in determining whether a function is essential include:
    - \* The written job description;
    - \* Whether the reason the position exists is to perform that function;
    - \* The number of other employees available to perform the function;

- \* The degree of expertise or skill required to perform the function;
- \* Actual work experience of present or past employees in the job;
- \* The time spent performing the function; and
- \* The consequence of not requiring an employee to perform the function.

2. **Reasonable accommodations** are alterations to the work environment or changes in customary work practices, which are not significantly difficult or expensive, and which enable an individual with a disability to perform the essential functions of the job.

The ADA does not interfere with the OLG's and DCRT's right to hire the best qualified applicant; rather, it ensures that an individual will not be discriminated against because of a disability in any employment practice, including recruitment, pay, hiring, firing, promotion, job assignment, training, leave, lay-off, benefits and other employment related activities. Further, the OLG and DCRT will ensure that disabled employees are not isolated or segregated from the rest of the workforce because of their disabilities; that disabled individuals have equal access to employment benefits (i.e., health insurance) and facilities (i.e., lunch room, lounges and break rooms); and that services provided through contractual relationships do not discriminate against the disabled.

## REQUIREMENTS

- A. **Application Process:** The OLG and DCRT will not use qualification standards, employment tests or other selection criteria which screen out or tend to screen out an individual with a disability or a class of individuals with disabilities on the basis of disability unless such criteria is job-related for the position in question and consistent with business necessity. Any tests administered will be selected and administered in the most effective manner to ensure that the test results accurately reflect the skills, aptitude and any other factor the test is intended to measure.

Pre-employment tests will be administered in accordance with standard, established procedure. If doubt exists regarding an applicant's ability to test, the person responsible for administering the examination will ask if the applicant has taken a test of the nature proposed before or if anything hinders his/her ability to achieve a score accurately representing his/her ability. If standard-testing procedures cannot be utilized, modifications will be considered. For instance, if the applicant is hard of hearing, the usual verbal questions could be reduced to writing. Alternatively, the applicant's experience, training and education could be considered in lieu of the customary testing procedure.

- B. **The Interview Process:** The interviewer cannot inquire regarding the applicant's disability or extent of any apparent disability. The applicant can be questioned regarding his/her ability to perform job-related functions such as getting to work on time, lifting, climbing, standing, driving, etc. The applicant may likewise be

- required to describe or demonstrate how, with or without accommodation(s); he/she will be able to perform job-related functions. Questions must be phrased in terms of the applicant's ability to perform the required function.
- C. **Medical Examinations:**
1. **Pre-employment:** If all applicants in the job category are subjected to a medical examination or inquiry, regardless of medical condition, a medical examination and/or inquiry may be required after an offer of employment is made and before the applicant begins employment. An offer of employment may be conditional on the results of such examination and/or inquiry. If certain medical criteria are used to screen applicants, the exclusionary criteria must be job-related and consistent with business necessity and reasonable accommodation(s) must be considered in determining the employee's ability to perform the job's essential functions. For example, if a job routinely requires lifting over fifty pounds as an essential function, the offer of employment can be revoked if the applicant is physically unable to do so.
  2. **Employees:** The OLG and DCRT may require an existing employee to submit to a medical examination or inquiry if such examination or inquiry is job-related and consistent with business necessity. Inquiries may be made regarding the ability of the employee to perform job-related functions.
- D. **Confidentiality:** Information obtained regarding the medical condition or history of an applicant or employee must be collected and maintained on a separate form and in a separate medical file. Any such information must be treated as a confidential medical record and disclosed only in accordance with law.
- E. **Job Descriptions:** To ensure consistency and to protect against after-the-fact analysis, the OLG and DCRT will maintain job descriptions, which clearly define the essential functions of each position. Job descriptions will be examined and updated to classify functions as "essential" and "marginal."
- F. **Reasonable Accommodations:** Reasonable accommodations usually fall into one of three categories:
1. **Accommodations in the selection process:** The OLG's and DCRT's duty under the ADA begins with the hiring process. If necessary, applicants will be assisted in completing the application or allowed to take it home. Interviewers must confine questions to job-related functions and criteria. An inquiry on an application form or during an interview regarding the existence and/or extent of a disability is strictly prohibited.
  2. **Accommodations to enable an employee to perform the essential functions of a job:** Such accommodations may include restructuring a job, modifying work schedules, acquiring or modifying equipment, providing

qualified readers or interpreters, reassigning a current employee to a vacant position or modifying examinations, training or other programs. Accommodations required to facilitate an applicant's/employee's performance of the essential functions of the position must be addressed on a case-by-case basis.

Example: An applicant satisfies the prerequisites for a vacant accountant position. Historically, the incumbent of this position has assisted others by answering the office telephone during afternoon break. The accounting-related tasks constitute essential functions, but phone answering during a break is a marginal job duty. Suppose a hearing-impaired person applies for the accountant position. The ability to hear may not be required to perform the essential functions of the position. As such, the individual must be considered for the position equally with all other qualified, non-hearing impaired applicants. This individual's hearing impairment must be disregarded in the selection process. The marginal job duty of answering the telephone must be assigned to another employee. Alternatively, equipment could be purchased and installed by the OLG or DCRT to facilitate the accountant's ability to answer the telephone.

3. **Accommodations to allow a disabled employee to enjoy the benefits and opportunities of employment afforded other employees.** Such accommodations may include restructuring work areas, lunchrooms, break rooms, training rooms and restrooms to make them available and accessible to all employees. Note that physical plant accommodations of this nature must be reasonable and are not required if they would impose undue hardship upon the OLG and DCRT.

"Undue hardship" means that accommodations would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. OLG and DCRT are not required to create a new position, to bump another employee or to promote an individual with a disability in order to satisfy the "reasonable accommodations" requirement. In identifying reasonable accommodations, consideration is given to the nature of the operation or facility, geographic location, impact of the accommodations on the operation of the facility, and the effect(s) of accommodations on the ability to conduct business.

- G. **Identifying Appropriate Accommodations:** Employees/applicants requiring accommodations are encouraged to suggest reasonable accommodations based upon their own life and/or work experiences. If particular requests are not made and the appropriate accommodations are not obvious, the OLG and DCRT will make a reasonable effort to identify appropriate accommodations. This will be accomplished through consultation with the employee/applicant, the treating physician and other individuals with significant knowledge relative the employee's/applicant's condition, the essential functions of the job and other relevant factors.

## EXCLUSIONS FROM PROTECTION

- A. **Alcoholism/Drug Addiction:** Alcoholism and drug addiction are classified as disabilities under the ADA. The protection and accommodation requirements of the ADA, however, do not apply to current abusers of drugs and alcohol. For example, an employee's work schedule should be modified to allow him/her to attend treatment or AA meetings, but that employee will be disciplined, like any other employee, for drinking on the job, possessing illegal drugs, being impaired on duty, failing to report for duty on time, etc.
- B. **Disability Poses Direct Threat/Significant Risk:** The protection of the ADA does not apply when a disability poses a direct threat or significant risk to the health and safety of the disabled employee or others. This exclusion is applicable only where reasonable accommodations would not reduce the risk. For example, a person a person with epilepsy who has lost consciousness due to seizures within the past year might seriously endanger his own life and the lives of others if employed in a position requiring the use of heavy equipment.

The OLG and DCRT will determine the existence of a genuine risk of substantial harm through objective, supportable data. In determining whether an individual poses a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the harm will occur; and (4) the imminence of the potential harm.

- C. **Conditions Which Are Not Considered Disabilities:** Conditions which are not considered disabilities include, but are not limited to: (1) environmental, cultural, and economic disadvantages; (2) homosexuality; (3) bisexuality; (4) pregnancy; (5) physical characteristics; (6) common personality traits; (7) normal deviations in height, weight, or strength; (8) transvestism; (9) transsexualism; (10) pedophilia; (11) exhibitionism; (12) voyeurism; (13) gender identity disorders not resulting from physical impairments; (14) sexual behavior disorders; (15) compulsive gambling; (16) kleptomania; (17) pyromania; (18) psychoactive substance use disorders resulting from current illegal use of drugs; and (19) temporary impairments which heal within normal time frames, such as colds, sprains and broken limbs.

## NON-DISCRIMINATION

In addition to not discriminating against qualified individuals with disabilities, the OLG and DCRT will not exclude or deny equal jobs or benefits to a qualified individual because of that individual's relationship or association with a disabled individual. For example, it would be unlawful to deny employment to an applicant who is the spouse of a disabled individual based upon the belief that the applicant would use excessive leave to care for his/her disabled spouse.

OLG and DCRT will not discriminate against an individual because he/she has opposed any act or practice made unlawful by the ADA or because that individual filed a charge, testified, assisted or otherwise participated in an investigation, proceeding or hearing to enforce any provision of the ADA. Further, no individual will be coerced, intimidated, threatened, harassed or interfered with because that individual aided or encouraged another individual in the exercise of any right granted or protected by the ADA.

## **ENFORCEMENT**

The Equal Employment Opportunity Commission (EEOC) enforces the provisions of the ADA prohibiting job discrimination. An applicant or employee who believes he/she has been discriminated against on the basis of disability is free to file a charge of discrimination with the EEOC. Strict time limitations apply and the administrative investigative process through EEOC must be satisfied prior to instituting litigation. Applicants and employees should also be aware that the State of Louisiana prohibits discrimination based upon disability. These statutes likewise provide strict time limits and procedures.

**The OLG and DCRT have posted throughout its premises notices describing the provisions of the ADA. Additional information may be requested from the OLG and DCRT Human Resources Division.**

*Summary of Changes: Revised policy number (December 1, 2011).*