THE ADA—THEN AND NOW

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- The ADA Amendments Act of 2008 ("ADAAA") became effective January 1, 2009.
    - The new law applies only prospectively to conduct that occurs on or after January 1, 2009.

- Congress's express purposes in passing the Act were:
    - (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;
    - (2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
    - (3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School *Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
    - (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled" and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
    - (5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of

whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

- (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

- On June 17, 2009, the EEOC voted to approve a proposed Notice of Proposed Rulemaking (NPRM) to conform its ADA regulations to the Amendments Act. The proposed NPRM is now sent for comment by other federal agencies pursuant to Executive Order 12067 and for approval by the Office of Management and Budget. When this process is completed, the Commission will publish its NPRM for public comment.

- The basic prohibition remains the same:

  - "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

  - "Discriminate" includes:

    - (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

    - (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

    - (3) utilizing standards, criteria, or methods of administration—

      - (A) that have the effect of discrimination on the basis of disability; or

      - (B) that perpetuate the discrimination of others who are subject to common administrative control;

    - (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

    - (5)

- (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

▪ (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

▪ (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

- Changes to the Definition of "Disability"

  - The basic definition remains the same:

    ▪ "The term 'disability' means, with respect to an individual—

      - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

      - (B) a record of such an impairment; or

      - (C) being regarded as having such an impairment."

  - However, the statute does tell us that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."

  - The changes are to the component parts of the definition—"major life activities" and "substantially limits."

Major Life Activities	
Then	**Now**
• Defined in EEOC regulations as: o "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." o Interpreted in the *Toyota Motor* case as: ▪ Those activities that are of central importance to most people's daily lives. ▪ "That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act. When it enacted the ADA in 1990, Congress found that 'some 43,000,000 Americans have one or more physical or mental disabilities.' If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."	• Congress expressly found that the *Toyota Motor* Court misunderstood the intent of the ADA. • The ADAAA struck the finding (quoted above) about some 43 million Americans having a disability. • The definition is now in the statute itself: o "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." AND ALSO o "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." o The forthcoming NPRM from the EEOC adds: ▪ To "major bodily functions": hemic, lymphatic, and musculoskeletal systems. ▪ These examples: "Kidney disease affects bladder function; cancer affects normal cell growth; diabetes affects functions of the endocrine system (e.g., production of insulin); epilepsy affects neurological functions or functions of the brain; and HIV and AIDS affect functions of the immune system and reproductive functions."

Substantially Limits	
Then	**Now**
• Defined in the EEOC regulations as: o (i) Unable to perform a major life activity that the average person in the general population can perform; or o (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. • Factors to Consider (per Regulations): o o (i) The nature and severity of the impairment; o o (ii) The duration or expected duration of the impairment; and o (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. • When the activity is working, "substantially limit" meant: o 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 in the major life activity of working. o We were to consider: ▪ (A) The geographical area to which the	• Congress expressly rejected the Supreme Court's prior interpretation of "substantially limits" as "prevents or severely restricts." o Congress explained that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis" • The EEOC's NPRM states "that in order to be 'substantially limiting,' an impartment need not severely restrict or significantly restrict performance of a major life activity." • The NPRM states that comparison of an individual's limitation to that of most people in the general population often may be made using a common-sense analysis without resorting to scientific or medical evidence. • The NPRM also identifies several conditions that are essentially "per se" disabilities: o Blindness o Deafness o Intellectual disabilities (formerly called mental retardation) o Partially or completely missing limbs o Mobility impairments that require the use of a wheelchair

individual has reasonable access; ▪ (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or ▪ (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). • Guidance re Temporary Impairments: o "[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities." • Mitigating Measures: o *Sutton* case had told us that we are to evaluate the individual <u>in his or her corrected state</u>—how he or she is with the use of mitigating measures (e.g., medication, corrective lenses, etc.).		o Autism o Cancer o Psychiatric disabilities such as major depression, bipolar disorder, and schizophrenia o HOWEVER, just because these conditions are per se disabilities does not necessarily mean the person is "qualified" or entitled to an accommodation (see below) • The NPRM provides these examples of conditions, that while not per se disabilities, *may* substantially limit a major life activity (this is not an exhaustive list, obviously): o Asthma o High blood pressure o Coronary artery disease o Learning disabilities o A back or leg impairment o Carpal tunnel syndrome o Psychiatric disabilities such as panic or anxiety disorder and forms of depression other than major depression o Hypothyroidism • Guidance re Temporary Impairments: o The EEOC's NPRM states that an impairment lasting for fewer than 6 months may still be substantially limiting. • The statute also provides these rules: o An impairment that substantially limits

		one major life activity need not limit other major life activities in order to be considered a disability. ▪ Example from EEOC's NPRM: "Someone with diabetes whose endocrine function (i.e., ability to produce insulin) is substantially limited need not also show that he is substantially limited in eating or any other major life activity." o An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. ▪ NPRM examples: epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as major depression, bipolar disorder, and post-traumatic stress disorder. • **Major Change re Mitigating Measures** • The determination of whether an impairment substantially limits a major life activity shall be made <u>without</u> regard to the ameliorative effects of mitigating measures such as— o (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; o (II) use of assistive technology; o (III) reasonable accommodations or auxiliary aids or services; or

		○ (IV) learned behavioral or adaptive neurological modifications. • EXCEPTION: "The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. • **Substantially Limited in Working** • NPRM states that an impairment "substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue as compared to most people having comparable training, skills, and abilities." ○ The concept of a "type of work" replaces the concepts of a class or broad range of jobs. ○ A type of work, the proposed rule says, may be defined in terms of the nature of the work or in terms of specific job-related requirements. ○ Examples of types of work include commercial truck driving (i.e., driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. ○ Job-related requirements characteristic of types of work include jobs requiring: repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces

		characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts. • NPRM makes two more points: o First, the fact that an individual has obtained employment elsewhere is not dispositive of whether an individual is substantially limited in working. ▪ So, for example, the proposed rule says that someone who can't perform jobs requiring repetitive bending or heavy lifting is still substantially limited in working, even if he has skills that qualify him to perform work that does not include these requirements. ▪ Someone who is denied a reasonable accommodation and therefore cannot perform manufacturing work requiring repetitive manual tasks could still be considered substantially limited in working, even if the individual was subsequently offered the same kind of work for another employer with an accommodation. o Second, the statistical analysis that some courts have required in "working" cases is unnecessary to show that an individual is substantially limited in working.

- As stated above, under the ADA (then and now), and individual is disabled even if he or she is not actually afflicted with an impairment that substantially limits a major life activity, but also if he or she has a record of having such an impairment (i.e., is misclassified as disabled), or is regarded as having such an impairment.

Regarded As Disabled	
Then	**Now**
• For an employee to qualify under the regarded-as prong, the employee had to show the employer regarded him as substantially limited in a major life activity—not just regarded him as unable to do this one particular job. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 (1999) ("An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.").	• The statute provides: o An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment <u>whether or not the impairment limits or is perceived to limit a major life activity</u>. o EXCEPTION: Unless the impairment upon which the employer takes action is "transitory and minor." ▪ A transitory impairment is an impairment with an actual or expected duration of 6 months or less. • The NPRM provides several examples: o An employer that does not hire someone for a temporary job due to a sprained wrist that will prevent the individual from typing for three weeks has not regarded the individual as having a disability, since a sprained wrist is transitory and minor. o But an employer who does not hire someone for a manufacturing job, believing she has carpal tunnel syndrome, regards the individual as having a disability, since carpal tunnel syndrome is not transitory and minor. o The proposed rule also makes it clear that actions based on an impairment's symptoms or based on an individual's use of a mitigating measure (e.g., medication), amount to actions based on an impairment. o SILVER LINING: Individuals covered only under the "regarded as" prong of the

		definition of disability are not entitled to reasonable accommodation. (No change in law in our circuit.)

- What Remains the Same
    - The ADAAA has significantly lowered the hurdle required for employees to show they have a disability.
    - Although that used to be how employers resolved many ADA issues and won many cases at the summary judgment stage, whether the individual has a disability is just the first step in the inquiry.
    - The individual still must be "qualified"—able to perform the essential functions of the job with or without reasonable accommodation.
        - **Now it is more important than ever for employers to identify what the essential functions of its positions are and document them in the job description.**
        - The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
        - A job function may be considered essential for any of several reasons, including but not limited to the following:
            - (i) The function may be essential because the reason the position exists is to perform that function;
            - (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
            - (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
        - Evidence of whether a particular function is essential includes, but is not limited to:
            - (i) The employer's judgment as to which functions are essential (Obviously better to have made this judgment before the employee wants an accommodation.)
            - (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

- What is a "reasonable" accommodation?
  - Definition:
    - (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
    - (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
    - (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
  - Reasonable accommodation may include but is not limited to:
    - (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
    - (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.
  - To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, **interactive process** with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

- It is now more important than ever to document what takes place during this interactive process

    - Forms the EEOC uses internally that employers could use as models are found at:

        - Confirmation of Request for Reasonable Accommodation: http://www.eeoc.gov/policy/docs/eeocprocedures-form1.html

        - Reasonable Accommodation Information Reporting Form: http://www.eeoc.gov/policy/docs/eeocprocedures-form3.html

        - Denial of Reasonable Accommodation Request: http://www.eeoc.gov/policy/docs/eeocprocedures-form2.html

- "Defenses" to Requests for "Reasonable Accommodation:

    - *Undue Hardship.* An accommodation is not reasonable if it would cause an undue hardship on the employer.

        - Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth below.

        - (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

        - (ii) 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;

        - (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

        - (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

- (v) 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.

- *Direct Threat*. An accommodation is not reasonable if it would pose a direct threat.

- Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

- The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose 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 potential harm will occur; and

- (4) The imminence of the potential harm.

- What to Do Now

- Review job descriptions—note essential job functions.

- For a great resource on formulating job descriptions, see http://www.jan.wvu.edu/media/JobDescriptions.html.

- For a fillable-form tool that can be used to prepare job descriptions, see http://www.acinet.org/acinet/jobwriter/default.aspx.

- Review policies and handbook—revise as needed to conform to amendments

- Approach every disability issue with the presumption in mind that the individual has a disability (the non-disabled employee is now the exception, not the rule)

- Focus instead on whether the employee can perform the essential functions of the job

- If not, consider whether an accommodation that is reasonable would allow the employee to perform the essential functions of the job.

The U.S. Equal Employment Opportunity Commission

ADA-Compliant Employer Preparedness For the H1N1 Flu Virus

I. Introduction

This short technical assistance document answers basic questions about workplace preparation strategies for the 2009 H1N1 flu virus (swine flu) that are compliant with the Americans with Disabilities Act (ADA). Because this situation is rapidly evolving, employers should consult their local public health authorities and the Centers for Disease Control and Prevention (CDC). For key facts on the H1N1 flu virus, see www.cdc.gov.

Accurate and timely public health information is critical to an effective and ADA-compliant pandemic plan. Employers should establish lines of communication with local public health authorities and community medical experts in advance of a pandemic. *See* www.pandemicflu.gov.

II. Disability-Related Inquiries and Medical Examinations

Title I of the Americans with Disabilities Act (ADA) protects applicants and employees from disability discrimination. Among other things, the ADA regulates when and how employers may require a medical examination or request disability-related information from applicants and employees, regardless of whether the individual has a disability. **This requirement affects when and how employers may request health information from applicants and employees regarding H1N1 flu virus.**

Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

- At the first stage **(prior to an offer of employment)**, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- At the second stage (after an applicant is given a conditional job offer, but before s/he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.
- The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

See Disability-Related Inquiries & Medical Examinations of Employees Under the ADA (2000) at http://www.eeoc.gov/policy/docs/guidance-inquiries.html. *See also* Enforcement Guidance: *Preemployment Disability-Related Questions & Medical Examinations* (1995) at http://www.eeoc.gov/policy/docs/preemp.html.

III. Frequently Asked Questions

A. Planning for Absenteeism

1. In light of the ADA's requirements, how may employers ask employees about factors, including

chronic medical conditions, that may cause them to miss work in the event of a pandemic?

An employer may survey its workforce to gather personal information needed for pandemic preparation **if** *the employer asks broad questions that are **not** limited to disability-related inquiries*. An inquiry would **not** be disability-related if it identified non-medical reasons for absence during a pandemic (e.g., mandatory school closures or curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that weaken immunity). Below is a sample ADA-compliant survey that could be given to all employees before a pandemic.

ADA-Compliant Pre-Pandemic Employee Survey

Directions: Answer "yes" to the whole question **without** specifying the reason or reasons that apply to you. Simply check "yes" or "no" **at the bottom**.

In the event of a pandemic, would you be unable to come to work because of any of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work, and/or;
- If you or a member of your household fall into one of the categories identified by CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ NO _____

2. May an employer require entering employees to have a medical test post-offer to determine their exposure to the influenza virus?

Yes, in limited circumstances. The ADA permits an employer to require entering employees to undergo a medical examination **after** making a conditional offer of employment but before the individual starts work, if all entering employees in the same job category must undergo such an examination.

> **Example A**: An employer in the international shipping industry implements its pandemic influenza preparedness plan when the WHO and the CDC confirm that a new influenza virus, to which people are not immune, is infecting large numbers of people in multiple countries. Because the employer gives these medical tests post-offer to all entering employees in the same job categories, the examinations are ADA-compliant.

B. Infection Control in the Workplace

3. During a pandemic, may an employer require its employees to adopt infection control practices?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and tissue usage and disposal, does not implicate the ADA.

4. May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of a pandemic virus?

Yes. An employer may require employees to wear personal protective equipment. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these absent undue hardship.

5. May an employer encourage or require employees to telework (i.e., work from an alternative location

such as home) as an infection control strategy?

Yes. An employer may encourage or require employees to telework as an infection-control strategy, based on timely information from public health authorities about pandemic conditions. Telework also may be a reasonable accommodation.

Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws.

See generally EEOC Fact Sheet on Work at Home/Telework as a Reasonable Accommodation at http://www.eeoc.gov/facts/telework.html

The Americans with Disabilities Act Amendments Act of 2008

Effective January 1, 2009, Congress amended the Americans with Disabilities Act pursuant to the Americans with Disabilities Act Amendments Act of 2008 (ADA AA or Amendments). The EEOC will be revising its ADA regulations to comply with these Amendments. With the ADA AA, Congress changed the way that the ADA's statutory definition of the term "disability" should be interpreted. The Amendments emphasize that the definition of disability should be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA, and generally shall not require extensive analysis. *See* http://www.eeoc.gov/ada/amendments_notice.html. For the full text of Titles I and V of the ADA, as amended, see Americans with Disabilities Act of 1990.

The ADA AA does not change the ADA's restrictions on disability-related inquiries and medical examinations, discussed herein.

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