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SUBJECT: AMERICANS WITH DISABILITIES ACT

ADOPTED DATE: MARCH 8, 1993

PAGE 1 OF 5

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## ADA - THE AMERICANS WITH DISABILITIES ACT

Cass County Government, in keeping with its mission, intends to implement the "spirit" of the Americans with Disabilities Act (ADA).

It is vital during this process of implementation that all units, committees and employees within Cass County Government keep foremost in their planning the basic intent of the law as agency efforts are made to ensure compliance with all requirements.

The Americans with Disabilities Act (ADA), was enacted into law in July of 1990. The effective date for the ADA is July 26, 1992, for a covered employer with 25 or more employees. Therefore, it is important to be aware of the provisions of the ADA and to lay the groundwork to comply with the law and avoid potential lawsuits. For covered employers with 15 to 24 employees, the Act becomes effective July 26, 1994.

It is estimated that there are approximately 43 million Americans today with one or more physical or mental disabilities. The ADA together with the Rehabilitation Act of 1973 and related state legislation such as the North Dakota Human Rights Act, NDCC 14-02.4, have been enacted in an effort to combat discrimination against such individuals in employment and other areas.

### A. COVERAGE OF ADA.

Although the ADA has five titles, those of most concern to personnel professionals are Title I, dealing with employment, and Title V containing some miscellaneous provisions related to employment. The ADA has been codified at 42 U.S.C. 12101 et seq. Regulations have been promulgated and can be found at 29 C.F.R. 1630.

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such an 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." 42 U.S.C. 12112(a). The regulations provide that "other terms, conditions, and privileges of employment" include:

- 1) recruitment, advertising and job application procedures;
- 2) hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- 3) rates of pay or any other form of compensation and changes in compensation;

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SUBJECT: AMERICANS WITH DISABILITIES ACT

PAGE 2 OF 5

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- 4) job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- 5) leaves of absence, sick leave, or any other leave;
- 6) fringe benefits available by virtue of employment, whether or not administered by the covered entity;
- 7) selection and financial support for training, including: apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- 8) activities sponsored by a covered entity including social and recreational programs;
- 9) any other term, condition, or privilege of employment.

29 C.F.R. S1630.4.

B. PROHIBITED ACTIVITIES.

The ADA (42 U.S.C. S12112) prohibits the following:

- 1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affect the opportunities or status of that person because of that person's disability;
- 2) participating in a contractual or other arrangement which has the effect of discriminating against a disabled individual;
- 3) utilizing standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability or perpetuates such discrimination (disparate impact discrimination);
- 4) excluding or otherwise denying equal jobs or benefits to qualified individuals because of the known disability of a person with whom the qualified individual has a relationship or association;
- 5) not making reasonable accommodations for the known physical or mental limitations of an otherwise qualified applicant or employee unless the employer establishes the accommodation would cause undue hardship;
- 6) denying employment opportunities to an otherwise qualified person with a disability if based on a need to make a reasonable accommodation;

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SUBJECT: AMERICANS WITH DISABILITIES ACT

PAGE 3 OF 5

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- 7) using qualification standards, employment tests or other selection criteria that screen out qualified individuals with a disability unless such selection criteria are job related and consistent with business necessity as defined by the ADA; and
- 8) failing to select and administer tests in the most effective manner to ensure the tests measure skills and aptitude of the person with the disability rather than reflecting a person's impairment.

(Emphasis supplied.)

The ADA also prohibits pre-employment medical exams unless the employer makes a conditional offer of employment to the applicant and requires a medical exam of all applicants for the position. The exam should only test for job related abilities and records of the exam must be kept separately in confidential files. 42 U.S.C. S12112(c)(3).

C. KEY TERMS USED IN THE ADA.

Although the ADA has a number of terms that are defined in the Act or in the regulations, in order to have an understanding of the Act, it is important to be aware of some of the basic terms used in the Act such as disabled individual, reasonable accommodation, and undue hardship.

1. Disabled Individual.

For purposes of the ADA, a disabled individual is 1) an individual with a physical or mental impairment that substantially limits one or more of the major life activities (such as walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself, or performing manual tasks; 2) an individual with a record of such impairment; or 3) an individual regarded as having such an impairment. 42 U.S.C. 12102(2).

Under the ADA, a qualified individual with a disability is applicant or employee who can, with or without reasonable accommodations, perform the essential functions of the employment position held or sought. 42 U.S.C. 12111(8).

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SUBJECT: AMERICANS WITH DISABILITIES ACT

PAGE 4 OF 5

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2. Reasonable Accommodation.

A key requirement of the ADA mandates employers to make reasonable accommodations for the limitations of qualified individuals with disabilities who are applying for employment or who are already employed to enable such individuals to perform the essential functions of the job.

Reasonable accommodation under the ADA can include any of the following: making existing facilities readily accessible and useable by disabled individuals, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, modifying or adjusting examinations, training materials or policies, and provision of qualified readers or interpreters, etc. 42 U.S.C. S12111(9).

3. Undue Hardship.

The ADA also defines whether an action of accommodation on the part of an employer would constitute an undue hardship, and thus establish a defense to having to accommodate a qualified individual with a disability. The ADA looks at the nature and cost of accommodations needed, the overall financial resources of the facility involved, the overall financial resources of the covered entity, and the type of operation or operations of the covered entity.

PREPARING TO IMPLEMENT THE ADA.

A. AVOID QUESTIONING JOB APPLICANTS ABOUT PHYSICAL OR MENTAL DISABILITIES.

Agencies should scrutinize employment applications and interview questions to avoid questions designed to elicit whether a person has a disability. The following are examples of questions that should be avoided:

- 1) Direct questions as to whether a person has a disability or is disabled, including questions regarding the nature and severity of a disability.

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SUBJECT: AMERICANS WITH DISABILITIES ACT

PAGE 5 OF 5

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- 2) Questions about whether a person has filed a workers compensation claim against a former employer or suffered a work-related injury or obtained such benefits.
- 3) Questions asking an applicant to identify physical or mental impairments or medical conditions.
- 4) Questions relating to use of leave because of a disability or perceived disability.
- 5) Questions as to whether a person has been treated for drug addiction, alcoholism, or for mental or psychological disorders.

The proper way to pose questions to job applicants is initially to review the essential functions of the job in question with the applicant; it is then legitimate and lawful to inquire whether the applicant can perform these essential job functions. The ADA protections are designed only to protect those qualified individuals with a disability who can perform the essential functions of the position with or without reasonable accommodation. The regulations define essential functions as "fundamental job duties of the employment position the individual with the disability holds or desires." 29 C.F.R. S1630.2(n). The term essential function does not include the marginal functions of the position.

**B. UPDATE AND REVISE JOB DESCRIPTIONS.**

One of the most important ways to prepare for the implementation of the ADA is for employers to review and revise job descriptions. Job descriptions should explicitly identify the essential functions of the position. Properly detailed and updated job descriptions would likely be the key piece of evidence to determine essential functions of any position. It is important that job descriptions are updated and reflect the essential functions of the job in question. If an applicant or employee cannot perform the essential functions of the position with or without reasonable accommodation, such applicant or employee need not be hired or retained.

**C. EMPLOYEE HANDBOOKS AND PERSONNEL POLICY SHOULD BE EXAMINED TO ENSURE THAT POLICIES ARE IN COMPLIANCE WITH THE ADA.**

HISTORICAL REFERENCE DATE: JULY 26, 1992