

The Commission has revised section 1630.16(e)(1) to refer to communicable diseases that "are" (rather than "may be") transmitted through the handling of food. Several commenters asked the Commission to make this technical change, which adopts the statutory language.

Several commenters also asked the Commission to conform the language of proposed sections 1630.16(f)(1) and (2) to the language of sections 501(c)(1) and (2) of the Act. The Commission has made this change. Thus, sections 1630.16(f)(1) and (2) now refer to risks that are "not inconsistent with State law."

Executive Order 12291 and Regulatory Flexibility Act  
The Commission published a Preliminary Regulatory Impact Analysis on February 28, 1991 (56 FR 8578). Based on the Preliminary Regulatory Impact Analysis, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small business entities. The Commission is issuing this final rule at this time in the absence of a Final Regulatory Impact Analysis in order to meet the statutory deadline.

The Commission's Preliminary Regulatory Impact Analysis was based upon existing data on the costs of reasonable accommodation. The

Commission received few comments on this aspect of its rulemaking.

Because of the complexity inherent in assessing the economic costs and benefits of this rule and the relative paucity of data on this issue, the Commission will further study the economic impact of the regulation and intends to issue a Final Regulatory Impact Analysis

prior to January 1, 1992. As indicated above, the Preliminary Regulatory Impact Analysis was published on February 28, 1991 (56

F.R. 8578) for comment. The Commission will also provide a copy to

the public upon request by calling the Commission's Office of Communications and Legislative Affairs at (202) 663-4900.

Commenters are urged to provide additional information as to the costs and benefits associated with this rule. This will further facilitate the development of a Final Regulatory Impact Analysis.

Comments must be received by September 26, 1991. Written comments

should be submitted to Frances M. Hart, Executive Officer,

Executive Secretariat, Equal Employment Opportunity Commission,  
1801 "L" Street, NW, Washington, D.C. 20507.

As a convenience to commenters, the Executive Secretariat will  
accept public comments transmitted by facsimile ("FAX") machine.  
The telephone number of the FAX receiver is (202) 663-4114.

(This  
is not a toll-free number). Only public comments of six or  
fewer  
pages will be accepted via FAX transmittal. This limitation is  
necessary in order to assure access to the equipment. Comments  
sent by FAX in excess of six pages will not be accepted.

Receipt  
of FAX transmittals will not be acknowledged, except that the  
sender may request confirmation of receipt by calling the  
Executive  
Secretariat Staff at (202) 663-4078. (This is not a toll-free  
number).

Comments received will be available for public inspection in the  
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EEOC Library, room 6502, by appointment only, from 9 a.m. to 5  
p.m., Monday through Friday except legal holidays from October  
15,  
1991, until the Final Regulatory Impact Analysis is published.  
Persons who need assistance to review the comments will be  
provided  
with appropriate aids such as readers or print magnifiers. To  
schedule an appointment call (202) 663-4630 (voice), (202) 663-  
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(TDD).

List of Subjects in 29 CFR Part 1630  
Equal employment opportunity, Handicapped, Individuals with  
disabilities.  
For the Commission,

Evan J. Kemp, Jr.  
Chairman.

Accordingly, 29 CFR Chapter XIV is amended by adding part 1630  
to

read as follows:

PART 1630 -- REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

- 1630.1 Purpose, applicability, and construction.
- 1630.2 Definitions.
- 1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."
- 1630.4 Discrimination prohibited.
- 1630.5 Limiting, segregating, and classifying.
- 1630.6 Contractual or other arrangements.
- 1630.7 Standards, criteria, or methods of administration.
- 1630.8 Relationship or association with an individual with a disability.
- 1630.9 Not making reasonable accommodation.
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1630.10 Qualification standards, tests, and other selection criteria.
- 1630.11 Administration of tests.
- 1630.12 Retaliation and coercion.
- 1630.13 Prohibited medical examinations and inquiries.
- 1630.14 Medical examinations and inquiries specifically permitted.
- 1630.15 Defenses.
- 1630.16 Specific activities permitted.

Appendix to part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act.

Authority: 42 U.S.C. 12116.

- 1630.1 Purpose, applicability, and construction.
  - (a) Purpose. The purpose of this part is to implement

(42 title I of the Americans with Disabilities Act  
U.S.C. 12101, et seq.) (ADA), requiring equal  
employment opportunities for qualified  
individuals  
with disabilities, and sections 3(2), 3(3), 501,  
503, 506(e), 508, 510, and 511 of the ADA as  
those  
sections pertain to the employment of qualified  
individuals with disabilities.

(b) Applicability. This part applies to "covered  
entities" as defined at section 1630.2(b).

(c) Construction. -- (1) In general. Except as  
otherwise provided in this part, this part does  
not  
apply a lesser standard than the standards  
applied  
under title V of the Rehabilitation Act of 1973  
(29 U.S.C. 790 - 794a), or the regulations issued by  
Federal agencies pursuant to that title.

(2) Relationship to other laws. This part does  
not invalidate or limit the remedies, rights, and  
procedures of any Federal law or law of any State  
or political subdivision of any State or  
jurisdiction that provides greater or equal  
protection for the rights of individuals with  
disabilities than are afforded by this part.

1630.2 Definitions.

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Civil
- (a) Commission means the Equal Employment Opportunity  
Commission established by Section 705 of the  
Rights Act of 1964 (42 U.S.C. 2000e-4).
- agency,  
(b) Covered Entity means an employer, employment  
labor organization, or joint labor management  
committee.
- have  
(c) Person, labor organization, employment agency,  
commerce and industry affecting commerce shall  
the same meaning given those terms in Section 701  
of the Civil Rights Act of 1964 (42 U.S.C.  
2000e).
- District  
(d) State means each of the several States, the

Guam, of Columbia, the Commonwealth of Puerto Rico,  
American Samoa, the Virgin Islands, the Trust  
Territory of the Pacific Islands, and the  
Commonwealth of the Northern Mariana Islands.

(e) Employer. -- (1) In general. The term "employer"  
means a person engaged in an industry affecting  
commerce who has 15 or more employees for each  
working day in each of 20 or more calendar weeks

in the current or preceding calendar year, and any  
agent of such person, except that, from July 26,  
1992 through July 25, 1994, an employer means a  
person engaged in an industry affecting commerce  
who has 25 or more employees for each working day  
in each of 20 or more calendar weeks in the  
current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not  
include --

States, (i) the United States, a corporation wholly  
owned by the government of the United  
or an Indian tribe; or

(ii) a bona fide private membership club  
(other than a labor organization) that is  
exempt from taxation under Section 501(c) of  
the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an  
employer.

(g) Disability means, with respect to an  
individual --

life (1) a physical or mental impairment that  
substantially limits one or more of the major  
activities of such individual;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.

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è (See section 1630.3 for exceptions to this  
definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific

disabilities.

(i) Major Life Activities means functions such as for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits. -- (1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major

activity as compared to the condition,

or duration under which the average person

the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is

substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of impairment; and

(iii) The permanent or long term impact, or

the expected permanent or long term impact

or resulting from the impairment.

(3) With respect to the major life activity of "working" --

(i) The term "substantially limits"

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes

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.

(ii) In addition to the factors listed

paragraph (j) (2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the 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,

or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class

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,

which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

history (k) Has a record of such impairment means has a of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:  
(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting

such \_7É3  
è limitation;

as (2) Has a physical or mental impairment that substantially limits major life activities only a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

position (m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment or without reasonable accommodation, can perform the essential functions of such position. (See section 1630.3 for exceptions to this definition).

marginal (n) Essential functions. -- (1) In general. 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 functions of the position.

for (2) A job function may be considered essential

any of several reasons, including but not limited to the following:

(i) The function may be essential because reason the position exists is to perform function;

(ii) The function may be essential because 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 for his or her expertise or ability to the particular function.

(3) 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;

(ii) Written job descriptions prepared advertising or interviewing applicants for 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 the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation. -- (1) The term "reasonable accommodation" means:

(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 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.

(2) 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

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è disabilities.

(3) 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  
accommodations disability and potential reasonable  
that could overcome those limitations.

hardship" (p) Undue hardship. -- (1) In general. "Undue  
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 in paragraph (p)  
(2)  
of this section.

(2) Factors to be considered. In determining  
whether an accommodation would impose an undue  
hardship on a covered entity, factors to be  
considered include:

(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;

composition, (iv) The type of operation or operations of  
the covered entity, including the  
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.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position

or desired.

(r) 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

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

to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."

(a) The terms disability and qualified individual a disability do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

- (1) Drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21

812).

(2) Illegal use of drugs means the use of drugs the possession or distribution of

which

is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by

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è provisions

Controlled Substances Act or other

of Federal law.

(b) However, the terms "disability" and "qualified" individual with a disability may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully

and

is no longer engaging in the illegal use of drugs; or

(2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b)(1) or (2)

of

this section is no longer engaging in the illegal use of drugs. (See section 1630.16(c) Drug testing).

(d) Disability does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity

disorders

not resulting from physical impairments, or other sexual behavior disorders;

pyromania;

(2) Compulsive gambling, kleptomania, or

or

resulting

(3) Psychoactive substance use disorders

from current illegal use of drugs.

- (e) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.