Section 1630.2(p) Undue hardship

The Commission has substituted "facility" or "facilities" for "site" or "sites" in section 1630.2(p)(2) and has deleted the definition of the term "site." Many employers and employer groups expressed concern about the use and meaning of the term "site." The final regulation's use of the terms "facility" and "facilities" is consistent with the language of the statute.

The Commission has amended the last paragraph of the interpretive guidance accompanying section 1630.2(p) to note that, when the cost of a requested accommodation would result in an undue hardship and outside funding is not available, an individual with a disability should be given the option of paying the portion of the cost that constitutes an undue hardship. This amendment is consistent with the legislative history of the Act. See Senate Report at 36; House Labor Report at 69.

Several employers and employer groups asked the Commission to expand the list of factors to be considered when determining if an accommodation would impose an undue hardship on a covered entity by adding another factor: the relationship of an accommodation's cost to the value of the position at issue, as measured by the compensation paid to the holder of the position. Congress, however, specifically rejected this type of factor. See House Judiciary Report at 41 (noting that the House Judiciary Committee rejected an amendment proposing that an accommodation costing more than ten percent of the employee's salary be treated as an undue hardship). The Commission, therefore, has not added this to the list.

Section 1630.2(q) Qualification standards

The Commission has deleted the reference to direct threat from the definition of qualification standards. This revision is consistent with the revisions the Commission has made to sections 1630.10 and 1630.15(b). (See discussion below).

Section 1630.2(r) Direct threat

Many disability rights groups and individuals with disabilities asserted that the definition of direct threat should not include a reference to the health or safety of the individual with a disability. They expressed concern that the reference to "risk to self" would result in direct threat determinations that are based on negative stereotypes and paternalistic views about what is best for individuals with disabilities. Alternatively, the commenters asked the Commission to clarify that any assessment of

risk must be based on the individual's present condition and not on speculation about the individual's future condition. They also asked the Commission to specify evidence other than medical knowledge that may be relevant to the determination of direct threat.

The final regulation retains the reference to the health or safety of the individual with a disability. As the Appendix notes, this is consistent with the legislative history of the ADA
and the case law interpreting section 504 of the Rehabilitation Act.

To clarify the direct threat standard, the Commission has made four revisions to section 1630.2(r). First, the Commission has amended the first sentence of the definition of direct threat to refer to a significant risk of substantial harm that cannot be eliminated "or reduced" by reasonable accommodation. This amendment clarifies that the risk need not be eliminated entirely
to fall below the direct threat definition; instead, the risk need only be reduced to the level at which there no longer exists
a significant risk of substantial harm. In addition, the Commission has rephrased the second sentence of section 1630.2(r)
to clarify that an employer's direct threat standard must apply to all individuals, not just to individuals with disabilities. Further, the Commission has made clear that a direct threat determination must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job." This clarifies that a determination that employment of an individual would pose a direct threat must involve an individualized inquiry and must be based on the individual's current condition. In addition, the Commission has added "the imminence of the potential harm" to the list of factors to be considered when determining whether employment of an individual would pose a direct threat. This change clarifies that both the probability of harm and the imminence of harm are relevant to direct threat determinations. This definition of direct threat is consistent with the legislative history of the Act. See Senate Report at 27, House Labor Report at 56-57, 73-75, House Judiciary Report at 45-46.

Further, the Commission has amended the interpretive guidance on section 1630.2(r) to highlight the individualized nature of the direct threat assessment. In addition, the Commission has cited examples of evidence other than medical knowledge that may be relevant to determining whether employment of an individual would
pose a direct threat.

Section 1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability"

Many commenters asked the Commission to clarify that the term "rehabilitation program" includes self-help groups. In response to these comments, the Commission has amended the interpretive guidance in this area to include a reference to professionally recognized self-help programs.

The Commission has added a paragraph to the guidance on section 1630.3 to note that individuals who are not excluded under this provision from the definitions of the terms "disability" and "qualified individual with a disability" must still establish that they meet those definitions to be protected by part 1630. Several employers and employer groups asked the Commission to clarify that individuals are not automatically covered by the ADA simply because they do not fall into one of the exclusions listed in this section.

The proposed interpretive guidance on section 1630.3 noted that employers are entitled to seek reasonable assurances that an individual is not currently engaging in the illegal use of drugs. In that regard, the guidance stated, "It is essential that the individual offer evidence, such as a drug test, to prove that he or she is not currently engaging" in such use. Many commenters interpreted this guidance to require individuals to come forward with evidence even in the absence of a request by the employer. The Commission has revised the interpretive guidance to clarify that such evidence is required only upon request.

1630.6 Contractual or other arrangements

The Commission has added a sentence to the first paragraph of the interpretive guidance on section 1630.6 to clarify that this section has no impact on whether one is a covered entity or employer as defined by section 1630.2.

The proposed interpretive guidance on contractual or other relationships noted that section 1630.6 applied to parties on either side of the relationship. To illustrate this point, the guidance stated that "a copier company would be required to ensure the provision of any reasonable accommodation necessary to enable its copier service representative with a disability to service a client's machine." Several employers objected to this example. In that respect, the commenters argued that the language of the example was too broad and could be interpreted as requiring employers to make all customers' premises accessible. The Commission has revised this example to provide a clearer, more concrete indication of the scope of the reasonable accommodation obligations in this area.

In addition, the Commission has clarified the interpretive guidance by noting that the existence of a contractual relationship adds no new obligations "under this part."

1630.8 Relationship or association with an individual with a disability

The Commission has added the phrase "or otherwise discriminate against" to section 1630.8. This change clarifies that harassment or any other form of discrimination against a qualified individual because of the known disability of a person with whom the individual has a relationship or an association is also a prohibited form of discrimination.

The Commission has revised the first sentence of the interpretive guidance to refer to a person's relationship or association with an individual who has a "known" disability. This revision makes the language of the interpretive guidance consistent with the language of the regulation. In addition, to reflect current, preferred terminology, the Commission has substituted the term "people who have AIDS" for the term "AIDS patients." Finally, the Commission has added a paragraph to clarify that this provision applies to discrimination in other employment privileges and benefits, such as health insurance benefits.

1630.9 Not making reasonable accommodation

Section 1630.9(c) provides that "[a] covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance...." Some employers asked the Commission to revise this section and to state that the failure to receive technical assistance is a defense to not providing reasonable accommodation. The Commission has not made the requested revision. Section 1630.9(c) is consistent with section 506(e) of the ADA, which states that the failure to receive technical assistance from the federal agencies that administer the ADA does not excuse a covered entity from compliance with the requirements of the Act.

The first paragraph of the interpretive guidance accompanying section 1630.9 notes that the reasonable accommodation obligation does not require employers to provide adjustments or modifications that are primarily for the personal use of the individual with a disability. The Commission has amended this guidance to clarify that employers may be required to provide items that are customarily personal-use items where the items are specifically designed or required to meet job-related needs.

In addition, the Commission has amended the interpretive guidance to clarify that there must be a nexus between an individual's disability and the need for accommodation. Thus, the guidance notes that an individual with a disability is "otherwise qualified" if he or she is qualified for the job except that, "because of the disability," the individual needs reasonable accommodation to perform the essential functions of the job. Similarly, the guidance notes that employers are required to accommodate only the physical or mental limitations "resulting from the disability" that are known to the employer.

In response to commenters' requests for clarification, the Commission has noted that employers may require individuals with disabilities to provide documentation of the need for reasonable accommodation when the need for a requested accommodation is not obvious.

In addition, the Commission has amended the last paragraph of the interpretive guidance on the "Process of Determining the Appropriate Reasonable Accommodation." This amendment clarifies that an employer must consider allowing an individual with a disability to provide his or her own accommodation if the individual wishes to do so. The employer, however, may not require the individual to provide the accommodation.

1630.10 Qualification standards, tests, and other selection criteria

The Commission has added the phrase "on the basis of disability" to section 1630.10(a) to clarify that a selection criterion that is not job related and consistent with business necessity violates this section only when it screens out an individual with a disability (or a class of individuals with disabilities) on the basis of disability. That is, there must be a nexus between the exclusion and the disability. A selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section. The Commission has made similar changes to the interpretive guidance on this section.

Proposed section 1630.10(b) stated that a covered entity could use as a qualification standard the requirement that an individual not pose a direct threat to the health or safety of the individual or others. Many individuals with disabilities objected to the inclusion of the direct threat reference in this section and asked the Commission to clarify that the direct threat standard must be raised by the covered entity as a

defense. In that regard, they specifically asked the Commission to move the direct threat provision from section 1630.10 (qualification standards) to section 1630.15 (defenses). The Commission has deleted the direct threat provision from section 1630.10 and has moved it to section 1630.15. This is consistent with section 103 of the ADA, which refers to defenses and states (in section 103(b)) that the term "qualification standards" may include a requirement that an individual not pose a direct threat.

1630.11 Administration of tests

The Commission has revised the interpretive guidance concerning section 1630.11 to clarify that a request for an alternative test format or other testing accommodation generally should be made prior to the administration of the test or as soon as the individual with a disability becomes aware of the need for accommodation. In addition, the Commission has amended the last paragraph of the guidance on this section to note that an employer can require a written test of an applicant with dyslexia if the ability to read is "the skill the test is designed to measure." This language is consistent with the regulatory language, which refers to the skills a test purports to measure.

Some commenters noted that certain tests are designed to measure the speed with which an applicant performs a function. In response to these comments, the Commission has amended the interpretive guidance to state that an employer may require an applicant to complete a test within a specified time frame if speed is one of the skills being tested.

In response to comments, the Commission has amended the interpretive guidance accompanying section 1630.14(a) to clarify that employers may invite applicants to request accommodations for taking tests. (See section 1630.14(a), below)

1630.12 Retaliation and coercion

The Commission has amended section 1630.12 to clarify that this section also prohibits harassment.

1630.13 Prohibited medical examinations and inquiries

In response to the Commission's request for comment on certain workers' compensation matters, many commenters addressed whether a covered entity may ask applicants about their history of workers' compensation claims. Many employers and employer groups argued that an inquiry about an individual's workers' compensation history is job related and consistent with business necessity. Disability rights groups and individuals with disabilities, however, asserted that such an inquiry could

disclose the existence of a disability. In response to comments and to clarify this matter, the Commission has amended the interpretive guidance accompanying section 1630.13(a). The amendment states that an employer may not inquire about an individual's workers' compensation history at the pre- offer stage.

The Commission has made a technical change to section 1630.13(b) by deleting the phrase "unless the examination or inquiry is shown to be job-related and consistent with business necessity" from the section. This change does not affect the substantive provisions of section 1630.13(b). The Commission has incorporated the job- relatedness and business-necessity requirement into a new section 1630.14(c), which clarifies the scope of permissible examinations or inquiries of employees. (See section 1630.14(c), below.)

1630.14 Medical examinations and inquiries specifically permitted

Section 1630.14(a) Acceptable pre-employment inquiry

Proposed section 1630.14(a) stated that a covered entity may make pre-employment inquiries into an applicant's ability to perform job-related functions. The interpretive guidance accompanying this section noted that an employer may ask an individual whether he or she can perform a job function with or without reasonable accommodation.

Many employers asked the Commission to provide additional guidance in this area. Specifically, the commenters asked whether an employer may ask how an individual will perform a job function when the individual's known disability appears to interfere with or prevent performance of job-related functions. To clarify this matter, the Commission has amended section 1630.14(a) to state that a covered entity "may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." The Commission has amended the interpretive guidance accompanying section 1630.14(a) to reflect this change.

Many commenters asked the Commission to state that employers may inquire, before tests are taken, whether candidates will require any reasonable accommodations to take the tests. They asked the Commission to acknowledge that such inquiries constitute permissible pre-employment inquiries. In response to these comments, the Commission has added a new paragraph to the interpretive guidance on section 1630.14(a). This paragraph clarifies that employers may ask candidates to inform them of the need for reasonable accommodation within a reasonable time

before
the administration of the test and may request documentation verifying the need for accommodation.

The Commission has received many comments from law enforcement and other public safety agencies concerning the administration of
physical agility tests. In response to those comments, the Commission has added a new paragraph clarifying that such tests are not medical examinations.

Many employers and employer groups have asked the Commission to discuss whether employers may invite applicants to self-identify as individuals with disabilities. In that regard, many of the commenters noted that Section 503 of the Rehabilitation Act imposes certain obligations on government contractors. The interpretive guidance accompanying sections 1630.1(b) and (c) notes that "title I of the ADA would not be a defense to failing to collect information required to satisfy the affirmative action
requirements of Section 503 of the Rehabilitation Act." To reiterate this point, the Commission has amended the interpretive
guidance accompanying section 1630.14(a) to note specifically that this section does not restrict employers from collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act.

Section 1630.14(b) Employment entrance examinations

Section 1630.14(b) has been amended to include the phrase "(and/or inquiry)" after references to medical examinations. Some
commenters were concerned that the regulation as drafted prohibited covered entities from making any medical inquiries or administering questionnaires that did not constitute examinations. This change clarifies that the term "employment entrance examinations" includes medical inquiries as well as medical examinations.

Section 1630.14(b)(2) has been revised to state that the results of employment entrance examinations "shall not be used for any purpose inconsistent with this part." This language is consistent with the language used in section 1630.14(c)(2).

The second paragraph of the proposed interpretive guidance on this section referred to "relevant" physical and psychological criteria. Some commenters questioned the use of the term "relevant" and expressed concern about its meaning. The Commission has deleted this term from the paragraph.

Many commenters addressed the confidentiality provisions of this

section. They noted that it may be necessary to disclose medical information in defense of workers' compensation claims or during the course of other legal proceedings. In addition, they pointed out that the workers' compensation offices of many states request such information for the administration of second-injury funds or for other administrative purposes.

The Commission has revised the last paragraph of the interpretive guidance on section 1630.14(b) to reflect that the information obtained during a permitted employment entrance examination or inquiry may be used only "in a manner not inconsistent with this part." In addition, the Commission has added language clarifying that it is permissible to submit the information to state workers' compensation offices.

Several commenters asked the Commission to clarify whether information obtained from employment entrance examinations and inquiries may be used for insurance purposes. In response to these comments, the Commission has noted in the interpretive guidance that such information may be used for insurance purposes described in section 1630.16(f).

Section 1630.14(c) Examination of employees

The Commission has added a new section 1630.14(c), Examination of employees, that clarifies the scope of permissible medical examinations and inquiries. Several employers and employer groups expressed concern that the proposed version of part 1630 did not make it clear that covered entities may require employee medical examinations, such as fitness-for-duty examinations, that are job related and consistent with business necessity. New section 1630.14(c) clarifies this by expressly permitting covered entities to require employee medical examinations and inquiries that are job related and consistent with business necessity. The information obtained from such examinations or inquiries must be treated as a confidential medical record. This section also incorporates the last sentence of proposed section 1630.14(c). The remainder of proposed section 1630.14(c) has become section 1630.14(d).

To comport with this technical change in the regulation, the Commission has made corresponding changes in the interpretive

guidance. Thus, the Commission has moved the second paragraph of the proposed guidance on section 1630.13(b) to the guidance on section 1630.14(c). In addition, the Commission has reworded the paragraph to note that this provision permits (rather than does not prohibit) certain medical examinations and inquiries.

Some commenters asked the Commission to clarify whether employers may make inquiries or require medical examinations in connection with the reasonable accommodation process. The Commission has noted in the interpretive guidance that such inquiries and examinations are permissible when they are necessary to the reasonable accommodation process described in this part.

1630.15 Defenses

The Commission has added a sentence to the interpretive guidance on section 1630.15(a) to clarify that the assertion that an insurance plan does not cover an individual's disability or that the disability would cause increased insurance or workers' compensation costs does not constitute a legitimate, nondiscriminatory reason for disparate treatment of an individual with a disability. This clarification, made in response to many comments from individuals with disabilities and disability rights groups, is consistent with the legislative history of the ADA. See Senate Report at 85; House Labor Report at 136; House Judiciary Report at 71.

The Commission has amended section 1630.15(b) by stating that the term "qualification standard" may include a requirement that an individual not pose a direct threat. As noted above, this is consistent with section 103 of the ADA and responds to many comments from individuals with disabilities.

The Commission has made a technical correction to section 1630.15(c) by changing the phrase "an individual or class of individuals with disabilities" to "an individual with a disability or a class of individuals with disabilities."

Several employers and employer groups asked the Commission to acknowledge that undue hardship considerations about reasonable accommodations at temporary work sites may be different from the considerations relevant to permanent work sites. In response to these comments, the Commission has amended the interpretive guidance on section 1630.15(d) to note that an accommodation that poses an undue hardship in a particular job setting, such as a temporary construction site, may not pose an undue hardship in another setting. This guidance is consistent with the

legislative history of the ADA. See House Labor Report at 69-70;
House

Judiciary Report at 41-42.

The Commission also has amended the interpretive guidance to note
that the terms of a collective bargaining agreement may be
relevant to the determination of whether a requested
accommodation would pose an undue hardship on the operation of a
covered entity's business. This amendment, which responds to
commenters' requests that the Commission recognize the relevancy
of collective bargaining agreements, is consistent with the
legislative history of the Act. See Senate Report at 32; House
Labor Report at 63.

Section 1630.2(p)(2)(v) provides that the impact of an
accommodation on the ability of other employees to perform their
duties is one of the factors to be considered when determining
whether the accommodation would impose an undue hardship on a
covered entity. Many commenters addressed whether an
accommodation's impact on the morale of other employees may be
relevant to a determination of undue hardship. Some employers
and employer groups asserted that a negative impact on employee
morale should be considered an undue hardship. Disability
rights
groups and individuals with disabilities, however, argued that
undue hardship determinations must not be based on the morale of
other employees. It is the Commission's view that a negative
effect on morale, by itself, is not sufficient to meet the undue
hardship standard. Accordingly, the Commission has noted in the
guidance on section 1630.15(d) that an employer cannot establish
undue hardship by showing only that an accommodation would have
a
negative impact on employee morale.

1630.16 Specific activities permitted

The Commission has revised the second sentence of the
interpretive guidance on section 1630.16(b) to state that an
employer may hold individuals with alcoholism and individuals
who
engage in the illegal use of drugs to the same performance and
conduct standards to which it holds "all of its" other
employees.
In addition, the Commission has deleted the term "otherwise"
from
the third sentence of the guidance. These revisions clarify
that
employers may hold all employees, disabled (including those
disabled by alcoholism or drug addiction) and nondisabled, to
the
same performance and conduct standards.

Many commenters asked the Commission to clarify that the drug testing provisions of section 1630.16(c) pertain only to tests to determine the illegal use of drugs. Accordingly, the Commission has amended section 1630.16(c)(1) to refer to the administration of "such" drug tests and section 1630.16(c)(3) to refer to information obtained from a "test to determine the illegal use of drugs." We have also made a change in the grammatical structure of the last sentence of section 1630.16(c)(1). We have made similar changes to the corresponding section of the interpretive guidance. In addition, the Commission has amended the interpretive guidance to state that such tests are neither encouraged, "authorized," nor prohibited. This amendment conforms the language of the guidance to the language of section 1630.16(c)(1).