9.1 Overview of Legal Obligations

a. An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment.

b. After making a conditional job offer, an employer may ask about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category.

c. An employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation. (See complete manual, Standards Necessary for Health and Safety: A "Direct Threat," Chapter IV of the Technical Assistance Manual.)

c. An employer may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

e. Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA.

9.2 Is a worker injured on the job protected by the ADA?

a. Whether an injured worker is protected by the ADA will depend on whether or not the person meets the ADA definitions of an " individual with a disability" and "qualified individual with a disability." (See complete manual, Chapter II.) The person must have an impairment that "substantially limits a major life activity," have a "record of" or be "regarded as" having such an impairment. S/he also must be able to perform the essential functions of a job currently held or desired, with or without an accommodation.

b. Clearly, not every employee injured on the job will meet the ADA definition. Work-related injuries do not always cause physical or mental impairment severe enough to " substantially limit" a major life activity. Also, many on-the-job injuries cause non-chronic impairments which heal within a short period of time with little or no long term or permanent impact. Such injuries, in most circumstances, are not considered disabilities under the ADA.

c. The fact that an employee is awarded workers' compensation benefits, or is assigned a high workers' compensation disability rating, does not automatically establish that this person is protected by the ADA. In most cases, the definition of disability under state workers' compensation laws differs from that under the ADA, because the state laws serve a different purpose. Workers' compensation laws are designed to provide needed assistance to workers who suffer many kinds of injuries, whereas the ADA's purpose is to protect people from discrimination on the basis of disability.

d. Thus, many injured workers who qualify for benefits under workers' compensation or other disability benefit laws may not be protected by ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA. Many job injuries are not "disabling" under the ADA, but it also is possible that an impairment which is not "substantially limiting" in one circumstance could result in, or lead to, disability in other circumstances

9.3 What can an employer do to avoid increased workers' compensation costs and comply with the ADA?

The ADA allows an employer to take reasonable steps to avoid increased workers' compensation liability while protecting persons with disabilities against exclusion from jobs they can safely perform.

Steps the employer may take:

After making a conditional job offer, an employer may inquire about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, an employer may not require an applicant to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) discloses a previous on-the -job injury, unless all applicants in the same job category are required to have the examination. (See Chapter V)

The employer may use information from medical inquiries and examinations for various purposes such as:

a. to verify employment history

b. to screen out applicants with a history of fraudulent workers' compensation claims

c. to provide information to state officials as required by state laws regulating workers' compensation and "second injury" funds

d. to screen out individuals who would pose a "direct threat" to health or safety of themselves or others, which could not be reduced to an acceptable level or eliminated by a reasonable accommodation. (See Chapter IV)

9.4 What can an employer do when a worker is injured on the job?

Medical Examination

An employer may only make medical examinations or inquiries of an employee regarding disability if such examinations are job related and consistent with business necessity. If a worker has an on-the-job injury which appears to effect his or her ability to do essential job functions, a medical examination or inquiry is job related and consistent with business necessity. A medical examination or inquiry also may be necessary to provide reasonable accommodation. (See Chapter VI)

When a worker wishes to return to work after absence due to accident or likeness, s/he can only be required to have a "job-related" medical examination, not a full physical exam, as a condition of returning to work.

The ADA prohibits an employer from discriminating against a person with a disability who is "qualified" for a desired job. The employer cannot refuse to let an individual with a disability return to work because the worker is not fully recovered from injury, unless s/he cannot perform the essential functions of the job s/he holds or desires with or without an accommodation; or would pose significant risk of substantial harm that could not be reduced to an acceptable level

with reasonable accommodation. (See Chapter IV) Since reasonable accommodation may include reassignment to a vacant position, an employer may be required to consider an employee's qualifications to perform other vacant jobs for which s/he is qualified, as well as, the job held when injured.

'Light Duty' Jobs

Many employers have established "light duty" positions to respond to medical restrictions on workers recovering from job-related injuries, in order to reduce workers' compensation liability. Such positions usually place few physical demands on an employee and may include such tasks as answering the telephone and simple administrative work. An employee's placement in such a position is often limited by the employer to a specific period of time.

The ADA does not require an employer to create a "light duty" position unless the "heavy duty" tasks an injured worker can no longer perform are marginal job functions which may be reallocated to co-workers as part of the reasonable accommodations of job-restructuring. In most cases however, "light duty" positions involve a totally different job from the job that a worker performed before the injury. Creating such positions by job restructuring is not required by the ADA. However, if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period.

When an employer places an injured worker in a temporary "light duty" position, that worker is "otherwise qualified" for that position for the term of that position; a workers' qualifications must be gauged in relation to the position occupied, not in relation to the job held prior to the injury. It may be necessary to provide additional reasonable accommodation to enable an injured worker in a light duty position to perform the essential functions of that position.

9.5 DO THE ADA'S PRE-EMPLOYMENT INQUIRY AND CONFIDENTIALITY RESTRICTIONS PREVENT AN EMPLOYER FROM FILING SECOND INJURY FUND CLAIMS?

Most states have established "second injury" funds designed to remove the financial disincentives in hiring employees with a disability. Without a second injury fund, if a worker suffered increased disability from a work related injury because of a pre-existing condition, the employer would have to pay the full cost. The second injury fund provisions limit the amount the employer must pay in these circumstances, and provide for the balance to be paid out of a common fund.

Many second injury funds require an employer to certify that it knew at the time of hire that the employee had a pre-existing injury. The ADA does not prohibit employers from obtaining information about pre-existing injury and providing needed information to second injury funds. As discussed in Chapter VI, an employer may make such medical inquiries and require a medical examination after a conditional offer of employment, and before a person starts work, so long as the examination or inquiry is made of all applicants in the same job category. Although the ADA generally requires that medical information obtained from such examinations or inquiries be kept confidential, information may be submitted to second injury funds or state workers' compensation authorities as required by state workers' compensation law.

9.6 COMPLIANCE WITH STATE AND FEDERAL WORKERS COMPENSATION LAWS

Federal Laws

It may be a defense to a charge of discrimination under ADA that a challenged action is required by another Federal law or regulation, or that another federal law prohibits an action that otherwise would be required by the ADA. This defense is not valid however if the federal standard does not require the discriminatory action, or if there is a way that an employer can comply with both legal requirements.

State Laws

ADA requirements supersede any conflicting state workers' compensation laws. For example: Some state workers' compensation statutes make an employer liable for paying additional benefits if an injury occurs because the employer assigned a person to a position likely to jeopardize the person's health or safety, or exacerbate an earlier workers' compensation injury. Some of the laws may permit or require an employer to exclude a disabled individual from employment in cases where the ADA would not permit such an exclusion. In these cases, the ADA takes precedence over the state law. An employer could not assert, as a valid defense to a charge of discrimination, that it failed to hire or return to work an individual with a disability because doing so would violate a state workers' compensation law that required exclusion of this individual.

9.7 DOES FILING OF A WORKERS' COMPENSATION CLAIM PREVENT AN INJURED WORKER FROM FILING A CHARGE UNDER THE ADA.

Filing a workers' compensation claim does not prevent an injured worker from filing a charge under the ADA. "Exclusivity" clauses in state workers' compensation laws bar all other civil remedies related to an injury that has been compensated by a workers' compensation system. However, these clauses do not prohibit from filing a discrimination charge with the EEOC, or filing suit under the ADA, if issued a "right to sue" letter by the EEOC. (See Chapter X)

9.8 WHAT IF AN EMPLOYEE PROVIDES FALSE INFORMATION ABOUT HIS/HER HEALTH OR PHYSICAL CONDITION?

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or workers' compensation history. Some state workers' compensation laws release an employer from its obligation to pay benefits if a worker falsely represents his/her health or physical condition at the time of hire and is later injured as a result. The ADA does not prevent use of this defense to a workers' compensation claim. The ADA requires only that information requests about health or workers' compensation history are made as part of a post-offer medical examination or inquiry. (See Chapter VI)

The above information is Chapter IX, taken from the Technical Assistance Manual for the Americans with Disabilities Act Title 1. Promulgated by the EEOC January 26, 1992. References made to other chapters will require a full manual. Contact the EEOC for a copy.