

TABLE OF CONTENTS

INTRODUCTION	1
CHAPTER ONE: DISABILITY DISCRIMINATION— THE LEGAL OVERVIEW	3
LAWS ON DISABILITY DISCRIMINATION	3
DISABILITY DISCRIMINATION DEFINED	4
ADA Definition of Disability Different From All Others	4
ADA Definition of Disability	6
“Physical or Mental Impairment”	6
“Substantially Limits Major Life Activities”	7
Major Life Activities	7
Substantially Limits	9
What Is Not a Disability	10
Temporary Conditions	10
Current Users of Illegal Drugs and Alcoholics Engaged in Misconduct	10
EEOC Exclusions	10
Certain Sexual Classifications	11
Mental Disorders Inherently Criminal	11
Qualified Employee	12
Qualified	12
Essential Functions	12
Reasonable Accommodation	20
MEDICAL EXAMINATIONS AND INQUIRIES	21
Pre-Employment Inquiries and Exams Before Offers of Employment ...	21
Pre-Employment Inquiries and Exams After an Offer of Employment ...	23
Medical Inquiries and Exams on the Job	23
Inquiries	24
Examinations	24
“Ability to Perform” and “Direct Threat”	24
Direct Threat	25
Ability to Perform	27
Protection of Medical Information	27
Protection of Documents	28
Protection of Information in Other Forms	28

CHAPTER TWO: SUPERVISORY AND EMPLOYEE RESPONSIBILITIES	31
THE SUPERVISOR’S ROLE	31
When Supervisors Become Involved	32
Dealing With Performance and Conduct	33
DISABLED EMPLOYEE RESPONSIBILITIES	35
Employee Raises the Issue	35
Employee Proves the Medical Condition	37
Involving Other Agency Resources	39
The Letters Begin	40
Describe the Accommodation Desired	41
Specific Accommodation	41
Connection Between Disability and the Job	43
When Management Must Act if the Disabled Employee Does Not Ask for Accommodation	45
MANAGEMENT’S DECISION.....	48
CHAPTER THREE: REASONABLE ACCOMMODATION	51
INTERACTIVE DIALOGUE.....	51
REASONABLE ACCOMMODATION	57
The Most Common Accommodations	58
What Agencies Are Not Required to Do	59
Remove an Essential Function	59
Create a Job	60
Give Employees the Accommodation of Their Choice.....	63
Reassignment to Another Supervisor	65
Excuse Misconduct for Which Non-Disabled Employees Are Sanctioned.....	66
Lower Performance Standards.....	68
Undue Hardship	70
Undue Hardship Defined	72
Management’s Burden of Proving Undue Hardship	72
Types of Undue Hardship	76
Cost.....	76
Effect on Other Employees	78
Direct Threat	78
The Individualized Assessment	79
Health Threats.....	82
Safety Threats.....	83
Specific Accommodations	87

Devices and Technology	87
Physical Modifications to Worksite.....	88
Light Duty.....	89
Interpreters for Hearing-Impaired	90
Readers.....	92
Changing Work or Shift Schedules.....	92
Changing Shifts.....	92
Work Schedules.....	94
Telework.....	95
Make the Employee Show the Relation Between Disability and Telework.....	96
Make the Employee Prove the Amount and Schedule Requested.....	97
Show Undue Hardship	99
Leave	103
Help From Other Employees	104
Administrative Disruption.....	105
Safety	106
Presence of Alternatives	106
Proportionality	107
Reassignment.....	108
Employees Covered	108
The Position.....	109
Scope of Consideration	110
How Much.....	110
Employee Responsibilities	110
Management Responsibilities	111
CHAPTER FOUR: OTHER DISABILITY DISCRIMINATION	113
OTHER ADA PROHIBITIONS.....	113
Regarded as Disabled.....	113
Record of Disability	116
THEORIES OF DISCRIMINATION	117
Intentional Discrimination.....	117
Direct Evidence.....	117
Circumstantial Evidence.....	118
<i>Prima Facie</i> Case.....	119
Management Articulates a Legitimate, Nondiscriminatory Reason.....	120
Employee Shows Pretext.....	123

Hostile Environment	124
Employee's Burden in Disability Harassment Cases	125
Employee Is a Qualified Individual With a Disability	125
The Harassment Was Based on the Employee's Disability	125
The Conduct Was Unwelcome.....	129
The Conduct Was Pervasive and Persistent	129
Management Obligated to Act	131
Management's Responsibility in Disability Harassment Cases	133
Preventive Measures	133
Dealing With the Low-Level Incidents	134
Reasonable Inquiry	135
Appropriate Action	137
Associational Discrimination	139
Retaliation.....	141
Participation	141
Opposition	143
CHAPTER FIVE: HANDLING COMMON DISABILITIES	145
ALCOHOLISM AND DRUG ADDICTION	145
Drug Addiction	145
Fully Rehabilitated.....	146
In Rehabilitation.....	146
Erroneously Regarded	146
Alcoholism.....	147
Employees Who Seek Rehabilitation	147
Harassment Because of Alcoholism	148
Regarded as Alcoholic	148
History of Alcoholism	149
ALLERGIES AND CHEMICAL SENSITIVITIES	149
Steps in Dealing With Accommodation Requests for Allergies and Chemical Sensitivities.....	150
Deal With Any Grave Medical Issue or Emergency	150
Require Detailed Medical Documentation.....	150
Begin Mitigation Measures	151
Evaluate the Medical Evidence	152
Substantially Limiting?	152
Limited in Only One Position?	153
Accommodations	153
DIABETES	157
Reasonable Accommodation for Diabetics	158

Intentional Discrimination.....	159
Regarded-As	160
DYSLEXIA	160
EPILEPSY	162
MENTAL IMPAIRMENTS	163
Bipolar Disorder.....	166
ADHD.....	168
Learning Disabilities.....	168
Depression.....	169
PTSD.....	170
Sleep Apnea.....	172
Direct Threat With Sleep Apnea	172
Reasonable Accommodation for Sleep Apnea	173
STRESS AND ANXIETY	175
VISION IMPAIRMENTS.....	176
CHAPTER SIX: AFTER ADA—OTHER OPTIONS AND STEPS WITH MEDICAL ISSUES	179
DEALING WITH PERFORMANCE AND CONDUCT.....	179
FITNESS FOR DUTY EXAMINATIONS	180
OPM Regulations on Fitness for Duty Examinations.....	182
Positions With Medical Standards	183
Employees Not Under Medical Standards.....	184
Psychiatric Fitness for Duty Examinations	185
DEAL DIRECTLY WITH THE MEDICAL PROBLEM: REMOVAL BASED UPON INABILITY TO PERFORM	187
Employee Status.....	188
Non-Status Employees.....	188
Status Employees.....	190
Management’s Burden.....	192
Conclusive Proof	193
Observed Deficiencies in Work Performance or a High Probability of Hazard.....	193
Observed Deficiencies.....	194
High Probability of Hazard.....	194
DEALING WITH THE ABSENTEEISM CAUSED BY THE MEDICAL PROBLEM	195
Leave Under Medical Circumstances.....	196
When Agencies Must Grant Medical Leave.....	196
Sick Leave.....	196

Family and Medical Leave Act.....	200
When Agencies May Grant Approved Leave for Medical Issue.....	207
Advance Sick Leave	207
Non-FMLA LWOP	211
Donated Leave	213
Steps in Taking an Action for Absences Caused by Medical Conditions	214
Force the Employee to Come to Work or Be Charged AWOL.....	214
Constrain the Employee With Rules.....	215
Question Absences	216
Put the Employee on Leave Restriction	217
Require Documentation	218
Deny Absences and Charge AWOL	218
Discipline for AWOL.....	218
Let the Employee Exhaust All Leave	219
Grant the Employee Accrued Sick Leave	220
Grant Donated Leave or Advanced Sick Leave Under Agency Procedures.....	220
Give the Option of LWOP or FMLA	221
Give the Twelve Weeks of FMLA.....	221
Offer LWOP	221
Deny Further LWOP When Hardship Exists or No End in Sight ...	221
ENFORCED LEAVE	222
OTHER MEDICAL ISSUES	223
Dealing With Immediate Danger Caused by Medical Problems.....	223
Handling Alcohol or Drug Situations.....	225
Off-Duty Alcohol Use.....	225
Agencies May Not Discriminate	226
Opportunity to Rehabilitate	226
Employees Must Be Fit for Duty	226
Steps in Dealing With Alcohol and Drug Incidents	226
MEDICAL ISSUES IN HIRING	228
TEMPORARY MEDICAL CONDITIONS.....	231
CHAPTER SEVEN: WORKERS' COMPENSATION	233
AGENCIES INVOLVED	233
COVERAGE.....	234
Traumatic Injury.....	234
Occupational Disease.....	234
Exposure to Infectious Agents.....	234

TRAUMATIC INJURY PROCESS	235
Immediate Measures	235
Medical Attention.....	235
Begin the Inquiry	236
Take a Picture	236
Preserve Any Unattached Physical Evidence.....	237
Interview Witnesses Immediately	237
Initial Employee Filing.....	238
Controversion	238
Request for Medical Treatment.....	238
Delayed Report.....	239
Choice of Physician	239
Obtaining Treatment.....	239
Further Referral	239
Physicians Medical Reports	239
Interim Reports	239
Filing for Wage Loss/Permanent Impairment	240
OCCUPATIONAL DISEASE PROCESS	241
Notice of Occupational Disease.....	241
Request for Medical Treatment.....	241
Claim for Wage Loss/Permanent Impairment	241
Leave Repurchase.....	242
Lost Wages for Medical Treatment	242
RECURRENCE	242
Claim for Recurrence of Disability.....	242
Medical Treatment.....	242
Continuing Claim for Wage Loss.....	243
DEATH.....	243
CONTINUATION OF PAY.....	243
Definition and Entitlement.....	243
Use of Leave Instead of COP	244
Controversion and COP	244
Pay Rates and Computations for COP.....	245
Light or Limited Duty Assignments.....	245
Terminating COP	246
REEMPLOYMENT AND RESTORATION.....	246
DOL Rules.....	246
Employees in Light- or Limited-Duty Status.....	247
OPM Regulations on Restoration to Duty	247

Fully Recovered Within One Year	247
Fully Recovered After One Year	247
Physically Disqualified	247
Partially Recovered.....	248
Appeal Rights.....	248
STATUTORY EXCLUSIONS	248
Willful Misconduct.....	249
Intoxication and Drug Impairment.....	250
Intent to Bring About Injury or Death to Oneself or Another.....	251
PERFORMANCE OF DUTY	252
Agency Premises	253
Parking Lots	253
Agency Housing.....	253
Telework.....	254
Performing Official Duties	256
Recreation and Social Activities	258
Union Representational Functions.....	259
OUTSIDE WORKING HOURS	260
OFF-PREMISES INJURIES	261
Lunch Hour	262
Breaks	262
Travel Status.....	262
Vehicle Accidents.....	265
OTHER ISSUES	265
Recreation.....	265
Fighting	265
Horseplay.....	266
Assault	267
Emergencies	268
CAUSAL RELATIONSHIP	268
Kinds of Causal Relationship.....	268
OTHER REASONS FOR CONTROVERTING CLAIMS	268
Differing Versions.....	269
Previous Injury	269
Time Lags	269
Other Employment.....	270

CHAPTER EIGHT: THE DISCRIMINATION COMPLAINT PROCESS	273
THE COMPLAINT PROCESS.....	273
Informal Counseling	273
Formal Complaint to the Agency	274
Acceptance or Rejection of the Complaint.....	274
Formal Investigation by the Agency	275
Final Agency Decision or Order	275
Appeal to EEOC.....	276
THE ROLE OF EEOC.....	276
Jurisdiction	276
Remedies.....	276
"Make Whole" Remedies.....	276
Compensatory Damages	277
Other Remedies.....	277
Mixed Cases	277
WHY AGENCIES LOSE CASES.....	278
Lack of Specificity	278
Failure to Explain Technical Details.....	279
Concealing the Real Reason.....	280
APPENDIX A: EXCERPTS FROM REGULATIONS ON MEDICAL DOCUMENTATION AND SICK LEAVE	283
APPENDIX B: SAMPLE LETTERS	289
REFERENCE MATERIALS	295
EEOC GUIDANCE AND CASES	295
Regulations	295
Sub-Regulatory Guidance.....	295
EEOC Cases	296
MERIT SYSTEMS PROTECTION BOARD CASES	296
LEGAL REFERENCE BOOKS	296

