

ARTICLE 3. ENTITLED EMPLOYMENT DISCRIMINATION AGAINST DISABLED PERSONS

Rule 1. Purpose; Applicability; Construction

910 IAC 3-1-1 Purpose

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 1. The purpose of this article is to implement IC 22-9-5 that requires equal employment opportunities for qualified individuals with disabilities. *(Civil Rights Commission; 910 IAC 3-1-1; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-1-2 Applicability

Authority: IC 22-9-5-27

Affected: IC 22-9-5-4

Sec. 2. This article applies to covered entities as defined at IC 22-9-5-4(c). *(Civil Rights Commission; 910 IAC 3-1-2; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-1-3 Construction

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 3. (a) Except as otherwise provided in this article, this article 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.

(b) This article does not invalidate or limit the remedies, rights, and procedures of any state law or political subdivision of the state or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this article. *(Civil Rights Commission; 910 IAC 3-1-3; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

Rule 2. Definitions

910 IAC 3-2-1 Applicability

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 1. The definitions in this rule apply throughout this article. *(Civil Rights Commission; 910 IAC 3-2-1; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-2 "Commerce" defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 2. "Commerce" has the meaning as set forth in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 20000e). *(Civil Rights Commission; 910 IAC 3-2-2; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-3 "Direct threat" defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 3. "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 job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge or on the best available objective evidence. In determining whether an individual would pose a direct threat, the following factors must be considered:

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

(Civil Rights Commission; 910 IAC 3-2-3; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-2-4 “Disability” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 4. (a) “Disability” does not include an individual currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use. The following definitions apply throughout this section:

(1) “Drug” means a controlled substance as defined in Schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 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. The term does not include the use of a drug taken under the supervision of a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of federal law.

(b) The term 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;

(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 article 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 subsection (b) is no longer engaging in the illegal use of drugs.

(d) The term does not include the following:

(1) Transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.

(2) Compulsive gambling, kleptomania, or pyromania.

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this article. *(Civil Rights Commission; 910 IAC 3-2-4; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1516; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-5 “Employment agency” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 5. “Employment agency” has the meaning as set forth in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 20000e). *(Civil Rights Commission; 910 IAC 3-2-5; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1517; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-6 “Essential functions” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 6. (a) “Essential functions” means the fundamental job duties of the employment position the individual with a disability

holds or desires. The term does not include the marginal functions of the position. A job function may be considered essential for any of several reasons, including, but not limited to, the following:

- (1) The function may be essential because the reason the position exists is to perform that function.
- (2) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
- (3) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
- (b) Evidence of whether a particular function is essential includes, but is not limited to, the following:
 - (1) The employer's judgment as to which functions are essential.
 - (2) Written job descriptions prepared before advertising or interviewing applicants for the job.
 - (3) The amount of time spent on the job performing the function.
 - (4) The consequences of not requiring the incumbent to perform the function.
 - (5) The terms of a collective bargaining agreement.
 - (6) The work experience of past incumbents in the job.
 - (7) The current work experience of incumbents in similar jobs.

(Civil Rights Commission; 910 IAC 3-2-6; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1517; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-2-7 "Has a record of such impairment" defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 7. "Has a record of such impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one (1) or more major life activities. 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 limitation;
- (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) has none of the impairments defined in section 10 of this rule but is treated by a covered entity as having a substantially limiting impairment.

(Civil Rights Commission; 910 IAC 3-2-7; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1517; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-2-8 "Industry affecting commerce" defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 8. "Industry affecting commerce" has the meaning as set forth in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 20000e). *(Civil Rights Commission; 910 IAC 3-2-8; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1518; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-9 "Major life activity" defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 9. "Major life activity" means a function, such as the following:

- (1) Caring for oneself.
- (2) Performing a manual task.
- (3) Walking.
- (4) Seeing.
- (5) Hearing.

- (6) Speaking.
- (7) Breathing.
- (8) Learning.
- (9) Working.

(Civil Rights Commission; 910 IAC 3-2-9; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1518; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-2-10 “Person” defined

Authority: IC 22-9-5-27
Affected: IC 22-9-5

Sec. 10. “Person” has the meaning as set forth in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 20000e). *(Civil Rights Commission; 910 IAC 3-2-10; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1518; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-11 “Physical or mental impairment” defined

Authority: IC 22-9-5-27
Affected: IC 22-9-5

Sec. 11. “Physical or mental impairment” means the following:

- (1) Any physiological disorder, condition, cosmetic disfigurement, or anatomical loss affecting one (1) or more of the following body systems:
 - (A) Neurological.
 - (B) Musculoskeletal.
 - (C) Special sense organs.
 - (D) Respiratory, including speech organs.
 - (E) Cardiovascular.
 - (F) Reproductive.
 - (G) Digestive.
 - (H) Genito-urinary.
 - (I) Hemic and lymphatic.
 - (J) Skin.
 - (K) Endocrine.
- (2) Any mental or psychological disorder, such as the following:
 - (A) Mental retardation.
 - (B) Organic brain syndrome.
 - (C) Emotional or mental illness.
 - (D) Specific learning disabilities.

(Civil Rights Commission; 910 IAC 3-2-11; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1518; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-2-12 “Qualification standards” defined

Authority: IC 22-9-5-27
Affected: IC 22-9-5

Sec. 12. “Qualification standards” means the personal and professional attributes, including:

- (1) skill;
- (2) experience;
- (3) education;
- (4) physical;
- (5) medical;
- (6) safety; and

(7) other requirements;
established by a covered entity as requirements that an individual must meet in order to be eligible for the position held or desired. *(Civil Rights Commission; 910 IAC 3-2-12; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1518; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-13 “Qualified individual with a disability” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 13. (a) “Qualified individual with a disability” means an individual with a disability:

(1) who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires; and

(2) with or without reasonable accommodation, can perform the essential functions of such position.

(b) The term does not include individuals currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use. The following definitions apply throughout this section:

(1) “Drug” means a controlled substance as defined in Schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 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. The term does not include the use of a drug taken under the supervision of a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of federal law.

(c) The term 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;

(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.

(d) It shall not be a violation of this article 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 subsection (c) is no longer engaging in the illegal use of drugs.

(e) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this article. *(Civil Rights Commission; 910 IAC 3-2-13; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1518; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-2-14 “Reasonable accommodation” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 14. (a) “Reasonable accommodation” means modifications or adjustments:

(1) to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires;

(2) to the work 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

(3) 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.

(b) The term may include, but is not limited to, the following:

(1) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

(2) Job restructuring.

(3) Part-time or modified work schedules.

(4) Reassignment to a vacant position.

(5) Acquisition or modifications of equipment or devices.

(6) Appropriate adjustment or modifications of examinations, training materials, or policies.

(7) The provision of qualified readers or interpreters.

(8) Other similar accommodations for individuals with disabilities.

(c) 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 disability and potential reasonable accommodations that could overcome those limitations. (*Civil Rights Commission; 910 IAC 3-2-14; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1519; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-2-15 “Substantially limits” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 15. (a) “Substantially limits” means the following:

(1) An individual is unable to perform a major life activity that the average person in the general population can perform.

(2) An individual is significantly restricted as to the condition, manner, or duration under which he or she can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(b) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(1) The nature and severity of the impairment.

(2) The duration or expected duration of the impairment.

(3) The permanent or long term impact, or the expected permanent or long term impact, of or resulting from the impairment.

(c) With respect to the major life activity of working, the term means an individual is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as 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.

(d) In addition to the factors listed in subsection (b), the following factors may be considered in determining whether an individual is substantially limited in the major life activity of working:

(1) The geographical area to which the individual has reasonable access.

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs).

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

(*Civil Rights Commission; 910 IAC 3-2-15; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1519; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-2-16 “Undue hardship” defined

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 16. (a) “Undue hardship”, with respect to the provision of an accommodation, means significant difficulty or expense incurred by a covered entity when considered in light of the factors as set forth in section 13 of this rule.

(b) In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include the following:

(1) The nature and net cost of the accommodation needed under this rule, taking into consideration the availability of tax credits and deductions or outside funding.

(2) 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.

(3) 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.

(4) The type of operation or operations of the covered entity, including the following:

- (A) Composition, structure, and function of the workforce of such entity.
- (B) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity.
- (5) The impact of the accommodation upon the operation of the facility, including the following:
 - (A) The impact on the ability of other employees to perform their duties.
 - (B) The impact on the facility's ability to conduct business.

(Civil Rights Commission; 910 IAC 3-2-16; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1520; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

Rule 3. General Provisions

910 IAC 3-3-1 Discrimination prohibited

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 1. (a) It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to the following:

- (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.
- (4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.
- (5) Leave 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 the following:
 - (A) Apprenticeships.
 - (B) Professional meetings, conferences, and other related activities.
 - (C) Selection for a leave of absence to pursue training.
- (8) An activity sponsored by a covered entity, including social and recreational programs.
- (9) Any other term, condition, or privilege of employment.

(b) As used in this section, "discrimination" includes, but is not limited to, the acts described in sections 2 through 10 of this rule. *(Civil Rights Commission; 910 IAC 3-3-1; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1520; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-3-2 Limiting; segregating; classifying

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 2. It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. *(Civil Rights Commission; 910 IAC 3-3-2; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1520; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-3-3 Contractual or other arrangements

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 3. (a) It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this article.

- (b) As used in this section, "contractual or other arrangement or relationship" includes, but is not limited to, the following:

- (1) A relationship with an employment or referral agency.
- (2) A labor union, including collective bargaining agreements.
- (3) An organization providing fringe benefits to an employee of the covered entity.
- (4) An organization providing training and apprenticeship programs.

(c) This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract that only affect that other party's employees or applicants. (*Civil Rights Commission; 910 IAC 3-3-3; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1520; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-4 Standards, criteria, or methods of administration

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 4. It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and that:

- (1) have the effect of discriminating on the basis of disability; or
- (2) perpetuate the discrimination of others who are subject to common administrative control.

(*Civil Rights Commission; 910 IAC 3-3-4; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1521; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-5 Relationship or association with an individual with a disability

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 5. It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social, or other relationship or association. (*Civil Rights Commission; 910 IAC 3-3-5; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1521; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-6 Not making reasonable accommodation

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 6. (a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this article because of any failure to receive technical assistance authorized by Section 506 of the Americans with Disability Act, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity, or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability. (*Civil Rights Commission; 910 IAC 3-3-6; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1521; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-7 Qualification standards, tests, and other selection criteria

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 7. It is unlawful for a covered entity to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. (*Civil Rights Commission; 910 IAC 3-3-7; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1521; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-8 Administration of tests

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 8. It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure). (*Civil Rights Commission; 910 IAC 3-3-8; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1521; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-9 Retaliation and coercion

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 9. (a) It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this article or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this article.

(b) It is unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this article. (*Civil Rights Commission; 910 IAC 3-3-9; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1521; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-10 Prohibited medical examinations and inquiries

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 10. (a) Except as permitted by section 11 of this rule, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) Except as permitted by section 11 of this rule, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability. (*Civil Rights Commission; 910 IAC 3-3-10; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1522; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-11 Medical examinations and inquiries specifically permitted

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 11. (a) A covered entity may:

(1) make preemployment inquiries into the ability of an applicant to perform job-related functions; or

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(2) ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(b) A covered entity may:

(1) require a medical examination (or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties; and

(2) condition an offer of employment on the results of such examination (or inquiry), if all entering employees in the same job category are subjected to such an examination (or inquiry) regardless of disability.

(c) Information obtained under subsection (b) regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, with the following exceptions:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.

(2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.

(3) Government officials investigating compliance with this article shall be provided relevant information on request.

The results of such examination shall not be used for any purpose inconsistent with this article.

(d) Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this article.

(e) A covered entity may:

(1) require a medical examination (or inquiry) of an employee that is job-related and consistent with business necessity; and

(2) make inquiries into the ability of an employee to perform job-related functions.

(f) Information obtained under subsection (e) regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, with the following exceptions:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.

(2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.

(3) Government officials investigating compliance with this article shall be provided relevant information on request.

(g) Information obtained under subsection (e) regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this article.

(h) A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, that are part of an employee health program available to employees at the work site.

(i) Information obtained under subsection (h) regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, with the following exceptions:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.

(2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.

(3) Government officials investigating compliance with this part shall be provided relevant information on request.

(j) Information obtained under subsection (h) regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this article. *(Civil Rights Commission; 910 IAC 3-3-11; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1522; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-3-12 Defenses

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 12. Defenses to an allegation of discrimination under this section may include, but are not limited to, the following:

(1) It may be a defense to a charge of disparate treatment brought under sections 1 through 5 and 8 through 9 of this rule that the challenged action is justified by a legitimate, nondiscriminatory reason.

(2) It may be a defense to a charge of discrimination, as described in section 7 of this rule, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this article.

(3) It may be a defense to a charge of discrimination brought under this article that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion, or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this article.

(4) It may be a defense to a charge of discrimination, as described in section 6 of this rule, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(5) It may be a defense to a charge of discrimination under this article that:

(A) a challenged action is required or necessitated by another federal law or regulation; or

(B) another federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this article.

(6) It may be a defense to a charge of discrimination under this article that the alleged discriminatory action is specifically permitted by section 11 or 13 of this rule.

As used in this section, "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (*Civil Rights Commission; 910 IAC 3-3-12; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1523; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-13 Specific activities permitted

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 13. A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual who satisfies the permitted religious criteria because of his or her disability. (*Civil Rights Commission; 910 IAC 3-3-13; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1523; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

910 IAC 3-3-14 Alcohol and drugs

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 14. With regard to alcohol and drugs, a covered entity may do the following:

(1) Prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees.

(2) Require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.

(3) Require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.).

(4) Hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism.

(5) Require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the:

(A) Departments of Defense and Transportation; and

(B) Nuclear Regulatory Commission;

regarding alcohol and the illegal use of drugs.

(6) Require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(Civil Rights Commission; 910 IAC 3-3-14; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1523; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-3-15 Drug testing

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 15. (a) For purposes of this section, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such a drug test by a covered entity to a job applicant or employee is not a violation of section 10 of this rule. However, this section does not encourage, prohibit, or authorize a covered entity to conduct s [sic.] drug test of s [sic.] job applicant or employee to determine the illegal use of drugs or to make an employment decision based on such test results.

(b) This section does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to do the following:

(1) Test employees of entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol.

(2) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol under subdivision (1).

(c) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to section 11 of this rule. *(Civil Rights Commission; 910 IAC 3-3-15; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1523; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-3-16 Smoking

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 16. A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this article. *(Civil Rights Commission; 910 IAC 3-3-16; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1524; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)*

910 IAC 3-3-17 Infectious and communicable diseases; food handling jobs

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 17. (a) Under Title I of the Americans with Disabilities Act, Section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases that are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE, Mailstop C09, Atlanta, Georgia 30333.) If an individual with a disability is disabled by one (1) of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(b) This section does not preempt, modify, or amend any state, county, or local law, ordinance, or rule applicable to food handling that is:

(1) in accordance with the list referred to in subsection (a) of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(2) designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(Civil Rights Commission; 910 IAC 3-3-17; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1524; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897)

910 IAC 3-3-18 Health insurance; life insurance; other benefit plans

Authority: IC 22-9-5-27

Affected: IC 22-9-5

Sec. 18. (a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with state law.

(b) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.

(c) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.

(d) The activities described in this subsection are permitted unless these activities are being used as a subterfuge to evade the purposes of this article. (*Civil Rights Commission; 910 IAC 3-3-18; filed Dec 31, 1998, 2:10 p.m.: 22 IR 1524; readopted filed Oct 18, 2005, 2:30 p.m.: 29 IR 897*)

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